

“Know Before You Owe” Is Still a Work in Progress

CFPB Proposes TRID Changes and Clarifications

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Background

- It's been 11 months since TRID took effect
- Lenders are still working out the kinks
- TRID regulations have left many disclosure questions unanswered
- Lenders and settlement agents have been repeatedly asking for regulatory amendments and more formal guidance
- Although every wish was not granted, the NPRM at least clarifies many previous landmines

How Did We Get Here?

- Dodd-Frank Act requires CFPB to propose a regulation that combines RESPA-TILA disclosures within one year of transfer of authority to CFPB
- Know Before You Owe
 - CFPB undertakes 18-month effort to get it right
- Consumer testing and focus groups
- July 9, 2012–Proposed Rule
- November 20, 2013–Final Rule
- October 3, 2015–Effective Date

Background

- Since finalizing the Rule, the CFPB has issued informal guidance and responded to individual inquiries
- The Notice of Proposed Rulemaking (NPRM), issued on July 29, 2016, seeks to “memorialize certain past informal guidance...”
 - Includes revisions to regulations, addition/revision to Commentary
- Public comments must be submitted by October 18, 2016

Topics for Today's Discussion

- “Black Hole”
- Construction-to-Permanent Loans
- Cooperatives
- Written List of Settlement Service Providers
- Total of Payments
- Housing Assistance Lending
- Privacy and Info Sharing
- Cash to Close
- Rounding
- What's Not Included in the NPRM

Closing the “Black Hole”

- The Loan Estimate (“LE”) is generally used to reset tolerances for a permitted increase in charges
- Once the Closing Disclosure (“CD”) has been provided, the LE may not be reissued to reset tolerances
- Tolerances can be reset with a revised CD if there are less than four business days between the time a revised LE is required to be provided (i.e., three business days after the change) and consummation

Closing the “Black Hole” (cont’d)

- Issues arise when changes occur and there are four or more business days between the time a revised CD is required to be provided and consummation
- CFPB proposes to close this “black hole”—it will permit a lender to re-baseline its estimates using a CD at any time after the initial CD is provided
 - Once a creditor provides the CD to the consumer, if a changed circumstance occurs, the creditor could reset tolerances by providing a revised CD reflecting the updated estimates—*as long as the creditor provides the revised CD within three business days of the changed circumstance*

Construction-to-Permanent Loans

- Allocation of Costs

- When disclosing a construction-to-permanent loan as two transactions, buyers points and similar amounts must be allocated between the two transactions
 - Current Rule: creditors have flexibility in the allocation
 - But, TILA prohibits dividing a loan into multiple transactions to avoid high-cost restrictions
- CFPB would add a “but for” test for the allocation of costs between the construction phase and permanent phase
 - A cost would be allocated to the construction phase if the amount would not be imposed *but for* the construction financing
 - Example: if a creditor charges an origination fee for a construction-only loan but charges a greater origination fee for a C-to-P loan, the difference in the fees would be allocated to the permanent phase

Construction-to-Permanent Loans (cont'd)

- “May Be Permanently Financed by the Same Creditor”
 - A creditor may treat a C-to-P loan as one transaction or two transactions when the multiple-advance loan to finance the construction *may be permanently financed by the same creditor*
 - Currently, the Rule does not provide a definition or guidance for the phrase
 - CFPB would add a threshold question—does the creditor generally make both construction and permanent financing available to consumers?
 - If “yes”, the loan *may be permanently financed by the same creditor*
 - Exception: If the consumer expressly indicates to the creditor that he/she will not obtain the permanent financing from that creditor or the lender does not provide permanent financing

Construction-to-Permanent Loans (cont'd)

- Appendix D to Regulation Z
 - Many lenders pulled back from C-to-P loans because of the lack of explicit guidance for completing the LE and CD for these loans
 - Currently, Appendix D provides optional instructions regarding the disclosure of C-to-P loans when the actual schedule of advances is not known at the time of consummation
 - Provides methods for calculating and determining the estimated interest, estimated APR, repayment schedule and amount financed

Construction-to-Permanent Loans (cont'd)

- Appendix D to Regulation Z (cont'd)
 - CFPB would provide additional explanations for the disclosure of C-to-P loans
 - Guidance regarding the: loan term, product, interest rate, initial periodic payment, increase in periodic payment, projected payments table, construction costs, and construction loan inspection and handling fees
 - For example, a proposed Comment would clarify that if the creditor discloses the construction and permanent financing as:
 - A single transaction → the disclosed loan term should be the total combined term of the phases
 - Separate transactions → the loan term of the permanent financing starts from the date that interest for the first scheduled periodic payment of the permanent financing begins to accrue

Construction-to-Permanent Loans (cont'd)

- Construction Loan Inspection and Handling Fees
 - Construction loan inspection and handling fees are loan costs associated with the construction phase for purposes of the LE and CD
 - CFPB would clarify that if fees are collected:
 - At or before consummation → disclosed in loan costs table on LE and CD
 - After consummation → disclosed in an addendum (Inspection and Handling Fees Collected After Closing)

Cooperatives

- The LE and CD are required for all closed-end consumer credit transactions secured by “real property”
- Are co-ops “real property”?
 - TILA/Reg Z does not define “real property.” Thus, the answer depends on state law
- The proposed rule removes uncertainty or different treatment based on state law
 - CFPB would require TRID disclosures in *ALL* closed-end consumer credit transactions secured by cooperative units, regardless of classification under state law

Written List of Service Providers

- Tolerances

- Current Rule: If a consumer is permitted to shop for settlement services, but the creditor fails to provide the WLSP or provides a noncompliant WLSP → 10% tolerance category
- Proposal: If a consumer is permitted to shop for settlement services, but the creditor fails to provide a WLSP or provides a noncompliant WLSP → **0% tolerance**
 - CFPB is taking the position that a consumer was not permitted to shop if he or she never received the WLSP or received a noncompliant version
 - It does not matter that the LE reflects that the consumer was able to shop or that the consumer may, in fact, have shopped for services

Written List of Service Providers (cont'd)

- Identification of Settlement Service Providers
 - Are creditors required to itemize each individual settlement service the consumer may shop for, or may creditors combine related services if the same provider offers those services?
 - A common question for title insurance-related services
 - The answer is unclear under the current regulations
 - CFPB would clarify that creditors must identify each service the consumer may shop for unless the creditor *knows* that the service is provided as part of a *package or combination of services* offered by a single provider
 - Example: If a creditor itemizes 4 title-related services as services the consumer may shop for on the LE, the creditor must itemize the 4 title-related services on the WLSP, unless it knows at the time it provides the WLSP that the provider of title-related services offers each of the 4 individual services as a package or combination of services

Total of Payments (TofP)

- TRID implements the TILA tolerances for accuracy of “the finance charge and other disclosures affected by any finance charge”
 - Prior to TRID, the Total of Payments disclosure was subject to the finance charge tolerance
 - The TofP required a creditor to disclose the sum of the amount financed and the finance charge
 - TRID altered how the TofP disclosure is calculated and states that the disclosure requires a creditor to disclose the sum of the “principal, interest, mortgage insurance and loan costs”
 - “Loan costs” may or may not be part of the finance charge
- CFPB states that it never intended to remove the tolerances applicable to the TofP disclosure
 - CFPB would clarify that the finance charge tolerances apply to the TofP disclosure

Housing Assistance Lending

- 2010 Revisions to GFE & HUD-1: HUD created an exception to the disclosure requirements for certain second-lien, homebuyer assistance loans
- CFPB adopted the same exception in TRID as it relates to the LE and CD
 - HFAs have reported issues with homebuyer assistance loans falling outside the exception because typical fees incurred as part of the loans exceed the exception limits
 - Total costs payable must be less than 1% of the loan amount and include no costs other than for recordation, application and counseling
 - Loans are typically small balance loans, and recording fees often exceed the 1% threshold
 - Example: If recording fees are \$36 and the loan amount is \$2,500, then fees exceed the 1% limitation

Housing Assistance Lending (cont'd)

- If a transaction does not meet exception criteria, the creditor must provide the GFE and HUD-1
 - Raises issues with vendor LOS systems and results in manual completion of disclosures
 - HFAs have reported that lenders will not support the origination of the loans without the capacity to create GFE and HUD-1 forms
- CFPB would clarify that:
 - Recording fees include transfer taxes
 - Recording fees and transfer taxes would not count towards the 1% exception threshold

Privacy and Info Sharing

- Creditor must provide the CD to the consumer; settlement agent must provide the CD to the seller
- Regulations do not address whether lenders or settlement agents may provide copies of the CD to other parties
- Lenders and settlement agents often require consumers to expressly consent to the sharing of the CD with real estate agents or other parties to the transaction
- In the NPRM, CFPB acknowledges two applicable exceptions in the Gramm Leach Bliley Act:
 1. If the financial institution shares customer NPI to comply with federal, state or local laws, rules and requirements; or
 2. If the financial institution's sharing of customer NPI is required "or is a usual, appropriate, or acceptable method, to provide the customer or the customer's agent or broker with confirmation, statement, or other record of the transaction..."

Privacy and Info Sharing (cont'd)

- CFPB discusses the GLBA exceptions for the first time in the NPRM
- As part of that discussion, CFPB notes that the CD is a record of the transaction both for the consumer and creditor
 - CFPB understands that it is “usual, appropriate, and accepted” for creditors and settlement agents to provide a CD to consumers, sellers and their agents
- This preamble discussion suggests the CFPB believes creditors and settlement agents may share the CD with other parties involved in the transaction, including real estate agents, based on existing GLBA exceptions
 - No express statement in the NPRM that a creditor or settlement agent may freely share copies of the CD with real estate agents or other parties to the transaction

Cash to Close

- TRID includes explicit calculations for each row of the Calculating Cash to Close table
 - Lenders have found it difficult to account for all factual scenarios without flexibility in the calculations
- CFPB would implement several changes and add clarifications to the calculation of amounts disclosed on the Cash to Close table:
 - Simultaneous loan for subordinate financing: CFPB would exclude the sales price, which will allow the Cash to Close calculation to accurately reflect the proceeds of the subordinate financing
 - Closing Costs to be Financed = loan amount minus estimated total amount of payments to third parties not otherwise disclosed
 - CFPB would explain that the loan amount is the total amount the consumer will borrow, as reflected by the amount of the note

Cash to Close (cont'd)

- CFPB would clarify that specific seller credits for the payment of certain loan costs and other costs may be disclosed either as lump sum “Seller Credits” in the Calculating Cash to Close table or be reflected within the amounts itemized for the specific fees
- “Adjustments and Other Credits” is currently required to be disclosed as a negative number
 - CFPB would eliminate this requirement for a negative number
 - CFPB would clarify that amounts expected to be paid by third parties not involved in the transactions are to be included in the amount **ONLY IF** expected to be paid at consummation

Rounding

- TRID includes various rounding requirements:
 - Round to Nearest Whole Dollar—e.g., dollar amounts under the “Other Costs” column on the LE
 - Never Rounded—per diem amount of interest and monthly amounts in the initial escrow section
 - % Amounts:
 - 2 or 3 Decimal Places—interest rate, amount of origination points, AIR table and TIP
 - Up to 3 Decimal Places—APR
- CFPB would clarify that the per diem amount and monthly amounts required for initial escrow payments should be rounded to the nearest cent and disclosed to 2 decimal places
 - For example, per diem interest of \$68 would be disclosed as “\$68.00”; \$75.367 would be disclosed as “\$75.37”

Rounding (cont'd)

- CFPB also would clarify that % disclosures should be disclosed by rounding the exact amounts to 3 decimal places and then dropping any trailing zeros to the right of the decimal point
 - For example:
 - 2.4999 percent APR becomes 2.500%, and is disclosed as “2.5%”
 - 7.005 percent APR is disclosed as “7.005%”
 - 7.000 percent APR is disclosed as “7%”
- Technical changes have potential to cause headaches for technology companies

What's Not in the NPRM

- What significant issues did the CFPB's proposal not discuss?
- Cure Provisions:
 - Ongoing concerns regarding:
 - Whether lenders and assignees have liability for errors disclosed on the LE despite corrected disclosures on the CD
 - How to apply the statutory cure to TRID errors
 - Addressing cure provisions would be “extraordinarily complex” and “would not be practicable without substantially undermining incentives for compliance with the rule”
 - Significant focus of secondary market
 - CFPB should expect the industry to continue to push for formal guidance

What's Not in the NPRM? (cont'd)

- Title Insurance Premiums

- Ongoing confusion in applying the CFPB's calculation of title insurance premiums:
 - TRID includes a specific formula for lender's and owner's title insurance premiums when discounts are available for the simultaneous issuance
 - The formula is not reflective of the actual discounts applied to the policies
 - The premiums disclosed on the LE and CD never match the actual charges
 - Formula reflects CFPB's belief that owner's title insurance is optional
 - CFPB treats this as a "policy" decision that it is not revisiting with this NPRM
 - CFPB should expect the title industry to continue to push for changes

Conclusion

- Many good proposals are in the NPRM; some unwanted “clarifications”
- Important issues still need to be addressed
- Public comment is critical
 - Should inform CFPB of what will be required to implement the changes
 - CFPB proposes an effective date of 120 days after publication of the final rule
 - CFPB specifically requests comments on whether this effective date would give technology companies time to make the changes
 - This may not be enough time for reprogramming and testing

Questions?

- Please submit questions by using the chat feature on the right panel of the WebEx portal
- Please email prucker@mayerbrown.com with any additional questions, or reach out to us directly:



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