



## Financial Services & Products ADVISORY ■

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### CFPB TILA-RESPA Integrated Disclosure Enforcement News and Disclosure Requirements for Servicers

The Consumer Financial Protection Bureau's (CFPB) new Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) Integrated Disclosure Rule (the "TRID Rule" or the "Rule") is not only complex, but creates extensive possibilities for enforcement and new liabilities and impacts on many different types of participants in the mortgage industry.

The CFPB stated in a letter last week that the oversight of the CFPB and the CFPB's fellow regulators regarding TRID implementation "will be sensitive to the progress made by those entities that have squarely focused on making good-faith efforts to come into compliance with the Rule on time." The CFPB did not indicate that enforcement will be delayed altogether and did not change the August 1 effective date. The CFPB also released a [fact sheet](#) to address concerns that the TRID Rule will delay closings.

The TRID rulemaking impacts servicers by amending the mortgage transfer notice (often called the 404 notice) to broaden its scope and to require disclosure of the loan owner's policies regarding acceptance of partial payments, implementing the escrow account cancellation notice required by the Dodd-Frank Act, requiring lenders to disclose whether the borrower is responsible for any deficiency judgment after foreclosure and repealing the servicing transfer disclosure under 12 C.F.R. § 1024.33 for all but reverse mortgage loans.

Under the TRID Rule, *all* loan estimate and closing disclosure, delivery, timing and content requirements are codified in Regulation Z instead of Regulation X and therefore may be subject to the liabilities provided by TILA, including private rights of action. Arguably, TRID disclosures authorized by RESPA are not subject to the liability provisions in TILA. However, new TILA disclosures added by the Dodd-Frank Act arguably sweep in many traditional RESPA disclosures. To the extent disclosures are authorized by TILA, assignees would also be subject to TILA liabilities through violations that are apparent based on the face of these disclosures and various other documents.

#### **CFPB's Sensitive Enforcement**

Even though the residential mortgage industry has been fastidiously implementing the CFPB's TRID Rule to integrate the mortgage loan disclosure requirements under TILA (15 U.S.C. §§ 1601 et seq.) and RESPA (12 U.S.C. §§ 2601 et seq.), the industry welcomed the CFPB's announcement in a June 3 letter to senators that its oversight of TRID implementation will be sensitive to the progress made by entities making "good-faith efforts" to comply with the TRID Rule by the August 1 effective date.

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The CFPB addressed industry concerns and those voiced in bipartisan letters reportedly from 255 representatives and 41 senators by reiterating the CFPB's plans to look for good-faith effort toward compliance. This echoes a similar approach the CFPB took prior to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")<sup>1</sup> Title XIV rules that were issued in January 2013 and went into effect in January 2014. In the letter, the CFPB stated that it and the CFPB's fellow regulators "will be sensitive to the progress made by those entities that have squarely focused on making good-faith efforts to come into compliance with the Rule on time." Although the letter was silent on what the CFPB means by "good-faith efforts," indicators of such good-faith efforts the CFPB has mentioned in the past could include whether compliance systems and technology for the Rule have been installed and whether senior management and the board have been informed and have contemplated the impacts of the Rule on their business. The letter indicates the CFPB's understanding that there will be hiccups as industry operationalizes the preparations made leading up to the effective date.

The CFPB, however, did not indicate how long this period of sensitive oversight will last. The CFPB only stated that this approach is consistent with the CFPB's approach during the "early months" of Title XIV implementation, "which has worked out well." The CFPB also did not delay the effective date of the Rule. Industry must still comply with the August 1 deadline. The announcement does nothing to limit private actions permitted under TILA.

The CFPB additionally released a [fact sheet](#) on June 3 stating that the new disclosure will not delay closings "for just about everybody." The fact sheet explains the three situations that trigger a new three-day waiting period and specifically states that a decrease in the APR will not require a new three-day waiting period if the decrease is based on changes to interest rates or other fees.

The fact sheet further lists examples of other changes that would not require a new three-day waiting period. These include unexpected discoveries on a walk-through, such as a broken refrigerator or a missing stove, even if they require seller credits to the buyer; most changes to payments made at closing, including the amount of the real estate commission, taxes and utilities proration, and the amount paid into escrow; and typos found at the closing table.

## **TRID Rule Servicing Impacts**

Not to be lost in the scramble by originators to comply with the TRID Rule, mortgage servicers need to recognize that TRID also directly impacts them. Mortgage servicers may be surprised that the TRID rulemaking amends the mortgage transfer notice (often called the 404 notice) to broaden its scope to cover all closed-end loans secured by a dwelling or real property and to require disclosure of the loan owner's policies regarding acceptance of partial payments using the term "lender" (instead of "owner" or "investor") and implements the escrow account cancellation notice required by the Dodd-Frank Act. Additionally, servicers should be aware that the TRID rulemaking requires lenders to disclose whether the borrower is responsible for any deficiency judgment after foreclosure and repeals the servicing transfer disclosure under Section 1024.33 for all but reverse mortgage loans.

### ***Mortgage transfer disclosure amended to address partial payments***

In 2009, Section 404(a) of the Helping Families Save Their Homes Act of 2009<sup>2</sup> amended TILA Section 131(g) to require the new owner of a mortgage loan to notify the consumer of the sale or transfer of the mortgage loan no later than 30 days

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<sup>1</sup> Public Law 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> Public Law 111-22, 123 Stat. 1632 (2009).

after the date on which the owner acquired the loan.<sup>3</sup> Section 1026.39 of Regulation Z implements Section 131(g) of TILA (commonly referred to as a 404 notice).

Section 1414(d) of the Dodd-Frank Act amended TILA Section 129C(h) to impose additional disclosure requirements applicable to new owners of residential mortgage loans.<sup>4</sup> Specifically, a person who becomes the new owner of an existing residential mortgage loan must disclose, while using the term “lender,” the lender’s policy regarding the acceptability of partial payments and if partial payments are accepted, how such payments will be applied to the mortgage loan and if such payments will be placed in escrow. This disclosure obligation is in addition to an identical pre-consummation partial payment disclosure added by Section 1414(d) of the Dodd-Frank Act.

The CFPB decided to integrate the post-consummation partial payment disclosure (TILA Section 129C(h)) with the mortgage transfer notice (TILA Section 131(g)) by amending Regulation Z, Section 1026.39. A covered person that becomes the owner<sup>5</sup> of an existing mortgage loan, whether through a purchase, assignment or other transfer, must provide the borrower with a mortgage transfer notice within 30 days of the date of mortgage transfer. If, however, the covered person will not also be the servicer of the mortgage loan, according to the CFPB, “the new creditor will have to make arrangements with the servicer to ensure that the consumer receives the disclosures required by § 1026.39(d)(5) [the partial payment disclosure].”

### ***Content of the partial payment disclosure***

The partial payment disclosure must be included in the mortgage transfer disclosure under the subheading “Partial Payment.” In its commentary to the TRID rulemaking, the CFPB indicates that “[a] covered person may utilize the format of the disclosure illustrated by [form H-25 of Appendix H \[the Closing Disclosure\]](#)” of the TRID rulemaking, which is the pre-consummation partial payment policy disclosure.<sup>6</sup> The CFPB aligned the disclosure content requirements for both the pre-consummation and post-consummation partial payment disclosures. Thus, a mortgage servicer should include the form of the pre-consummation partial payment disclosure in the mortgage transfer notice, which the CFPB included on page 4 of the closing disclosure (as found in the TRID rulemaking).

Significantly, “[a]ny modifications must be appropriate and not affect the substance, clarity, or meaningful sequence of the disclosure.”<sup>7</sup> A servicer may modify the disclosure language to make it consistent with the format of the mortgage transfer notice. For example, a servicer may change the disclosure from “Your Lender” to “We will” or “We are your new lender and have a different Partial Payment Policy than your previous lender. Under our policy we will...”<sup>8</sup>

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<sup>3</sup> See 15 U.S.C. § 1641(g).

<sup>4</sup> See 15 U.S.C. § 1639c(h).

<sup>5</sup> A servicer of a mortgage loan is not treated as the owner of the obligation if the servicer holds title to the loan, or if title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the obligation. 12 C.F.R. § 1026.39(a)(1).

<sup>6</sup> Integrated Mortgage Disclosure Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79730, 80363 (Dec. 31, 2013).

<sup>7</sup> 78 Fed. Reg. 80363.

<sup>8</sup> See Comment 39(d)(5), 78 Fed. Reg. 80363.

### ***Applicability of the partial payment disclosure***

The applicability of the partial payment disclosure is complicated by the fact that under the Dodd-Frank Act the mortgage transfer notice and the partial payment portion of the disclosure apply to different categories of mortgage loans. The mortgage transfer disclosure is required for open-end consumer credit transactions that are secured by the principal dwelling of a consumer and closed-end consumer credit transactions secured by a dwelling or other real property. In contrast, the partial payment portion of the mortgage transfer notice is only required for closed-end mortgage loans (including credit transactions secured by a timeshare plan) secured by a dwelling or real property, other than reverse mortgage transactions. The partial payment disclosure is not required for home equity lines of credit, reverse mortgages or chattel-dwelling loans.

In the TRID rulemaking, the CFPB broadened the applicability of the mortgage transfer disclosure by amending the definition of “mortgage loan” to mean: “(i) [a]n open-end consumer credit transaction that is secured by the principal dwelling of a consumer; and (ii) [a] closed-end consumer credit transaction secured by a dwelling or real property.” Under current law, “mortgage loan” is defined as any “consumer credit transaction that is secured by the principal dwelling of a consumer.”<sup>9</sup> Thus, on or after August 1, 2015, a mortgage servicer must provide the mortgage transfer disclosure to an owner of a second home. The TRID rulemaking clarifies reverse mortgage transactions are excluded.

### **Post-Consummation Escrow Account Cancellation Notice**

Sections 1461 and 1462 of the Dodd-Frank Act created new Section 129D of TILA, establishing escrow requirements for consumer credit transactions secured by first-lien, closed-end mortgage loans (other than a reverse mortgage). Section 129D(j) requires that if a consumer chooses to waive escrow service before or after consummation of the loan, the creditor or servicer<sup>10</sup> (collectively, “servicer”) must provide a timely and clearly written disclosure that informs the consumer (1) of applicable fees and costs associated with the closure of such account; (2) that the consumer is responsible for payment of non-escrowed items and in the absence of such account, the cost of taxes, insurance and related fees can be substantial; (3) in a clear explanation, of the consequences of any failure to pay non-escrowed items; and (4) of other information that the CFPB determines is necessary for the protection of consumers.

In the CFPB’s 2011 Escrow Proposal, the bureau effectively delayed the implementation of the post-consummation escrow cancellation notice to allow it to use feedback received from consumer testing and also harmonize it with the pre-consummation escrow waiver disclosure. In the TRID rulemaking, the bureau adopted Section 1026.20(e) of Regulation Z to implement the requirements of the post-consummation escrow cancellation notice.

### ***Scope and applicability of the escrow cancellation notice***

The escrow account<sup>11</sup> cancellation notice (“notice”) is required for closed-end consumer credit transactions secured by first-lien (other than reverse mortgages) secured by personal property (e.g., manufactured homes, boats or recreational vehicles) used as a dwelling or by real property (e.g., vacant or unimproved land).<sup>12</sup>

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<sup>9</sup> 12 C.F.R. § 1026.39(a)(2)(i).

<sup>10</sup> “Servicer” has the same definition as under RESPA, Regulation X, 12 C.F.R. § 1024.2(b).” See 78 Fed. Reg. 79897.

<sup>11</sup> “Escrow account” has the same definition as under RESPA, Regulation X, 12 C.F.R. § 1024.17(b). See 78 Fed. Reg. 79897.

<sup>12</sup> 78 Fed. Reg. 79897.

The disclosure requirements, however, are not triggered unless an escrow account was established in connection with the transaction and will be canceled whether by the borrower or the servicer. In the official commentary to Section 1026.20(e), the bureau further clarifies the applicability of the escrow account cancellation notice as “[n]either creditors nor servicers are required to provide the disclosures . . . when an escrow account that was established solely in connection with the consumer’s delinquency or default on the underlying debt obligation will be cancelled.”<sup>13</sup> In addition, the disclosure obligation does not arise when the underlying debt obligation for which an escrow account was established is terminated by repayment, refinancing, rescission or foreclosure.<sup>14</sup>

### ***Timing for escrow account cancellation notice***

The timing for the notice depends on whether or not the consumer has requested the escrow cancellation. If the consumer has requested the cancellation, the servicer must provide the notice within three business days<sup>15</sup> before closure of the consumer’s escrow account.

If the notice is provided by mail, the consumer is deemed to have received the disclosure three business days after the notice is placed in the mail. For a servicer that uses email or a courier to provide the disclosure, the CFPB explained that a servicer “may also use this [three business day delivery period] approach.”<sup>16</sup>

If the escrow cancellation is not at the consumer’s request, however, a servicer must ensure the consumer receives the notice at least 30 business days before the closure of the consumer’s escrow account. Whichever method of delivery is used, a creditor or servicer may rely on documentation of receipt in determining when the three business day or 30 business day waiting period begins.<sup>17</sup>

### ***Format and content requirements***

The notice must follow specific content and format requirements. Headings, content, order and format must be substantially similar to the [Escrow Cancellation Notice Model Form in Appendix H-29](#) that the bureau adopted in the TRID rulemaking. A servicer must clearly and conspicuously provide the disclosure under the heading “Escrow Closing Notice.” The clear and conspicuous standard “generally requires that disclosures be in a reasonably understandable form and readily noticeable to the consumer.”<sup>18</sup> The notice must be provided in a minimum 10-point font, grouped together on the front side of a one-page document, separate from all other materials.

A servicer may include its name and company logo, which may be placed above the “Escrow Closing Notice” heading. A servicer may also include the consumer’s name, phone number, mailing address and property address, the issue date of the notice, loan number or consumer’s account number on the notice, but those must be placed under the “Escrow Closing Notice” heading above the disclosures.

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<sup>13</sup> See Comment 20(e)(1)(2), 78 Fed. Reg. 80328 – 80329.

<sup>14</sup> See Comment 20(e)(1)(3), 78 Fed. Reg. 80329.

<sup>15</sup> See 12 C.F.R. § 1026.2(a)(6).

<sup>16</sup> See Comment 20(e)(5)(iii), 78 Fed. Reg. 80329.

<sup>17</sup> 78 Fed. Reg. 79901.

<sup>18</sup> See Comment 20(e)(2), 78 Fed. Reg. 80329.

A servicer may provide a consumer with additional information on separate pages and include those pages at the same time the servicer provides the notice, provided the servicer complies with the requirements set forth in Section 1026.20(e).<sup>19</sup>

## Other Notable Amendments

There are two additional amendments in the TRID rulemaking that are worth mentioning. First, the TRID rulemaking amends Section 1026.38(p)(3) of Regulation Z to require a creditor to include in the closing disclosure “[a] brief statement of whether, and the conditions under which, the consumer may remain responsible for any deficiency after foreclosure and under applicable State law, a brief statement that certain protections may be lost if the consumer refinances or incurs additional debt on the property, and a statement that the consumer should consult an attorney for additional information, under the of the heading ‘Liability after Foreclosure.’”<sup>20</sup> In the preamble to the TRID rulemaking, the CFPB stated that Section 1026.38(p)(3), as finalized and as illustrated by form H-25 of Appendix H to Regulation Z, “clearly requires the creditor to determine whether, after a foreclosure that does not cover the amount of unpaid balance on the loan, State law may protect the consumer from liability for the unpaid balance after foreclosure or, alternatively, whether State law does not protect the consumer from liability.”<sup>21</sup>

Second, the CFPB limited the scope of the servicing disclosure statement (whether the servicing of a mortgage loan may be assigned, sold or transferred to any other person at any time, which is required to be provided within three days) contained in Regulation X, Section 1024.33 to closed-end reverse mortgage transactions. The bureau incorporated the servicing disclosure statement in the consolidated TILA-RESPA Loan Estimate, but because the disclosure forms do not apply to reverse mortgage loans, the CFPB amended Section 1024.33 to require that reverse mortgage loan applicants receive the servicing disclosure statement.

## Alston & Bird Observations and Conclusions

### *Enforcement news*

The CFPB’s enforcement announcement is welcome news that is reassuring to the industry as the CFPB continues working to standardize and brand its approach each step of the way from rulemaking to implementation to supervision to enforcement. This announcement appears to be a standardization of the same approach announced by the CFPB in hearings before Congress and at several conferences and events leading up to the effective date of the Dodd-Frank Act Title XIV Rules in January 2014.

Even though this announcement is a positive development, some were hoping for a delayed effective date. If that were to occur, private rights of action brought by litigants based on the TRID Rule would also be postponed. The TRID Rule brings with it a slew of complex technical and operational changes. Many are fearful that even with the best implementation efforts there will still be many loose ends on August 1. As it stands now, TRID violations beginning on August 1 may become subject to private litigation.

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<sup>19</sup> 78 Fed. Reg. 79899.

<sup>20</sup> 12 C.F.R. § 1026.38(p)(3).

<sup>21</sup> 78 Fed. Reg. 80047.

***TRID creditor and assignee liability beyond the CFPB***

The options for litigants to bring private rights of action under the Rule itself remain unclear. Under RESPA, violations involving the HUD-1 and good faith estimate were not subject to private rights of action, and subsequent purchasers of the loan were not subject to assignee liability. In general, for originators to be subject to liability under RESPA, federal and state regulators and related administrative authorities would need to bring an action. Under the TRID Rule, *all* loan estimate and closing disclosure, delivery, timing and content requirements are codified in Regulation Z and not Regulation X and therefore may be subject to the liabilities provided by TILA, including private rights of action. Arguably, TRID disclosures authorized by RESPA are not subject to the liability provisions in TILA. To this point, the CFPB indicated in the adopting release for the Rule that a determination of whether Regulation Z liability applies depends on the specific authorization relied on for each provision in the Rule (i.e., RESPA or TILA). Thus, from the CFPB's perspective, a provision-by-provision analysis would be required to determine liability. However, the CFPB also promulgated most provisions of the TRID Rule that traditionally were RESPA-related using both RESPA and TILA Section 105(a) authority.

To cloud this issue further, TILA, as amended by the Dodd-Frank Act, now requires disclosure of the aggregate amount of settlement services and other costs (i.e., traditional RESPA disclosures). Thus, many of the settlement costs and other fee disclosures that were exclusively authorized under RESPA prior to the Dodd-Frank Act are arguably now also authorized under TILA. Each individual cost is necessary for disclosing the aggregate amounts of the costs. This development further strengthens the possibility that most, if not all, of the TRID Rule disclosures are subject to TILA liability. Moreover, the timing requirements were already subject to TILA through the Mortgage Disclosure Improvement Act.

Assignees are also subject to TILA liabilities through violations that are apparent based on the face of the disclosures. That standard typically includes whether the disclosure can be determined to be incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note or any other disclosure of disbursement, or the disclosure statement does not use the required terms or required format.

This is an evolving area of the law and unfortunately, liabilities for particular TRID Rule violations may remain unclear until courts decide the issue uniformly. Most long-time industry participants know that this outcome could take years and years given historical district and federal circuit court splits.

***Servicer Impacts***

These additional servicing-related components of the TRID rulemaking are some of the final pieces from the Dodd-Frank Act stemming from concern that some borrowers do not understand the full costs of owning a home over the life of the loan and to further emphasize to consumers the role that investors and other loan buyers play after the loan closes. Mortgage servicers need to be prepared to implement the amended servicing disclosure requirements under the TRID rulemaking before the August 1, 2015, deadline. Mortgage lenders also should consider tracking state law changes to anti-deficiency laws, something originators may not have previously done. Failure to do so could prove quite costly to servicers if the CFPB pursues supervisory or enforcement actions or other corrective measures to address violations.

If you need assistance preparing for these changes, our team includes one of the early founders of the CFPB and former senior counsel on the CFPB's Know Before You Owe TRID team, and we have TRID preparedness checklists and resources to help you ensure you are ready. Please contact any of the attorneys listed on the following page.

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