Insights: Alerts

CFPB Finalizes Amendment to TRID Mortgage Disclosure Rule

APRIL 26, 2018 Written by Gary R. Bronstein, Christina M. Gattuso and Edward G. Olifer

Amendment Addresses the "Black Hole" Issue

On April 26, 2018, the Consumer Financial Protection Bureau (CFPB or Bureau) finalized an amendment[1] to its TILA-RESPA Integrated Disclosure (TRID) Rule[2] that addresses when mortgage lenders with a valid justification may pass on increased closing costs to consumers and disclose them on a Closing Disclosure. According to the CFPB, the amendment "is intended to provide greater clarity and certainty to the mortgage industry."

The TRID Rule requires creditors to provide consumers with good faith estimates of the loan terms and closing costs required to be disclosed on a Loan Estimate. Under the rule, an estimated closing cost is disclosed in good faith if the charge paid by or imposed on the consumer does not exceed the amount originally disclosed, subject to certain exceptions. In some circumstances, creditors may use revised estimates, instead of the estimate originally disclosed to the consumer, to compare to the charges actually paid by or imposed on the consumer for purposes of determining whether an estimated closing cost was disclosed in good faith. If the conditions for using such revised estimates are satisfied, the creditor generally may provide revised estimates on a revised Loan Estimate or, in certain circumstances, on a Closing Disclosure. The provision of such revised estimates is referred to as resetting tolerances. However, under the current rule, circumstances may arise in which 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. This 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 regarding the provision of revised estimates. This has been referred to in industry as a "gap" or "black hole" in the TRID Rule.

The CFPB acknowledges that these circumstances have led to uncertainty in the market and created implementation challenges that may have consequences for both consumers and creditors. The Bureau received feedback from industry requesting clarification on when creditors may pass on increased costs to consumers and disclose them on a Closing Disclosure. Specifically, a timing restriction on when the creditor may use a Closing Disclosure to communicate closing cost increases to the consumer could prevent a creditor from charging the consumer for those cost increases despite a valid reason for doing so, such as a changed circumstance or borrower request. "If creditors cannot pass increased costs to consumers in the specific transactions where the costs arise, creditors may spread the costs across all consumers by pricing their loan products with added margins," states the CFPB. The Bureau also recognizes that some creditors may be denying applications, even after providing the Closing Disclosure, in some circumstances where the creditor cannot pass otherwise permissible cost increases directly to affected consumers, which can have negative effects for those consumers. Additionally, the CFPB notes that confusion over the current rules has the potential to create legal and compliance risks for creditors, which could have a negative impact on the cost and availability of credit.

For these reasons, in July 2017, the CFPB proposed to address the issue by specifically providing that creditors may use 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. The Bureau also proposed to make several changes regarding interest rate dependent charges.

The Bureau is finalizing those amendments as proposed, with minor clarifying changes. Specifically, the final rule permits creditors to reset tolerances with either an initial or corrected Closing Disclosure regardless of when the Closing Disclosure is provided relative to consummation.

With respect to concerns about creditors sending Closing Disclosures very early in the process before engaging in due diligence to ensure that any costs that are not finalized are estimated in good faith, the Bureau concluded that the rule's existing provisions should prevent creditors from sending Closing Disclosures very early in the process before engaging in due diligence. However, the Bureau states that it will "continue to monitor the market for practices that do not comply with the rule's Closing Disclosure accuracy standard."

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

[1]Consumer Financial Protection Bureau, *Federal Mortgage Disclosure Requirements under the Truth in Lending Act (Regulation Z)* (Apr. 26, 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_tila-respa_final-rule_amendments-to-federal-mortgage-disclosure-requirements.pdf.

[2]In November 2013, pursuant to sections 1098 and 1100A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the CFPB issued the Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (2013 TILA-RESPA Final Rule), combining certain disclosures that consumers receive in connection with applying for and closing on a mortgage loan into two new forms: the Loan Estimate and Closing Disclosure. 78 Fed. Reg. 79730 (Dec. 31, 2013). The CFPB has since finalized amendments to the 2013 TILA-RESPA Final Rule, including in January and July of 2015 and in July of 2017. *See* 80 Fed. Reg. 8767 (Feb. 19, 2015) (January 2015 Amendments); 80 Fed. Reg. 43911 (July 24, 2015) (July 2015 Amendments); 82 Fed. Reg. 37656 (Aug. 11, 2017) (July 2017 Amendments). The 2013 TILA-RESPA Final Rule and subsequent amendments to that rule are referred to collectively herein as the TRID Rule.

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