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Financial Services & Products ADVISORY ■

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CFPB Proposes TRID Rule Clarifications

On Friday, July 29, 2016, the Consumer Financial Protection Bureau (CFPB) proposed revisions to the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) Integrated Disclosure Rule (the "TRID Rule"), as promised. This formal TRID clarification process is welcome news for many who in their good-faith efforts to fully comply with the TRID Rule have been struggling to ascertain the meaning of various requirements, including those that could expose originators and their assignees to material liability.[1] If crafted appropriately, the revisions could eliminate much of this uncertainty and reduce enforcement and private civil litigation risk once they become effective.

Due Date for Comments and Possible Effective Date

Comments on the proposal are due by October 18, 2016. Comments will be extremely important, providing the CFPB with the practical information and background it needs to craft useful clarifications and to ensure the industry will be ready for the changes when they become effective.

The CFPB is attempting to thread the needle between reopening major portions of the TRID Rule and not providing enough clarity. The CFPB stated that it "is reluctant to entertain major changes that could involve substantial reprogramming of systems so soon after the October 2015 effective date or to otherwise distract from industry's intense and very productive efforts to resolve outstanding implementation issues." This suggests that the CFPB does not want to go back to the well very often to make formal TRID clarifications. However, the CFPB did leave the door open to comments other than those specifically requested.

The CFPB also requested comments on the amount of time required to implement the revisions to help determine the effective date once the proposal is finalized. The CFPB proposed 120 days after publication in the *Federal Register*. Based on this timeline, the CFPB stated that the current tentative working date for the final TRID Rule would be April 1, 2017.

[1] Material violations of the TRID Rule that are apparent on the face of the disclosure could expose originators and their assignees to TILA's civil statutory damages, actual damages, attorneys' fees, court costs and possible recoupment claims in a foreclosure if allowed by state law.

Topics Addressed by the Proposal

Although the CFPB stated in the proposal that it "is reluctant to entertain major changes," the proposal contains a fairly substantial number of clarifications, which are mostly welcome considering the current state of confusion. The CFPB will also accept comments on other issues. The topics the CFPB expressly requested comment on include:

- Applying TRID to loans secured by co-ops regardless of whether the co-ops are considered personal or real property under state law.
- Clarifying that the total of payments disclosure excludes charges designated as paid by the seller or others, including the lender, but not for the "In 5 Years" disclosure (when lenders provide lender credits, the In 5 Years disclosure calculation under the current version of TRID includes the increased monthly payment amount used to provide lender credits at closing and the full amount of fees to be offset by the lender credits; to include fees offset by specified lender credits and the increased monthly payment equates to double-counting and therefore inaccurately discloses the true cost of the loan contrary to the purposes of TILA).
- Creating a tolerance requirement based on the finance charge tolerance for the total of payments disclosure.
- Clarifying the rounding rules for percentage disclosures.
- Changing the expiration date requirement for the Loan Estimate (LE) if the creditor states the LE expires in a period longer than the 10 days specified in the current rule.
- Clarifying that if the creditor did not provide the settlement service providers list or a correct list, related charges will be subject to the 0% tolerance requirement.
- Addressing the "black hole" by clarifying that a revised Closing Disclosure (CD) can be issued prior to closing for a valid changed circumstance.
- Settlement agents providing the consumer's CD to the seller if the CD contains information relating to the seller's transaction.
- Clarifying construction loan disclosure provisions.
- Clarifying the projected payments table.
- Permitting fees disclosed in the LE to be offset if the creditor knows at the time that another party will be paying for the fee.
- Issuing revised LEs every time information is updated.
- Clarifying that prepaid interest is included in the total interest percentage disclosure.
- Clarifying the use of principal curtailments.
- Disclosing the names of natural persons for right of rescission transactions.
- Clarifying how gift funds are calculated and disclosed.
- Clarifying when post-consummation escrow cancellation notices are required—a change that will impact mortgage servicers.

Some of What Is Not Included

Cures

The CFPB is clearly taking its TRID implementation assistance efforts seriously. The CFPB, however, expressly declined to provide additional "cures" that would fill gaps not covered by the cures provided in the current TRID Rule.[2] Many had hoped the CFPB would provide cures for numeric clerical errors, postconsummation cures for disclosures that are only included in the LE, cures for numeric disclosure errors that are not dollar values and cures for disclosure delivery timing errors. The CFPB indicated in the proposal that if it provided additional cures, there would be no incentive for industry to comply with the TRID Rule. This could be interpreted as a possible departure from statements in the assignee liability letter that Director Richard Cordray sent to the Mortgage Bankers Association (MBA).

Cordray's letter

The letter sent by Director Cordray to the MBA on December 29, 2015, addressing assignee liability under the TRID Rule is currently informal guidance only. Investors and other industry participants have requested that the CFPB issue the letter as a policy statement in the *Federal Register* or address the content of the letter in the preamble of a TRID clarification rule. This proposal does not address the letter or substantially deal with the topic of assignee liability for TRID errors other than with respect to the proposed total of payments disclosure tolerance.

May Not Get Another Bite at the Apple Any Time Soon

It's hard not to be excited about the proposal given the implementation issues that most have been grappling with for more than a year. The proposal shows the CFPB's thinking on many issues in a formal writing. Until finalized, however, these proposed clarifications do not necessarily override or clarify similar provisions in the current final TRID Rule. Given the CFPB's history assisting with regulatory implementation, we are optimistic that most of these helpful changes will be finalized.

On the other hand, the CFPB may not provide another opportunity for comprehensive TRID clarifications through formal rulemaking any time soon given the CFPB's stated concerns regarding time-consuming system and process changes. Even in this proposed rule, however, the proposed changes if adopted are expansive enough that a lot of time will be required to reprogram systems or at least confirm that current programming and interpretations are correct. While the CFPB's concerns regarding extensive changes are understandable, the car is already in the shop so to speak. Most would likely welcome comprehensive revisions to the extent they mitigate risk over the long run.

We expect that comments will be overwhelmingly positive and responsive to the CFPB's requests, but will likely also address other issues the CFPB did not mention in the proposal. If enough of these issues are repeated by commenters, the CFPB may provide clarifications regarding them in the preamble or even add them to the final rule text and commentary.

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2 The TRID Rule provides several closing or post-consummation "cures" that lenders can use to fix disclosure errors. If lenders comply with these TRID Rule cure requirements, the fixed disclosures are deemed to comply with the TRID Rule. The cures in the current version of the TRID Rule address tolerance errors and nonnumeric clerical errors.

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