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CFPB Finalizes TRID Rule Clarifications

*R. Colgate Selden, Stephen Ornstein, Nanci L. Weissgold, and Elizabeth A. Corbett**

The Consumer Financial Protection Bureau recently finalized most proposed revisions to the Truth in Lending Act and Real Estate Settlement Procedures Act Integrated Disclosure Rule, which “memorializes the Bureau’s informal guidance on various issues and makes additional clarifications and technical amendments.” At the same time, the Bureau issued a proposed rule addressing the “black hole” issue. The authors of this article explain the rule clarifications and black hole issue.

The Consumer Financial Protection Bureau (“CFPB”) has finalized most proposed revisions¹ to the Truth in Lending Act (“TILA”) and Real Estate Settlement Procedures Act (“RESPA”) Integrated Disclosure Rule (the “TRID Rule”) that the CFPB proposed on July 29, 2016. In the adopting release, the CFPB stated that the final rule “memorializes the Bureau’s informal guidance on various issues and makes additional clarifications and technical amendments.” At the same time, the CFPB issued a proposed rule addressing the “black hole” issue.²

WHAT THE RULE DOES

Overall, the final TRID Rule clarifies a large number of ambiguities in the original TRID Rule, which should significantly reduce potential lender and assignee liability due to varying interpretations currently in the marketplace. These interpretations often differed from lender to lender and carried the prospect of a court later determining that only one or a handful of them were actually permissible. For example, the Rule clarifies calculations and provides tolerances for the total of payments (“TOP”) disclosure. Errors involving this

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¹ http://files.consumerfinance.gov/f/documents/201707_cfpb_Final-Rule_Amendments-to-Federal-Mortgage-Disclosure-Requirements_TILA.pdf.

² https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_Proposed-Rule_Amendments-to-Federal-Mortgage-Disclosure-Requirements_TILA.pdf.

material disclosure pose TILA statutory damages and rescission risk. These types of risks should be substantially curtailed going forward once clarifications in this Rule are properly implemented.

REMAINING ISSUES

There are still a handful of larger issues that remain. Most notably, the CFPB did not resolve the “black hole” revised closing disclosure (“CD”) timing issue. On the other hand, the CFPB also did not finalize a proposal that would have increased costs on industry by imposing a zero percent tolerance requirement on fees for services the borrower was permitted to shop for when the settlement service provider list (“SSPL”) was not provided. The text in the original version of the Rule is clear enough to indicate that the 10 percent tolerance should be imposed (whether or not the CFPB originally intended this result). Reducing the tolerance to zero percent would arguably have constituted a new rulemaking that did not properly track the administrative process for increasing economic burdens on industry.

The Rule also introduces new interpretations that run counter to long-standing policies. For example, the Rule permits comparing the final CD to the first loan estimate (“LE”) for tolerance comparison purposes instead of to intervening LEs or CDs. In other words, the final Rule would permit originators to potentially engage in bait and switch activities. In practice, this could look like a \$1,000 origination fee disclosed on the initial LE. When the consumer comes back with a better offer from a competitor, the lender could counter with a \$0 origination fee on a revised LE. At closing, the lender could then switch back to a \$1,000 origination fee all the while remaining in compliance with TRID. (We strongly recommend against lenders engaging in this practice given that federal and state unfair, deceptive, or abusive acts or practices (UDAAP/UDAP) laws would still very much be in play).

Additional clarifications and cleanup when the black hole proposed rule is finalized are expected.

EFFECTIVE DATE

Mandatory compliance with the requirements of the Rule is October 1, 2018. However, compliance is optional within 60 days of the Rule being published in the *Federal Register*. Given that the CFPB characterized many provisions of the Rule as clarifying existing text of Regulation Z, it seems that continuing with noncompliant practices until October 1, 2018, could create uncertainty around whether the Rule was actually violated. In practice, the October 1, 2018, mandatory compliance date may be somewhat illusory.

Presumably, the CFPB would be loath to bring enforcement actions against lenders acting in good faith when engaging in disclosure practices that weren't clearly a violation under the original TRID Rule until the October 1, 2018, mandatory compliance date when they clearly become a violation.

FINAL CLARIFICATIONS AND HIGHLIGHTED VARIATIONS FROM THE PROPOSAL

The CFPB finalized a substantial number of clarifications that were proposed. The following chart illustrates select issues finalized by the CFPB and a few notable final rule variations from the proposed rule.

Highlighted TRID Final Rule Issues		
Issue	Finalized?	Variance from Proposal
TRID applies to all loans secured by co-ops.	Yes	
TOP does not include specified seller, lender, or paid by other fees as disclosed in the CD.	Yes	
New TOP tolerance based on the finance charge tolerance (overstated TOP is accurate).	Yes	
Percentage disclosures rounded to three places but no trailing zeroes to the right of the decimal point.	Yes	
Extending the LE expiration date requirement if the creditor offers a longer period.	Yes	
No settlement service providers list; related charges will be subject to a zero percent tolerance requirement.	Not as proposed	No list provided, 10 percent tolerance applies.
Addressing the "black hole" by clarifying how a revised CD can be issued before closing for a valid changed circumstance.	No	Reproposed. Comments are due 60 days after publication in the <i>Federal Register</i> .
Permitting the creditor to benchmark against the initial LE instead of intervening LEs and CDs for tolerance comparison purposes.	Yes	
Settlement agents providing the consumer's CD to the seller if the CD contains information relating to the seller's transaction.	Yes	
Clarifying construction loan disclosure provisions.	Yes	
Clarifying the projected payments table.	Yes	
Clarifying the calculating cash to close table.	Yes	

Highlighted TRID Final Rule Issues		
Issue	Finalized?	Variance from Proposal
Permitting loan costs and other closing costs fees disclosed in the LE to be offset by seller credits if the creditor knows at the time that the seller will be paying some or all of the fee.	Yes	
Permitted to issue revised LEs every time information is updated, even if there is no changed circumstance.	Yes	
A revised LE or CD, as applicable, must be issued when the rate is locked even if the disclosed terms and charges are the same.	Yes	
Clarifying that prepaid interest is included in the total interest percentage ("TIP") disclosure.	Yes	
Clarifying the use of principal curtailments.	Yes	Identified as "principal reductions."
Disclosing the names of natural persons with rescission rights for rescindable transactions.	Not as proposed	Only loan applicants for the LE and obligors listed as borrowers for the CD, not persons with rescission rights.
Clarifying how gift funds are calculated and disclosed.	Yes	
Clarifying when postconsummation escrow cancellation notices and partial payment disclosures are required—a change that will impact mortgage servicers.	Yes	
Clarified that prepaid interest, property insurance premiums, amounts placed into escrow, charges for option services, property taxes, and other charges paid for third-party services not required by the creditor are not subject to tolerances other than the good-faith best information standard even if paid to affiliates of the creditor.	Yes	

WILL THIS RULE WITHSTAND THE CONGRESSIONAL REVIEW ACT?

We doubt there would be any serious challenge by Congress to this Rule via the Congressional Review Act. The Rule should reduce overall uncertainty (and potential costs) with regulatory enforcement and private civil liability. More-

over, the CFPB issued a final arbitration rule on July 10, 2017, that will certainly garner more congressional scrutiny than this TRID cleanup rule.

WHAT TO DO ABOUT THE BLACK HOLE³ FOR NOW?

Before the issuance of the final Rule, creditors could arguably issue CDs more than four days before closing and issue a revised CD within three days of a valid changed circumstance based on several provisions in the Rule, written CFPB implementation guidance, and the text of the proposed cleanup TRID Rule. However, in the final TRID Rule, when the CFPB referenced the black hole proposal, the CFPB also stated:

As noted above and described in the proposal, proposed comment 19(e)(4)(ii)-2 was intended to clarify that the reference to Closing Disclosures required by § 1026.19(f)(1) in existing comment 19(e)(4)(ii)-1 refers to both the initial Closing Disclosure required by § 1026.19(f)(1) and to any corrected Closing Disclosures provided pursuant to § 1026.19(f)(2). Although the Bureau recognizes that the text of proposed comment 19(e)(4)(ii)-2 could plausibly be interpreted as also removing the existing four-business day limit for providing corrected Closing Disclosures to reset tolerances, the preamble to the proposal does not describe that the Bureau intended such a change.

. . . In particular, the Bureau recognizes that the current rules may lead to circumstances under which creditors might be unable to provide revised estimates for purposes of resetting tolerances where the Closing Disclosure has already been provided and there are four or more days between consummation and the time the revised version of the disclosures is required to be provided pursuant to § 1026.19(e)(4)(i). The Bureau believes, however, that before finalizing a rule that addresses this issue it is advisable to propose more explicit language and to seek comment so that stakeholders who understood the proposal in accordance with the Bureau's intent will have the opportunity to provide their perspectives on this issue.

This language appears to indicate that the CFPB never expressly and formally intended for creditors to be permitted to issue initial CDs four days or more

³ The “black hole” issue, as generally described, arises when lenders have issued an initial CD, a changed circumstance occurs but there are more than three days left before closing. Some interpret the TRID Rule to only permit revised CDs, which reset the benchmark for tolerance comparison purposes, to be issued only when the initial CD has been provided within four days of closing.

before closing and issue revised CDs if there is a changed circumstance outside of the three days before the closing window. This casts doubt on some current interpretations based on all written regulation and guidance that creditors are not expressly prohibited from issuing and revising CDs four or more days before closing until the black hole proposed rule is finalized to permit this approach.

On the other hand, this language is also part of a proposed rule and therefore does not carry the same precedential value as a final rule. Issuing initial CDs more than four days before closing and revising them based on changed circumstances outside of the three days before the closing window could still arguably follow the same interpretations based on such written materials until the proposal is finalized. After all, the current text of the Rule and commentary do not explicitly say an initial CD must be provided no more than three days before closing. The commentary is also written in a fashion that illustrates issuing a revised CD as an example to address circumstances when there are less than four days before closing, the creditor has already issued the initial CD, and the creditor therefore has no alternative but to use a revised CD in lieu of an LE. That is, the plain text of the regulation and comment could reasonably be interpreted as not an express prohibition or timing restriction on issuing revised CDs beyond the three-day window if an initial CD has already been provided.

Hurricane season is just around the corner—for a rule to mandate that lenders must choose to either walk away from a loan or bear the cost of all additional inspections and appraisals when closings are delayed by a week or two for circumstances beyond the control of the lender would be unprecedented. Or, consider that consumers may need to delay closing for various reasons; in those cases lenders must also bear the costs or walk away if the economics of the transaction are no longer feasible. It is also questionable whether the CFPB properly considered all of these potential costs as a basis for the narrow three-day CD revision window interpretation when promulgating the original TRID Rule in the first place.

The concurrent proposal issued with the TRID final Rule states that “under the current proposal, creditors could use either initial or corrected Closing Disclosures to reflect changes in costs for purposes of determining if an estimated closing cost was disclosed in good faith, regardless of when the Closing Disclosure is provided relative to consummation.” If finalized as proposed, this would undoubtedly clarify the issue once and for all and benefit both consumers and industry.

Even with this open issue, the Rule is a welcome outcome that should greatly help to reduce creditor and assignee liability.