



## Financial Services & Products ADVISORY ■

**MAY 1, 2018**

### CFPB Eliminates the Black Hole That Has Plagued the Mortgage Industry

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In a welcome development, on April 26, 2018, the Consumer Financial Protection Bureau (CFPB) issued a final rulemaking (the “[2018 Rulemaking](#)”) amending the TILA/RESPA Integrated Disclosure (TRID) mortgage disclosure rule to clarify an issue that has vexed the mortgage industry since the original promulgation of TRID in October 2015. The amendment sets forth the instances in which mortgage lenders with a valid justification may pass on increased closing costs to consumers and disclose such costs on a closing disclosure. In particular, the 2018 Rulemaking resolves the so-called “black hole” issue by eliminating the four-business-day limit on a creditor’s ability to reset tolerances with the closing disclosure. Consequently, if a changed circumstance or another triggering event has occurred, the 2018 Rulemaking permits a creditor to reset tolerances with either an initial or corrected closing disclosure regardless of the number of days between consummation and the date the closing disclosure reflecting the revised estimate is required to be provided to the consumer—as long as the creditor provides the revised closing disclosure at or before consummation and within three business days of receiving information sufficient to establish the requisite changed circumstances. On a more troubling note, however, the 2018 Rulemaking indicates that the creditor must allow a new three-business-day waiting period when providing a corrected closing disclosure when the APR becomes inaccurate—even presumably when the initial closing disclosure *overstates* the APR.

#### Basic TRID Requirements

TRID requires mortgage lenders to provide consumers with a loan estimate that discloses good-faith estimates of key loan terms and closing costs for certain residential mortgage loans no later than three business days after the consumer submits a loan application. A second form, known as the closing disclosure, must be *received* by the consumer at least three business days before consummation. Under TRID, absent certain exceptions and established tolerances, lenders must adhere to the estimates set forth in the loan estimate. If circumstances warrant, the lender may revise the loan estimate, but TRID requires that the consumer receive any revised loan estimate not later than four business days before consummation. TRID also prohibits lenders from providing revised loan estimates on or after the date the lender provides the closing disclosure.

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## The Black Hole Conundrum

Circumstances may arise where a cost increases but the creditor is unable to use an otherwise permissible revised estimate on either a loan estimate or a closing disclosure for purposes of determining whether an estimated closing cost was disclosed in good faith. The situation, which may arise when the creditor has already provided a closing disclosure to the consumer when it learns about the cost increase, occurs because of the intersection of timing rules for providing revised estimates. This situation is known as the “black hole.”

Notably, before the CFPB’s issuance of a clarification of a number of TRID issues in a rulemaking in July 2017 (the 2017 TRID Rule), lenders could arguably issue closing disclosures more than four days before consummation and issue a revised closing disclosure within three business days of a valid changed circumstance based on several provisions in TRID, written CFPB implementation guidance, and the text of the proposed cleanup TRID Rule. However, the 2017 TRID Rule seemed to indicate that the CFPB never expressly and formally intended for creditors to be permitted to issue initial closing disclosures four or more days before closing and issue revised closing disclosures if there is a changed circumstance outside of the three days before the closing window. The preamble to the 2018 Rulemaking underscores this interpretation.

## Resolution of the Black Hole

The 2018 Rulemaking closes this black hole by removing the four-business-day limit on a lender’s ability to reset tolerances with a closing disclosure. Thus, in the case of a changed circumstance or other permitted justification, this amendment permits a creditor to reset tolerances with either an initial or revised closing disclosure regardless of the number of days between consummation and the date the closing disclosure reflecting the revised estimate is required to be provided to the consumer. The closing disclosure reflecting the revised estimate must be provided at or before consummation and within three business days of receiving information sufficient to establish that the changed circumstance has occurred.

## APR Inaccuracies

Significantly, the CFPB indicated in the 2018 Rulemaking that if the lender corrects the closing disclosure because the APR becomes inaccurate beyond the permitted statutory tolerances, it must provide a new three-day waiting period before consummation—presumably, even in instances when the APR *has decreased due to a reduced interest rate or lower finance charges*. This interpretation seems to contradict a provision in Regulation Z that permits the lender to *overstate the finance charge in any amount—and not face liability for disclosures impacted by that overdisclosure*.

The final rule will take effect 30 days after its publication in the *Federal Register*.

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