

Diversity and Inclusion by Language Choice

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Over the past year, our focus as a country and around the world has made a seismic shift toward equality, diversity, and inclusion. In some ways, the financial services industry (at least big banks) had already moved incrementally in that direction with respect to hiring, diversity programs and training, and antidiscrimination efforts. In other ways, it's still playing catch-up. On January 13, 2021, with its release of the [Statement Regarding the Provision of Financial Products and Services to Consumer with Limited English Proficiency](#) (the "LEP Statement"), the CFPB may have spurred the industry a bit forward by issuing guidelines for providing disclosures and services in languages other than English.

The LEP Statement is intended to "encourage financial institutions to better serve consumers with limited English proficiency (LEP) and to provide principles and guidelines to assist financial institutions in complying with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Equal Credit Opportunity Act (ECOA), and other applicable laws." In other words, the goal is to increase access to fair and nondiscriminatory credit for LEP customers while ensuring compliance with relevant federal, state, and other legal requirements.

Consistent with that purpose, the LEP Statement encourages financial institutions to promote access to financial products and services for all consumers *by better serving LEP consumers*. In doing so, the CFPB recognizes both the industry's willingness to serve LEP customers and the challenges to LEP program implementation, including balancing legal requirements and practical considerations, such as resource and operational constraints. Specific challenges include language, product and lifecycle selections. With respect to language selection, industry faces the challenge of determining in which non-English languages to provide products and services. Industry must then decide which products and services to offer in non-English languages and where in the product lifecycle to provide services in non-English languages, all while staying fair lending compliant and mitigating UDAAP risk.

Sounds easy, right - just do it. Turns out, it takes a lot of pre-planning, a comprehensive implementation strategy, and post implementation analysis to do this well and in compliance with the law.

The LEP Statement establishes guiding principles for serving LEP customers, suggesting that creditors may implement pilot programs or phased in approaches to better serve LEP

customers while mitigating risk by "providing LEP consumers with clear and timely disclosures in non-English languages describing the extent and limits of any language services provided throughout the product lifecycle." This means that creditors must explain what products and services they are and are not providing in the non-English language. How a creditor decides is detailed in the LEP Statement and summarized below.

- Language Selection. To determine which languages a creditor might offer to LEP consumers, a creditor may consider documented and verifiable information such as the stated customer preference or U.S. census demographic or language data. The CFPB seemingly approves a nationwide institution largely focusing on only Spanish speaking customers while regional organizations are able to rely on local demographics for language selection.
- Product Selection. In determining which products and services to offer in languages other than English, the LEP Statement indicates that creditors may consider a variety of factors, including the extent to which LEP consumers use particular products and the availability of non-English language services.
- Life Cycle. In determining when during the product lifecycle creditors can offer services in non-English languages and the extent of those services, creditors should consider activities and communications that most significantly impact consumers. To determine significant impact, creditors should consider whether a communication conveys essential information about credit terms and conditions (e.g., loan pricing), or about borrower obligations and rights, such as delinquency and default servicing, loss mitigation, and debt collection. Creditor should also consider existing customer data on what services LEP consumers use most frequently.

Just to throw a wrench in the selection process, the CFPB mandates that creditors review relevant policies, procedures, and practices for features that may pose heightened risk of unlawful discrimination.

The LEP Statement suggests that creditors may collect and track customer language information to facilitate communication with LEP consumers in non-English languages. Creditors may ask a consumer about language preference on a credit application or over the life of a transaction. The LEP statement specifically authorizes this question and indicates that creditors do not violate the ECOA or Regulation B when they collect the language preference of an applicant or buyer/borrower in a credit transaction, so long as the consumer language preference is not used in a way that violates applicable law. For example, a creditor cannot deny credit based upon a selection of a non-English language preference.

With respect to translated documents, the LEP Statement reiterates that creditors must follow state law, but where translation is not legally mandated, creditors may determine whether and to what extent to provide consumers with translated documents. Credits must ensure the accuracy of any translated documents and should prioritize translations of documents that most significantly impact consumers - think TILA credit terms and

collection letters.

The LEP Statement also outlines how creditors can develop an LEP specific CMS or integrate LEP programs into its compliance management system:

- Document decisions related to language selection and reasons for choosing the languages, products, and services. Include infrastructure, systems, operational limitations, cost estimates, as well as a plan for implementation or the reasons of discontinuing offerings.
- Engage in quality assurance testing and monitoring of business transactions. Include monitoring of services and changes to services to address fair lending and mitigate UDAAP risk. Review the quality of services provided to LEP consumers. Consider whether your marketing includes/excludes certain populations. Ensure that your marketing, disclosures and other materials are designed to ensure an accurate understanding by ELP customers.
- Follow-up program implementation with a fair lending statistical analysis.
- Incorporate vendor oversight of LEP program provided by a third party. Include review for fair lending, UDAAP other federal financial services laws. Pay particular attention to those who participate in underwriting or pricing decisions.

So, what does this mean for creditors? The CFPB guidance encourages creditors to expand access to credit to limited English proficiency consumers. Creditors must evaluate their customers or prospective customers, determine whether to offer products and services in languages other than English, what language(s), and what products and services. The timing of the offerings is important, too. Creditors should ensure that non-English communications are available when they most significantly impact limited English speakers - such as at credit origination and post default servicing.

Creditor should also be aware of laws that impact the delivery of disclosures. For example, does giving a Spanish language privacy notice constitute delivery of a privacy notice? If both an English and Spanish retail contract are given, which one is operative? Does giving Article 9 default notices in a language other than English satisfy the requirements of Article 9? Finally, and probably most important, if a creditor offers any type of LEP program, that program should be monitored to ensure the creditor is not inadvertently violating fair lending laws or at significant risk of UDAAPs.

If you plan to establish a LEP program, we suggest involving your lawyer to help you mitigate risk.

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