INFOBYTES SPECIAL ALERT:
CFPB FINALIZES RULE COMBINING TILA AND RESPA MORTGAGE DISCLOSURES

December 2, 2013

On November 20, 2013, the CFPB finalized its long-awaited rule combining the mortgage disclosures consumers receive under the Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA").[1] For more than 30 years, the TILA and RESPA mortgage disclosures had been administered separately by, respectively, the Federal Reserve Board ("FRB") and the U.S. Department of Housing and Urban Development ("HUD"). In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") transferred authority over TILA and RESPA to the Bureau and directed the Bureau to create "rules and model disclosures that combine the disclosures required under [TILA] and sections 4 and 5 of [RESPA], into a single, integrated disclosure for mortgage loan transactions covered by those laws."[2] Congress did not, however, amend TILA and RESPA provisions governing timing, responsibility, and liability for the disclosures, leaving it to the Bureau to resolve the inconsistencies.

Unlike the Bureau's other Dodd-Frank Act mortgage rules, Congress did not impose a January 2013 deadline for the TILA-RESPA Integrated Disclosure rule. Nevertheless, from the outset, the Bureau made the project the public centerpiece of its rulemaking efforts, announcing its commencement in December 2010 and releasing the first prototype disclosures for public comment in conjunction with the beginning of consumer testing in May 2011. Over the next twelve months, the Bureau released nine additional sets of prototype disclosures, conducted nine additional rounds of testing, and convened its first Small Business Review Panel, culminating in the release of the proposed rule in July 2012. Following the proposal, the Bureau conducted additional testing and developed Spanish-language and refinancing versions of the disclosures.

For additional background, please review our report on the rule as proposed.

EFFECTIVE DATE AND SCOPE

The final rule generally applies to covered transactions for which the creditor or mortgage broker receives an application on or after **August 1, 2015**.[3] The rule applies to most closed-end consumer mortgage loans, although it establishes different requirements for timeshares and construction loans. The rule does not apply to:

- Home equity lines of credit
- Reverse mortgages

[1] Bureau of Consumer Financial Protection, Final Rule, Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Nov. 20, 2013), http://www.consumerfinance.gov/regulations/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the-truth-in-lending-act-regulation-z/ (publication in the Federal Register forthcoming) (hereinafter "*TILA-RESPA Integrated Disclosure Rule*" or "*TRID Rule*"). The CFPB has also released a guide summarizing the rule: http://files.consumerfinance.gov/f/201311_cfpb_tila-respa_detailed-summary.pdf.

[2] Dodd-Frank Act § 1032(f).

[3] *TRID Rule* at p. 1243.

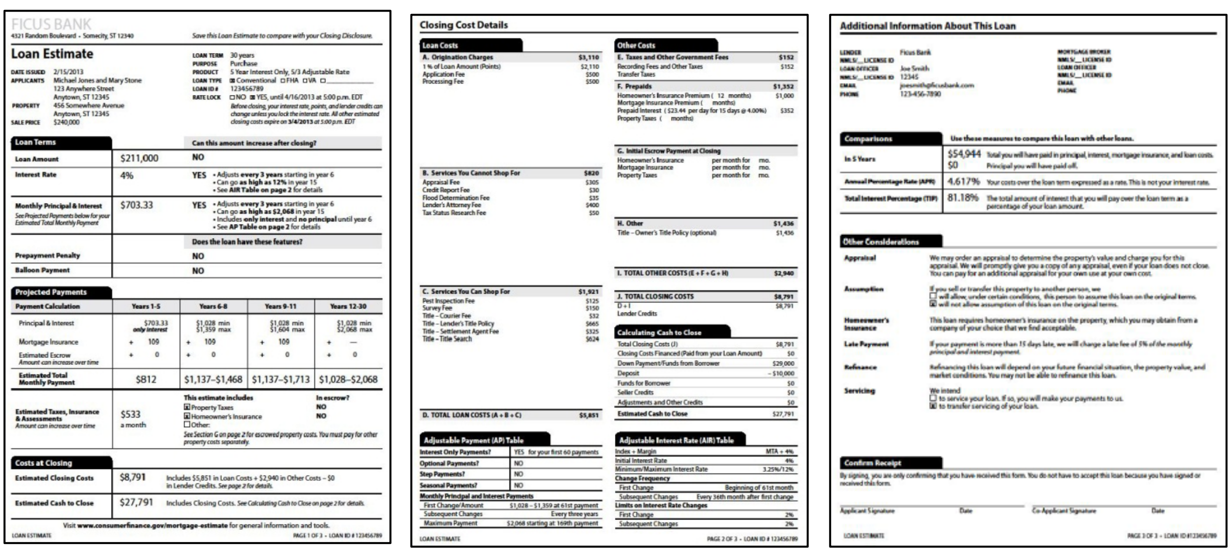
- Mortgage loans secured by a mobile home or by a dwelling that is not attached to real property[4]
- Loans made by a lender who makes five or fewer mortgages in a year[5]
- Certain no-interest second mortgage loans made for the purpose of downpayment assistance, property rehabilitation, energy efficiency, or foreclosure avoidance[6]

THE FORMS

Use of the Bureau's forms is mandatory for most transactions and only limited modifications are permitted.[7] Despite requests from industry, the Bureau's regulation and official interpretations do not specify which disclosures are subject to TILA liability and which are subject to RESPA liability. Instead, the Bureau stated that the "detailed discussions [in the final rule's preamble] of the statutory authority for each of the integrated disclosure provisions provide sufficient guidance for industry, consumers, and the courts regarding the liability issues raised by the commenters."[8] We will continue to study this issue.

The Loan Estimate: Truth in Lending Statement + Good Faith Estimate

The Bureau's Loan Estimate combines some of the disclosures that are currently provided in the initial Truth in Lending ("TIL") statement with the disclosures that are currently provided in the RESPA Good Faith Estimate ("GFE"). The form also incorporates other disclosures that are required by the Dodd-Frank Act or are currently provided separately, such as the Total Interest Percentage required by TILA (as amended by the Dodd-Frank Act), the appraisal notice required by the Equal Credit Opportunity Act, and the servicing notice required by RESPA.



(click to enlarge)

[4] 12 C.F.R. § 1026.19(e)(1)(i) and (f)(1)(i). Unless otherwise noted, all citations to the Code of Federal Regulations and the commentary are to revised version adopted in the TRID Rule.

[5] 12 C.F.R. § 1026.2(a)(17)(v). Thus, this long-standing exception in Regulation Z now applies to provision of the RESPA §§ 4 and 5 disclosures.

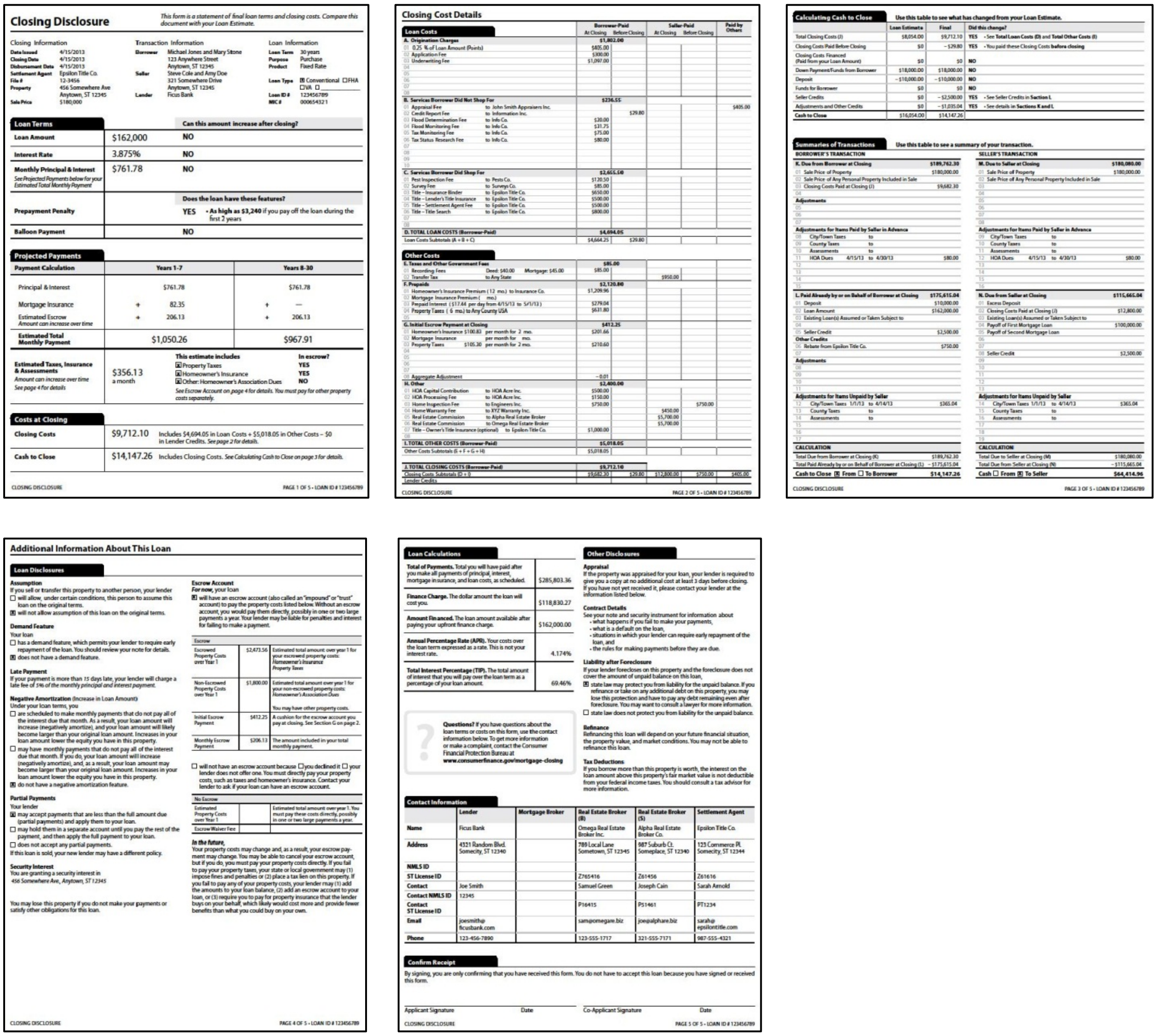
[6] 12 C.F.R. § 1026.3(h).

[7] 12 C.F.R. §§ 1026.37(o), 1026.38(t).

[8] *TRID Rule* at pp. 120-21.

The Closing Disclosure: Truth in Lending Statement + HUD-1/1A Settlement Statement

The Bureau's Closing Disclosure combines the disclosures that are currently provided in the final TIL statement with the disclosures that are currently provided in the RESPA HUD-1 or HUD-1A settlement statement. Like the Loan Estimate, the form also incorporates other disclosures, including the new TILA negative amortization and escrow account notices.



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Initial Observations

The regulation and official interpretations provide extensive, highly-detailed guidance on how to fill out the Loan Estimate and Closing Disclosure.[9] In addition to the sample Loan Estimate above (which is for an interest-only adjustable rate purchase loan), the Bureau provided samples for fixed-rate, balloon-payment, and negative amortization purchase loans and for a refinancing.[10] The Bureau also provided

[9] *See* 12 C.F.R. §§ 1026.37 and 1026.38 and Official Interpretations.

[10] *See* Sample Forms H-24(B)-(F).

two variations of page one and four variations each of pages two and three of the Loan Estimate to address the variable content requirements. Similarly, the Bureau provided multiple samples of the Closing Disclosure, including samples separating the borrower and seller information for privacy reasons.[11]

Although our analysis of the final rule is ongoing, we make the following observations regarding the forms:

- *Itemization*: Unlike HUD's 2010 GFE, the Bureau's Loan Estimate requires the itemization of individual charges. The GFE prohibits separately disclosing the items that are consolidated in, for example, the origination charge. But the Loan Estimate mandates providing a consolidated figure on page 2 under the subheading of "Origination Charges," with an itemization of each amount that the consumer will pay to each creditor and loan originator for originating and extending the credit.[12] These separately disclosed items may include, for example, an application fee, origination fee, underwriting fee, processing fee, verification fee, and rate-lock fee.[13] A consolidated subtotal and an itemization of individual amounts must also be provided for "Services You Cannot Shop For" and "Services You Can Shop For."[14] The items listed as loan costs under these provisions generally must be labeled using terminology that describes each item and listed alphabetically.[15]
- *Disclosure of Discount Points*: Under the subheading "Origination Charges" on page 2 of the Loan Estimate, the points paid to the creditor to reduce the interest rate must be disclosed as a separate line item, listed as both a dollar amount and as a percentage of the amount of credit extended labeled as "__% of Loan Amount (Points)."[16] A charge imposed to pay for a loan level pricing adjustment ("LLPA") assessed on the creditor, which the creditor passes on to the consumer as a charge at consummation and not as an adjustment to the interest rate, must be separately itemized.[17]
- *Disclosure of Broker Compensation*: One of the most significant revisions made to the GFE in 2010 was the emphasis placed on disclosing compensation paid to a mortgage broker by the lender as both a charge to the consumer and a "credit" from the lender. The Loan Estimate does not disclose creditor-paid mortgage broker compensation in the same manner. Consumer-paid broker compensation must be disclosed on the Loan Estimate as an individual line item under "Origination Charges" on page 2.[18] Unlike the GFE, the CFPB does not require (and, in fact, prohibits) disclosure of creditor-paid broker compensation (*e.g.*, compensation to a loan originator paid indirectly by the creditor through the interest rate) on the Loan Estimate.[19] On the Closing Disclosure, borrower-paid and creditor-paid compensation are separately disclosed on page 2. Consumer-paid broker compensation is disclosed as a "Borrower-Paid" charge, whereas lender-paid broker compensation is disclosed as a charge in the "Paid by Others" column.[20]

[11] *See* Sample Forms H-25(B)-(J).
[12] 12 C.F.R. § 1026.37(f)(1).
[13] Comment 37(f)(1)-3.
[14] 12 C.F.R. § 1026.37(f)(2, 3).
[15] 12 C.F.R. § 1026.37(f)(5).
[16] 12 C.F.R. § 1026.37(f)(1)(i).
[17] Comment 37(f)(1)-5.
[18] 12 C.F.R. § 1026.37(f)(1) and Official Interpretations.
[19] *Id*.
[20] 12 C.F.R. § 1026.38(f)(1) and Official Interpretations.

- *De-emphasis of APR and Other TIL Disclosures*: Based on consumer testing performed by the FRB and the Bureau indicating that the traditional "TIL Box" disclosures of Annual Percentage Rate ("APR"), Finance Charge, Amount Financed, and Total of Payments were not helpful to consumers, the Bureau used its exception and adjustment authority to move the APR to the last page of the forms and to provide the other disclosures only on the last page of the Closing Disclosure. While these changes were supported by industry, consumer advocates strongly opposed the relegation of the APR to the back page.
- *Elimination of Average Cost of Funds*: Based on its consumer testing, the Bureau used its exception authority to eliminate the Average Cost of Funds disclosure required by Congress in the Dodd-Frank Act, which would have required creditors to disclose a figure representing the cost to the creditor of the funds used to make the loan. This disclosure was strongly opposed by industry as being burdensome and unhelpful to consumers.

THE RULES

The Loan Estimate

The Loan Estimate must provide a "good faith estimate" of the loan's costs and terms.[21] Until the Loan Estimate is provided and the consumer indicates an intent to proceed with the transaction, a creditor cannot impose any fee other than a bona fide and reasonable credit report fee.[22] A creditor is also prohibited from requiring the consumer to submit documents verifying information relating to the consumer's application until the Loan Estimate has been provided.[23]

Timing Requirements

The Loan Estimate must be delivered or placed in the mail not more than three business days after receipt of an application and not less than seven business days before consummation of the transaction.[24] Two definitions are critical to understanding this requirement:

- *Application.* Under the final rule, an "application" has been received for purposes of triggering the obligation to provide the Loan Estimate once the creditor receives six pieces of information:

  1. The consumer's name;
  2. The consumer's income;
  3. The consumer's social security number to obtain a credit report;
  4. The property address;
  5. An estimate of the value of the property; and
  6. The mortgage loan amount sought.[25]

  This represents a departure from the definition of application that applies to the current RESPA GFE and initial TIL disclosures, which includes a seventh "catch-all" element that permits the loan originator to determine what other information is necessary to complete the application.[26]

[21] 12 C.F.R. § 1026.19(e)(1)(i).
[22] 12 C.F.R. § 1026.19(e)(2)(i)(A).
[23] 12 C.F.R. § 1026.19(e)(2)(iii).
[24] 12 C.F.R. § 1026.19(e)(1)(iii).
[25] 12 C.F.R. § 1026.2(a)(3)(ii).
[26] *TRID Rule* at 120.

The CFPB acknowledged the difficulties associated with eliminating the seventh catch-all element, but concluded that creditors can resolve those issues by collecting any other information deemed necessary before obtaining all six pieces of information from the consumer (*e.g.*, by requiring the consumer to submit all other information deemed necessary to process the application before obtaining the consumer's social security number).[27]

- *Business Day.* "Business day" has two different meanings for purposes of the Loan Estimate. For the requirement that the Loan Estimate be provided within three business days of application, business day means "a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions."[28] However, for purposes of the seven business day waiting period before consummating the transaction, business day means all calendar days except Sundays and the legal public holidays.[29] Although having multiple definitions is confusing, this distinction benefits creditors by allowing more time to provide the Loan Estimate without lengthening the waiting period after the Loan Estimate is provided before the loan may be consummated.

  The seven business day waiting period may be waived or modified if the consumer determines, after receiving the Loan Estimate, that the extension of credit is needed to meet a "bona fide personal financial emergency."[30] However, the Bureau retained the existing requirements for such waivers or modification, which require the consumer to give the creditor a dated written statement that: (1) describes the emergency; (2) specifically modifies or waives the waiting period; (3) bears the signature of all consumers who are primarily liable on the legal obligation; and (4) is not a printed form.[31] Because investors have historically been unwilling to purchase loans where the waiting period has been waived or modified, it is unclear whether this exception will be meaningful in allowing consumers to avoid closing delays.

Responsibility for Provision

The Loan Estimate must be provided either by the creditor or the mortgage broker who received the consumer's application.[32] However, the creditor retains ultimate responsibility – and liability – for ensuring the Loan Estimate is provided in accordance with the rule, even if the mortgage broker delivers it.[33]

Permissible Changes

The Bureau generally retained the "tolerance" regime adopted by HUD in 2010, with certain adjustments. The Loan Estimate must provide a "good faith estimate of the closing costs."[34] An estimate is in good faith if the "charge paid by or imposed on the consumer does not exceed the amount originally disclosed," except as follows:

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[27] *See, e.g., TRID Rule* at 132-3; *see also* comment 2(a)(3)-1 ("This definition does not prevent a creditor from collecting whatever additional information it deems necessary in connection with the request for the extension of credit."). In addition, if a creditor provides a written estimate of terms or costs specific to a consumer before the consumer receives the Loan Estimate, the creditor must clearly and conspicuously state at the top of the front of the first page: "Your actual rate, payment, and costs could be higher. Get an official Loan Estimate before choosing a loan." 12 C.F.R. § 1026.19(e)(2)(ii).
[28] 12 C.F.R. § 1026.2(a)(6).
[29] *Id*.
[30] 12 C.F.R. § 1026.19(e)(1)(v).
[31] *Id*.
[32] 12 C.F.R. § 1026.19(e)(1)(i)-(ii).
[33] 12 C.F.R. § 1026.19(e)(1)(ii).
[34] 12 C.F.R. § 1026.19(e)(1)(i) and (e)(3)(i).

- *10% increase permitted for certain third-party charges.* A third-party service fee or a recording fee may be estimated and will be considered in good faith if:
  - The aggregate amount of charges for third-party services and recording fees ultimately paid by or imposed on the consumer does not exceed the aggregate amount of such charges disclosed on the Loan Estimate by more than 10%;
  - The third-party service charge is not paid to the creditor or its affiliate; and
  - The consumer is permitted to shop for the third-party service.[35]
- *No limitations on increases for certain charges*. The following charges may be estimated and will be considered in good faith if they are consistent with the best information reasonably available to the creditor at the time the estimate is provided, regardless of the amount actually paid:
  - Prepaid interest;
  - Property insurance premiums;
  - Amounts placed into an escrow, impound, reserve, or similar account;
  - Charges paid to third-party service providers selected by the consumer that are not on the creditor's list of service providers; and
  - Charges paid for third-party services not required by the creditor, even if paid to an affiliate of the creditor.[36]
- *Exceptions for revisions to estimates*. Unless a revision is permitted for one of the reasons discussed below, increases are not allowed for other estimated charges, such as creditor and loan originator charges and charges paid to an affiliate of the creditor. In addition, for unaffiliated third-party charges subject to the 10% limitation, the aggregate amount of such charges cannot increase by more than 10% unless an exception applies. A creditor may increase an estimated charge beyond the limitations discussed above if the increase is due to any of the following reasons:
  - *Changed circumstances affecting eligibility or settlement charges*. One of the following changed circumstances affects the consumer's creditworthiness or the value of the security or causes the estimated charge to increase:
    - An extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction;
    - Information specific to the consumer or transaction that the creditor relied upon when providing the Loan Estimate and that was inaccurate or changed after the disclosures were provided; or
    - New information specific to the consumer or transaction that the creditor did not rely on when providing the original Loan Estimate.[37]
  - Consumer request. The consumer requests revisions to the credit terms or the settlement that cause an estimated charge to increase.[38]

[35] 12 C.F.R. § 1026.19(e)(3)(i)-(ii). A fee is not considered "paid to" a person if the person does not retain the fee but instead passes it on to a servicer provider. Comment 19(e)(3)(i)-3.
[36] 12 C.F.R. § 1026.19(e)(3)(iii).
[37] 12 C.F.R. § 1026.19(e)(3)(iv)(A)-(B).
[38] 12 C.F.R. § 1026.19(e)(3)(iv)(C).

- *Interest rate dependent charges*. The discount points, loan originator charges, and loan originator credits change because the interest rate was not locked when the Loan Estimate was provided. On the date the interest rate is locked, the final rule requires the creditor to provide a revised Loan Estimate that includes the revised interest rate, discount points, loan originator charges and credits, and all other interest rate dependent charges and terms.[39]
- *Expiration*. The consumer does not indicate an intent to proceed with the transaction within 10 business days after the Loan Estimate was provided.[40]

If an estimate is revised for one of the above reasons, the creditor must provide a revised Loan Estimate within three business days of receiving information sufficient to establish that the reason applies.[41] However, the creditor must not provide a revised Loan Estimate on or after the date it provides the Closing Disclosure.[42] Therefore, the consumer must receive the revised Loan Estimate not later than four business days prior to consummation.[43]

For unaffiliated third-party charges subject to the 10% limitation, it appears that the final rule permits the creditor to provide a revised Loan Estimate when such charges increase by less than 10%, regardless of whether this increase is due to a changed circumstance or other exception. However, unless these charges increase in the aggregate by more than 10% due to a changed circumstance or other exception, the revised Loan Estimate does not "re-set" the 10% tolerance and the final charges will be measured against those disclosed on the original Loan Estimate or on the last revised Loan Estimate that was based on a changed circumstance or other exception.[44]

The Closing Disclosure

The Closing Disclosure generally must state "the actual terms of the credit transaction, and the actual costs associated with the settlement of that transaction."[45] If, however, information is not known despite the creditor having exercised due diligence to obtain that information, the creditor may disclose an estimate based on the best information reasonably available, even if the creditor knows that more precise information will be available at or before consummation.[46]

Timing Requirements

The final rule requires that the consumer *receive* the Closing Disclosure no later than three business days before consummation.[47] If the Closing Disclosure is not delivered in person, it is presumed received three business days after it is placed in the mail, sent by email, or otherwise delivered.[48] However, the creditor

[39] 12 C.F.R. § 1026.19(e)(3)(iv)(D).
[40] 12 C.F.R. § 1026.19(e)(3)(iv)(E).
[41] 12 C.F.R. § 1026.19(e)(4)(i).
[42] 12 C.F.R. § 1026.19(e)(4)(ii).
[43] *Id*. If the revised Loan Estimate is not provided to the consumer in person, the consumer is considered to have received it three business days after the creditor delivers or places it in the mail. *Id*. If there are less than four business days between the time the revised Loan Estimate is required to be provided and consummation, a creditor may comply with this requirement if the revised disclosures are reflected in the Closing Disclosure. Comment 19(e)(4)(ii)-1.
[44] Comment 19(e)(3)(iv)(A)-1.ii.
[45] Comment 19(f)(1)(i)-1.
[46] Comment 19(f)(1)(i)-2.ii.
[47] 12 C.F.R. § 1026.19(f)(1)(ii)(A).
[48] 12 C.F.R. § 1026.19(f)(1)(iii); comments 19(f)(1)(iii)-1 and -2.

may rely on evidence that the consumer received the Closing Disclosure earlier (*e.g.*, the consumer's signed receipt of delivery by overnight mail or acknowledgment of receipt via email).[49]

For purposes of these requirements, "business day" means all calendar days except Sundays and the legal public holidays.[50] The three business day waiting period may be waived or modified in the case of a bona fide personal financial emergency, consistent with the standard discussed above.[51]

As discussed below, the Bureau's final rule substantially relaxes the proposed limitations on changes to the amounts disclosed on the Closing Disclosure. Nevertheless, this requirement means that the creditor and settlement agent must coordinate to obtain the "best information reasonably available" for each item on the Closing Disclosure several days or even a week before closing in order to ensure that the consumer receives the completed form three business days before closing.

Responsibility for Provision

The Closing Disclosure must be provided by either the creditor or a settlement agent. However, as with the Loan Estimate, the creditor retains ultimate responsibility – and liability – for ensuring that the disclosure is provided in accordance with the rule.[52]

Permissible Changes

The requirements governing changes to the terms and costs on the Closing Disclosure vary depending on what item changes and when the change occurs:

- *Changes during the three business day waiting period.* In response to industry concerns about harmful closing delays, the Bureau made substantial revisions to the proposed rule, which would have required a revised Closing Disclosure and an additional three business day waiting period for most changes. Under the final rule, if a change occurs after the initial provision of the Closing Disclosure but before consummation, the creditor is generally permitted to provide a revised Closing Disclosure at or before consummation.[53] The only changes that require re-disclosure and a new three business day waiting period are:
    1. A change in the APR of more than 1/8 of 1 percentage point above or below the disclosed APR or, if the transaction is irregular (*e.g.*, multiple advances or irregular payment periods), a change of more than 1/4 of 1 percentage point;[54]
    2. A change in the loan product (*e.g.*, from adjustable rate to fixed rate);[55] or
    3. The addition of a prepayment penalty.[56]
- *Changes after consummation*. If during the 30 calendar days following consummation an event in connection with the settlement occurs that causes the Closing Disclosure to become inaccurate and the inaccuracy results in a change to an amount actually paid by the consumer (*e.g.*, the fee charged by the recorder's office after closing for recording the security instrument

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[49] Comments 19(f)(1)(iii)-1 and -2.
[50] 12 C.F.R. § 1026.2(a)(6).
[51] 12 C.F.R. § 1026.19(f)(1)(iv).
[52] 12 C.F.R. § 1026.19(f)(1)(v).
[53] 12 C.F.R. § 1026.19(f)(2)(i). The consumer must be permitted to inspect the Closing Disclosure, completed with all information known to the creditor at the time of the inspection, during the business day immediately preceding consummation, but the creditor may omit from the inspection items relating only to the seller's transaction. 12 C.F.R. § 1026.19(f)(2)(i).
[54] 12 C.F.R. §§ 1026.19(f)(2)(ii), 22(a).
[55] 12 C.F.R. §§ 1026.19(f)(2)(ii), 37(a)(10).
[56] 12 C.F.R. § 1026.19(f)(2)(ii).

differs from the amount disclosed and paid at closing), the creditor must provide a corrected Closing Disclosure within 30 calendar days of receiving information sufficient to establish the event.[57] If the Closing Disclosure contains non-numeric clerical errors, the creditor must provide a corrected Closing Disclosure no later than 60 days after consummation.[58]

- *Curing Tolerance Violations*. If the estimated costs disclosed on the Loan Estimate increase the beyond the permitted levels and the consumer pays those amounts at consummation, then no later than 60 days after consummation the creditor must (1) refund the excess payment to the consumer; and (2) provide a corrected Closing Disclosure reflecting the refund.[59]

Other Issues

- *"All-In" APR:* In the face of strong industry opposition and a mixed reaction from consumer advocates, the Bureau did not adopt the proposed amendments adding additional costs (such as title insurance) to the finance charge. If adopted, these amendments would have simplified the process of calculating the finance charge but also significantly increased APRs and, as a result, the number of loans considered "high-cost" or "higher-priced" unless the Bureau also made adjustments to those thresholds. The amendments could have also decreased the number of Qualified Mortgages that are eligible for the safe harbor. The Bureau did, however, state that it would reexamine this issue as part of the five-year review required by the Dodd-Frank Act for major rules.
- *Record Retention and Electronic, Machine-Readable Format Requirement:* The final rule generally requires creditors to retain evidence of compliance for three years after the later of consummation or the date a disclosure or other action is required. The final Closing Disclosure, however, and any related documents must be retained for five years after consummation by the creditor or any assignee.[60] In response to strong industry opposition, the Bureau did not adopt its proposed requirement that creditors maintain evidence of compliance in an "electronic, machine readable format." The Bureau emphasized, however, that it would continue to work with industry and the GSEs to promote the development of electronic forms and to reduce the amount of paper used in the closing process.

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Questions regarding the matters discussed in this Alert may be directed to any of our lawyers listed below, or to any other BuckleySandler attorney with whom you have consulted in the past.

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[57] 12 C.F.R. § 1026.19(f)(2)(iii).
[58] 12 C.F.R. § 1026.19(f)(2)(iv).
[59] 12 C.F.R. § 1026.19(f)(2)(v).
[60] 12 C.F.R. § 1026.25(c).