

¿MI CASA ES SU CASA? **SPANISH-SPEAKING HOME MORTGAGE BORROWERS NEED TO UNDERSTAND THEIR LOANS**

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I. THE OPPORTUNITIES

In an increasingly competitive mortgage market, smart lenders are aggressively reaching out to underserved markets. Among the most prominent of these markets is the growing population of Spanish speakers in the United States today. According to the Harvard Joint Center for Housing Studies, minority household growth will outpace white household growth by 2 to 1 in the next decade, with Hispanics "at the forefront" of this growth.¹ By 2010, the purchasing power of Hispanics in the U.S. is expected to reach \$1 trillion.²

Responding to market trends, a number of lenders have developed Spanish language marketing materials to target Spanish-speaking consumers. Others have hired more Spanish-speaking employees. Market leaders such as Countrywide Financial Corp. and others are partnering with community nonprofit organizations to expand homeownership education and opportunities to Hispanics in the U.S.³

But once a Hispanic borrower walks through the door, how can a lender be sure that the borrower understands the mortgage loan transaction process, the loan terms, and the serious consequences of failing to meet the payment obligations of a home mortgage loan? Do other types of mortgage industry service providers, such as loan servicers, have obligations as well?

This article briefly reviews the compliance risks and obligations associated with marketing, making, and servicing residential mortgage loans to borrowers whose first language is Spanish.

II. THE RISKS

Lenders and servicers who fail to ensure that Hispanic and other foreign-born borrowers understand the terms of their loans and the consequences for not meeting those terms risk liability under a variety of laws, including foreign-language disclosure laws, fair lending laws, unfair and deceptive trade practices ("UDAP") laws, fair debt collection practices acts ("FDCPA"), and basic contract laws.

1. Litigation

A number of recent cases illustrate the perils of failing to provide clear disclosures and forthrightly explain loan terms to consumers whose first language is not English. In a 2003 Oregon case, the plaintiffs claimed, among other things, that the lender orally promised in Spanish to consolidate their two mortgage loans into one loan at a 7.8% fixed rate, but had them sign loan documents written in English for a second mortgage loan at a rate of 12.9%.⁴ The Oregon judge held that the arbitration rider in the mortgage agreement was unconscionable because the lender did not inform the Spanish-speaking consumers about important elements of the agreement in their native language and mischaracterized other elements, including arbitration costs, confidentiality of arbitration results, prohibitions on class actions, and the fact that arbitration was binding.⁵

Last year, Spanish-speaking plaintiffs who could not read or write English claimed that the lender gave them oral assurances that they could afford to buy their respective homes and that their mortgage payments would not exceed a certain sum. Among plaintiffs' claims were that the lender failed to provide the Spanish language disclosures required by California law and that they were victimized by a "bait and switch" scam. The court found for the consumers and permitted the case to go forward on eight of the counts, including alleged violations of the federal Fair Housing Act, the Equal Credit Opportunity Act, the California Fair Employment and Housing Act, and breach of fiduciary duty.⁶

In another California case last year, a Hispanic plaintiff who spoke and read little or no English claimed that a mortgage broker solicited her for a refinance of her home loan in Spanish, promising that she could get \$25,000 cash out while only "marginally" increasing her monthly payment. Her loan balance at the time of solicitation was \$165,000 with a monthly payment of \$1,350. The loan documents were not translated into Spanish and the brokers allegedly did not explain the documents. When the plaintiff received her copy after execution, the loan balance was \$299,000 with monthly payments of \$2,495. The court found for the consumer, permitting the case to proceed on all counts, including claims of violations of the Fair Housing Act, the Equal Credit Opportunity Act, the Truth in Lending Act, California's Unfair Competition law and state Spanish language disclosure laws.⁷

2. Enforcement

Given demographic trends, state and federal regulators' attention to whether Hispanic consumers are getting a fair deal can be expected to intensify. The Federal Trade Commission ("FTC") has already taken an especially active role. In 2002, the FTC settled its first FDCPA enforcement action against a debt-collection company for violating the rights of Spanish-speaking borrowers. The settlement imposed on Houston-based United Recovery Systems Inc. ("URS") included a \$240,000 civil penalty, in addition to several prescriptive requirements relating to how URS conducts its collection activities.⁸

In April 2004, the FTC launched the FTC National Hispanic Initiative to prevent fraudulent, deceptive and unfair business practices against Hispanic consumers. Since April 2004, the FTC has initiated at least 29 actions involving Spanish-language frauds, including fraud by consumer finance businesses.⁹

III. WHAT SHOULD I DO?

Fortunately, reducing the compliance risks of marketing, originating, and servicing loans for Spanish-speaking borrowers need not require extraordinary measures. Below are seven suggestions.

1. Comply with foreign-language disclosure laws.

To date, a number of state statutes and regulations require mortgage lenders to provide mandatory disclosures in Spanish. Predictably, California¹⁰ and Texas¹¹ have enacted Spanish-language disclosure laws directly impacting mortgage lenders. Entities engaged in any aspect of consumer lending, however, will want to examine all state foreign-language disclosure laws relating to financial services and real estate to determine whether their activities trigger the disclosure requirements. Examples of these laws include the following:

- Arizona laws requiring a variety of financial services providers to give Spanish-language notices and disclosures.¹²
- Connecticut's law requiring the drawee of a dishonored check to demand payment from the drawer in both Spanish and English.¹³
- Delaware's requirement that lenders of short-term, closed-end consumer loans must provide loan applications in Spanish and English, with a conspicuously displayed written disclosure of certain consumer information.¹⁴

- Laws on door-to-door solicitation requiring Spanish language notice of cancellation rights in Delaware,¹⁵ Kansas,¹⁶ and Nebraska.¹⁷
- Illinois's disclosure and translation requirements for non-English-language transactions involving retail sales.¹⁸
- A New Mexico law requiring subdividers of land to make disclosures in Spanish.¹⁹
- A New York law requiring licensed check cashers to post fee schedules in both English and Spanish.²⁰

2. Monitor legal and regulatory developments requiring Spanish disclosures and notices.

Even if existing disclosure laws do not apply directly to your particular business, mortgage service providers need to be prepared to comply with new laws that will apply to them. The trend in new state legislation is to require financial service providers to give consumers disclosures in Spanish or the language in which the financial transaction was negotiated. In the current legislative session, at least eight state legislatures considered bills that would impose Spanish-language disclosure requirements on financial services providers.²¹ So far, at least four of these bills have been enacted - an Illinois law requiring payday lenders to provide certain disclosures in Spanish²²; a Kansas law requiring lenders of consumer loans with cash advances to provide a Spanish language notice to borrowers²³; a Nevada law requiring check cashers to give consumers certain information in Spanish²⁴; and a Texas law clarifying that the "plain language" requirement for consumer loan, retail installment, and home equity loan contracts regulated by the Office of Consumer Credit Commissioner means that the lender must provide loan contracts and certain disclosures in the language in which the loan was negotiated.²⁵

Currently, Federal law does not impose any Spanish language disclosure requirements that expressly apply to marketing, originating, or servicing mortgage loans.²⁶ But federal agencies appear to be moving in this direction. In 2001 and 2004, the Interagency Task Force on Fair Lending issued brochures in Spanish, educating Spanish speakers about how to shop for a mortgage loan and the perils of predatory lending²⁷. Under amendments to the Fair Credit Reporting Act passed in 2003, the FTC issued rules that include (but do not require) both English and Spanish disclosures.²⁸ Several federal agencies, including the Federal Reserve Board, Office of Thrift Supervision, Office of the Comptroller of the Currency, Department of Housing and Urban Development, and the FTC, offer educational and other materials regarding consumer financial services in Spanish. Fannie Mae now has available over 100 security instruments, notes, riders, and special purpose documents in Spanish.²⁶

3. Be prepared to assist Spanish-speaking customers throughout the loan process to understand the nature and terms of their obligations.

Such assistance might include the following:

- making interpreters available;
- providing translations of loan documents, disclosures and other communications (using a certified translator and ensuring that translations are accurate);
- submitting translations of required notices to appropriate state agencies for approval (where the form of Spanish-language translations for required notices are not precisely prescribed by regulation or statute);
- hiring sales representatives and loan officers to talk with consumers in Spanish, especially in areas with high Spanish-speaking populations;
- offering correspondence, telephone customer service communications and borrower seminars in Spanish.

4. Ensure that Spanish-language marketing materials are not deceptive and comply with TILA's advertising rules and any other advertising rules that may apply.

5. Ensure that information given to Spanish-speaking borrowers in oral communications corresponds with written materials provided to the borrower, especially loan documents.

6. Tighten monitoring of brokers and loan officers in Hispanic communities to ensure that they are not engaging in fraudulent or misleading tactics with Spanish-speaking borrowers.

7. Consider developing relationships with Hispanic community organizations who are able to educate Spanish-speakers about the home buying process - but be mindful of the Real Estate Settlement Procedures Act prohibitions on referral fees.

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Smart lenders are marketing mortgages to Spanish-speaking consumers. But the smartest lenders are taking steps to communicate clearly and honestly with these borrowers, treat them fairly, and give them a good deal - in short, to ensure that they have a positive lending experience from application through servicing. The families and friends of today's Hispanic borrowers will soon be seeking home mortgages of their own.

1. HARVARD UNIVERSITY JOINT CENTER OF HOUSING STUDIES, *The State of the Nation's Housing 2005* (June 2005), pp. 13, 14.

2. Elisabeth Malkin, "Spanish Bank Courts Hispanic Customers in United States," *New York Times* (Sept. 22, 2004).

3. See, e.g., Annette Haddad, "Countrywide joins with a nonprofit in East L.A. as borrowing by whites is expected to slow," *L.A. Times* (May 27, 2005); see also MORTGAGE BANKERS ASS'N, "MBA and Bank of America Join Forces to Train Hispanic Real Estate Professionals with Education Scholarship" (Oct. 3, 2003) www.mortgagebankers.org/news/2003/pr1003a.html (visited Aug. 12, 2005).

4. See *Vasquez-Lopez, et al. v. Household Beneficial Oregon Inc.*, No. 0210-10108 (Or. Cir. Ct. 05/13/03) (as reported in *Consumer Financial Services Law Report*, Vol. 7, No. 2 (June 20, 2003)).

5. See *id.*

6. *Munoz v. Internat'l Home Capital Corp.*, 2004 LEXIS 26362 (N.D. Cal. 2004).

7. *Gonzalez v. Ameriquest Mortgage Co.*, 2004 WL 2472249 (N.D. Cal. 2004).

8. See *U.S. v. United Recovery Systems*, "Consent Decree," (S.D.Tex. 2002). FDCPA violations cited in the FTC Complaint against URS included: (i) communicating with consumers at times and places URS knew or should have known to be inconvenient for the consumer, without proper consent; (ii) improperly communicating with third parties about the consumer's debt; (iii) harassing and abusing the consumer in a number of ways, including using obscene or profane language and causing the telephone to ring continuously; and (iv) using false or misleading representations, including that nonpayment of a debt will result in arrest or imprisonment. See *id.*, "Complaint for Civil Penalties, Injunctive, and Other Relief," (S.D.Tex. 2002).

9. FTC, "FTC Targets Scams Aimed at Hispanics" <http://www.ftc.gov/opa/2005/07/phoenix.htm> (visited Aug. 15, 2005). See, e.g., *FTC v. Call Center Express Corp. et al.*, Stipulated Final Judgment and Order for Permanent Injunction, Case No. 04-22289-Civ-Martinez/Bandsta (S.D. Fla. 2005) (defendants

charged with deceptively marketing "advance-fee" credit cards, enjoined from misrepresenting credit card terms, and penalized \$20,000 in consumer redress, among other penalties).

10. See Cal. Civ. Code §§ 1632 (includes requirements for disclosures in Spanish, Korean, Chinese, Tagalog, or Vietnamese, as appropriate), § 1799.91; see also Cal. Bus. & Prof. Code § 10240.

11. See 7 Tex. Admin. Code §§ 5.1(a)(2), (c)(5)(implementing Tex. Fin. Code § 343.102); see also Tex. Fin. Code § 341.502 (2005).

12. See Ariz. Rev. Stat. §§ 6-631 (consumer loan lenders), 6-1257 (deferred presentment companies), 6-1411 (premium finance companies), and 44-1362 (check cashers).

13. See Conn. Gen. Stat. § 52-565a(g).

14. See Del. Code §§ 978(b), 2235A.

15. See 6 Del. Code § 4404.

16. See K.S.A. § 50-640(b).

17. See Neb. Rev. Stat. § 69-1604(3).

18. See 815 ILCS 505/2N.

19. See New Mex. Stat. Ann. § 47-6-17.

20. See 3 N.Y.C.R.R. 400.6(a)(1).

21. See, e.g., 2005 Ill. H.B. 1100, 2005 Kan. H.B. 2172, 2005 Mass. S.B. 1078, 2005 Miss. S.B. 2807, 2005 Nev. A.B. 340, 2005 N.M. H.B. 372, 2005 N.Y. A.B. 1366, 2005 Tex. H.B. 398, 2005 Tex. H.B. 1547.

22. See 2005 Ill. H.B. 1100, § 2-20.

23. See 2005 Kan. H.B. 2172, § 12.

24. See 2005 Nev. A.B. 384, § 30.

25. See 2005 Tex. H.B. 1547 (codified at Tex. Fin. Code § 341.502). Regulations are not expected to be issued in time to meet the statutory effective date of Sept. 1, 2005.

26. Regulation Z permits, but does not require, creditors to provide TILA disclosures in a foreign language. If creditors provide disclosures in a foreign language, they must also provide them in English, at the consumer's request. This requirement does not apply to advertisements. See 12 C.F.R. § 226.27.

27. INTERAGENCY TASK FORCE ON FAIR LENDING (Board of Governors of the Federal Reserve System, Department of Housing and Urban Development, Department of Justice, Federal Deposit Insurance Corporation, Federal Housing Finance Board, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Federal Housing Enterprise Oversight, Office of Thrift Supervision), *Buscando la hipoteca más favorable: Compare, Verifique, Negocie* ("Looking for the Best Mortgage: Shop, Compare, Negotiate") (March 8, 2001); *Utilizar su*

hogar como garantía para un préstamo es arriesgado ("Putting Your Home on the Line is Risky Business") (April 13, 2004).

28. 16 C.F.R. App. A to Part 698 ("Model Prescreen Opt-Out Notices"); see also 70 Fed. Reg. 5022, 5029, 5036-5037 (Jan. 31, 2005).

29. See

<http://www.fanniemae.com/singlefamily/ns/span/spanmortdocs.jhtml?role=ou&referrer=duemss2>
(visited Aug. 16, 2005).

30. 12 C.F.R. §§ 226.16, .24.

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