

Client Alert

September 23, 2016

HUD Releases New Guidance on Limited English Proficiency Discrimination Under the Fair Housing Act

By Leonard N. Chanin and Amanda J. Mollo

On September 15, 2016, the U.S. Department of Housing and Urban Development (HUD) issued guidance on how the nondiscrimination provisions in the Fair Housing Act (FHA) apply to persons who consider an individual's "Limited English Proficiency" (LEP), or limited ability to speak, read, write, or understand English, in housing transactions. The "Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency" (the "Guidance") addresses liability for both intentional discrimination and practices that have a disparate impact. While the primary focus is potential discrimination in renting a dwelling, the Guidance also discusses mortgage loan transactions.

LEP is not a new concept in housing and housing finance. Like all federal agencies that provide services to the public, HUD has been required to make its services and assistance equally available to LEP persons as those services are made available to English speakers since President Bill Clinton's 2000 Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," which coincided with a release of guidance from the Department of Justice. On January 22, 2007, HUD issued regulations, as required by Executive Order 13166, clarifying the obligations of programs that receive federal financial assistance with respect to LEP persons. Those regulations provide that recipients of federal financial assistance have an obligation under Title VI of the Civil Rights Act to assist LEP persons with access to federally funded programs.

Unlike guidance commonly issued by federal banking agencies, the Guidance provides little in the way of "best practices" to comply with the FHA. Rather, the Guidance has the appearance of a legal memorandum, complete with numerous citations to court decisions. For example, the document is just over eight pages long, but has 56 footnotes, many of which cite to multiple court decisions.

NEXUS TO PROTECTED CLASSES

The Guidance notes that, although LEP individuals are not a protected class under the FHA, discrimination on the basis of race or national origin can occur if LEP is considered because LEP is closely related to those prohibited bases. HUD observes that race and national origin often correlate to English proficiency because, in most cases, individuals have LEP because they or their family members are from non-English speaking countries. Thus, the Guidance notes that a lack of English proficiency can be a proxy for national origin, and practices that restrict access to housing on the basis of LEP can have a discriminatory effect based on national origin, race, or other protected characteristic, even when the housing provider has no intent to discriminate. The Guidance goes on to explain how a housing provider's policies or practices may violate the FHA and sets out the legal standards used to evaluate potential discrimination.

Client Alert

SUSPECT PRACTICES

The Guidance provides examples of a number of policies or practices that may be deemed discriminatory, such as turning away all applicants for housing who are not fluent in English. The Guidance notes that if a housing provider or resident can access free or low-cost language assistance services, “any cost-based justification for refusing to deal with LEP persons would also be immediately suspect.” HUD declined to provide specific examples of what would constitute disparate impact discrimination, instead stating that each case involving a “discriminatory effects” claim requires a fact-specific analysis. The Guidance, however, does clarify that a claim of discriminatory effects may be based on a policy or practice that targets a specific race or national origin or a policy or practice that adversely impacts multiple groups or even all LEP individuals.

LEGAL STANDARD FOR DISPARATE IMPACT

The Guidance follows the traditional three-step analytical framework for evaluating whether a housing provider’s policy or practice results in a disparate impact. First, a plaintiff (or HUD) must demonstrate that the policy or practice results in a disparate impact on a group of persons because of the group’s national origin, race, or other protected characteristic. Second, if the plaintiff meets this burden, the defendant must then demonstrate that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Finally, if the defendant meets this burden, the burden then shifts to the plaintiff to prove that there is a less discriminatory alternative method to achieve the same interest as the allegedly discriminatory policy or practice.

The Guidance states that an LEP-related policy may be found to have a disparate impact based on U.S. Census Bureau data or on the actual applicants affected by a provider’s policy. The Guidance then discusses the defendant’s duty to show the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. The Guidance declares that “refusing to allow an LEP borrower to have mortgage documents translated, or refusing to provide the borrower with translated documents that the lender or mortgage broker has readily available” is likely not necessary to achieve a substantial, legitimate, nondiscriminatory interest. Similarly, requiring an English speaker to co-sign a mortgage will likely not prove justifiable.

RELATION TO OTHER LAWS

Notably, the Guidance draws heavily on doctrines of employment law, rather than credit or housing law, such as the FHA. For example, the Guidance cites to the Equal Employment Opportunity Commission’s (EEOC) “Guidelines on Discrimination Because of National Origin,” along with several cases involving the EEOC, to explain the meaning of national origin and how English-only policies may disproportionately affect persons based on their national origin. However, the Guidance’s discussion of how to evaluate whether a policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest dismisses the employment law analogy in evaluating whether a justification may be sufficient to overcome a disparate impact claim. HUD states:

Many of the LEP cases in the employment context where the business justification defense has succeeded lack analogs in the housing context. Housing and employment practices differ for many reasons, including the amount and nature of the communication that they generally require. [Footnote omitted] Therefore, many of the business justifications that have succeeded under Title VII will not apply or will not be considered substantial, legitimate, nondiscriminatory interests under the Act.

Client Alert

This sweeping conclusion appears to dismiss the premise that disparate impact claims are fact-specific and seems to seek to nullify offhand, potential justifications for policies or practices that may have a disparate impact.

TAKEAWAYS

As noted above, the Guidance does not take the form of typical guidance for compliance with laws and regulations. The Guidance addresses potential discriminatory conduct regarding LEP applicants, especially in the context of rental housing practices. In light of the detailed legal analysis, it is surprising that HUD issued this Guidance through the Office of the General Counsel instead of issuing a proposed rule to amend its FHA regulations at 24 C.F.R. pt. 100. Forgoing such an approach provides no opportunity for comment and results in limited guidance to providers of housing services who seek to comply with the FHA. Finally, the Guidance alludes to the failure of housing providers to provide translation services to consumers. While the Guidance does not suggest that lenders or others must, or even should, provide such services, this is clearly an important issue that will likely get greater attention in the future.

Contact:

Leonard N. Chanin
(202) 887-8790
lchanin@mofo.com

Amanda J. Mollo
(202) 778-1609
amolloy@mofo.com

Client Alert

Financial Services Team

California

Michael J. Agoglia	(415) 268-6057
Alexis A. Amezcua	(415) 268-6557
Elizabeth Balassone	(415) 268-7585
Roland E. Brandel	(415) 268-7093
Sarah Nicole Davis	(415) 268-7478
Henry M. Fields	(213) 892-5275
Joseph Gabai	(213) 892-5284
Angela E. Kleine	(415) 268-6214
Jim McCabe	(415) 268-7011
James R. McGuire	(415) 268-7013
Mark David McPherson	(212) 468-8263
Ben Patterson	(415) 268-6818
Sylvia Rivera	(213) 892-5734
Nicholas Alan Roethlisberger	(415) 268-7534
Grant C. Schrader	(415) 268-6635
William L. Stern	(415) 268-7637
Nancy R. Thomas	(213) 892-5561
Lauren Lynn Wroblewski	(415) 268-6458

New York

James M. Bergin	(212) 468-8033
Tiffani B. Figueroa	(212) 336-4360
David J. Fioccola	(212) 336-4069
Marc-Alain Galeazzi	(212) 336-4153
Adam J. Hunt	(212) 336-4341
Jessica Kaufman	(212) 336-4257
Mark P. Ladner	(212) 468-8035
Jiang Liu	(212) 468-8008
David H. Medlar	(212) 336-4302
Barbara R. Mendelson	(212) 468-8118
Michael B. Miller	(212) 468-8009
Judy Man Ni Mok	(212) 336-4073
Jeffrey K. Rosenberg	(212) 336-4130
Mark R. Sobin	(212) 336-4222
Joan P. Warrington	(212) 506-7307

Washington, D.C.

Leonard N. Chanin	(202) 887-8790
Rick Fischer	(202) 887-1566
Adam J. Fleisher	(202) 887-8781
Natalie A. Fleming Nolen	(202) 887-1551
Calvin D. Funk	(202) 887-6930
Julian E. Hammar	(202) 887-1679
Oliver I. Ireland	(202) 778-1614
Crystal N. Kaldjob	(202) 887-1687
Steven M. Kaufmann	(202) 887-8794

Washington, D.C. (continued)

Donald C. Lampe	(202) 887-1524
Jeremy R. Mandell	(202) 887-1505
Amanda J. Mollo	(202) 778-1609
Obrea O. Poindexter	(202) 887-8741
Ryan J. Richardson	(202) 887-8761
Sean Ruff	(202) 887-1530
Trevor R. Salter	(202) 887-1527
Nathan D. Taylor	(202) 778-1644

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 13 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.