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August 1, 2015 is Around the Corner

**THE COMBINED TILA AND RESPA MORTGAGE DISCLOSURES
(Memo Updated on 1/27/15 to include the changes below)**

As most of you are probably aware, a major change is coming in the mortgage industry on August 1, 2015. After more than 30 years of mortgage lenders providing separate RESPA and TILA disclosures, beginning with applications taken on or after August 1, 2015, lenders will now provide (i) a single upfront disclosure called the "Loan Estimate" containing the information from the current GFE and TILA disclosures in a new format that is intended to be easier for the consumer to understand and comparison shop and (ii) a new disclosure called the "Closing Disclosure" containing the information from the current HUD-1 and the final TILA disclosures in a new format that is intended to be easier for the consumer to compare the Loan Estimate with the final charges for the loan. The CFPB announced the final rule on November 20, 2013.

January 20, 2015 Updated Changes:

The CFPB proposed clarifications to the Final Rule on October 10, 2014, which it finalized with a clarification to the Final Rule on January 20, 2015. One controversial aspect of the Final Rule that the CFPB was asked to reconsider was its requirement that a revised Loan Estimate be provided on the same day a loan was locked. Although the October 10, 2014 proposal suggested a one business day extension of this timeframe, the January 20, 2015 clarification extended the time period to provide the revised Loan Estimate upon locking of the loan to the same three business day rule applicable to other re-disclosures for a change in circumstance. Accordingly, lenders under the TRID rules will continue to have three business days to provide a new Loan Estimate upon the locking of a mortgage loan. Other changes in the January 20, 2015 clarification include (i) an explicit provision permitting lenders to include language on the Loan Estimate for a loan for new construction making clear that the lender can revise the loan estimate up to sixty day prior to the consummation date, (ii) adding a place for the NMLS number on both the Loan Estimate and the Closing Disclosure, and (iii) making conforming amendments to cross-references and other technical corrections.

Are Additional Changes Anticipated?

The CFPB has made clear in both public and private conversations that it fully intends to proceed on the current timetable and lenders and other parties should therefore work diligently to insure they are able to comply with the August 1, 2015 implementation date. Accordingly, we do not anticipate any significant additional changes to the Rule because such changes would create a moving target making implementation more problematic.

Significant Process Changes.

Aside from the significant programming required to correctly generate the two new disclosure forms, the two major process changes that the combined disclosures present are (i) the requirement that the Closing Disclosure be RECEIVED by the Borrower at least 3 business days prior to closing, and (ii) the practical necessity that, because of TILA liability concerns, most lenders will require that the LENDER, rather than the title company or closing agent, prepare the Closing Disclosure.

WHAT TRANSACTIONS ARE INCLUDED?

The TILA-RESPA Integrated Disclosure (TRID) rule applies to most closed-end consumer mortgage loans, except:

- Home Equity lines of credit;
- Loans secured by a mobile home or by a dwelling that is not attached to real property;
- Reverse Mortgages;
- Certain no-interest second mortgage loans made to obtain down payment assistance, property rehabilitation or foreclosure avoidance;
- Loans made by a lender making five or fewer mortgages in a year.

In addition, the rule sets forth different requirements for construction loans and for loans involving time-share transactions.

THE FORMS

The CFPB mandates the use of the new forms for applications taken on or after August 1, 2015. There are elements of the new forms that we believe will be beneficial to consumers. Although the new forms become mandatory August 1, 2015, lenders will continue to close loans using the current HUD-1 and final TILA

disclosure even after August 1, 2015 **IF** the application was taken before August 1, 2015. Accordingly, lenders should be prepared to have both the current closing forms and the new Closing Disclosure available after August 1, 2015 until the loan pipeline for applications taken prior to August 1, 2015 is closed or otherwise disposed of.

The CFPB has attempted to be very comprehensive in providing guidance regarding the new disclosures. The final rule published in November of 2013 was 1,888 pages long and the CFPB has also provided a number of samples forms, which can be accessed on the CFPB website at <http://www.consumerfinance.gov/regulatory-implementation/tila-respa/#disclosures>.

The Loan Estimate

The new Loan Estimate must provide a “good faith estimate” of the loan’s costs and terms. Until the Loan Estimate is provided and the borrower indicates an intent to proceed with the transaction, the Lender cannot collect any fee other than a reasonable bona fide fee for a credit report. A lender also cannot require the borrower to provide documentation (including verification documents) until the Loan Estimate is provided.

Two improvements to the current GFE is that the Loan Estimate now contains an “Estimated Cash to Close” section and a place for the Borrower to sign and confirm receipt of the Loan Estimate. The APR disclosure is now moved to the last page of the new Loan Estimate form and contains an explicit statement that the APR is *not* the borrower’s interest rate. The CFPB’s testing indicated that borrowers were confused by the APR calculation and APR was not important to borrowers in shopping for the best loan so the placement later in the document, with the explanation that it isn’t the interest rate, is intended to minimize such confusion. The Finance Charge, Amount Financed, and Total of Payments boxes that are currently on the TIL disclosure were NOT considered helpful to the borrower in shopping and are not included on the Loan Estimate at all, but are included on the Closing Disclosure. The Itemization of Amount Financed, however, is not included in either the Loan Estimate or the Closing Disclosure.

The current GFE prohibits a lender from itemizing certain loan origination charges. The Loan Estimate changes this approach and now **REQUIRES** the itemization of individual charges. The lender must provide a consolidated figure on page 2 under “Origination Charges”, with an itemization of each amount the consumer will pay to each creditor and loan originator for extending the credit. These items may include, for example, an application fee, origination, fee, underwriting fee, processing fee, verification fee, rate-lock fee, or similar charges. Under the subheading “Origination Charges” on page 2 of the Loan Estimate, 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).” Any loan level price adjustment that the creditor passes on to

the consumer as a charge at consummation and not as an adjustment to the interest rate, must also be separately itemized.

The Loan Estimate also incorporates other disclosures that are required by Dodd Frank or are currently provided separately, such as the Total Interest Percentage required by TILA (as amended by Dodd Frank), the ECOA appraisal notice, and the servicing notice required by RESPA.

Timing of Providing the Loan Estimate

Like the current GFE, the Lender is REQUIRED to provide a Loan Estimate to the Borrower within 3 business days of receipt of a loan application. Business Day is again defined in this context to mean a day when the lender is open for substantially all business functions. "Loan Application" is deemed received when the lender has received:

- The consumer's name;
- The consumer's income;
- The consumer's social security number to obtain a credit report;
- The property address;
- An estimate of the value of the property; and
- The mortgage amount sought.

Please note that the CFPB has deleted a seventh "catch-all" item that permitted a loan originator to determine such other information necessary to complete the application. Although the CFPB has stated that lenders can, in place of the catch-all item, instead simply delay collecting one of the above 6 items (such as the consumer's social security number) to avoid triggering the Loan Estimate disclosure requirement, such an approach may be problematic. On the one hand, in informal guidance, the CFPB has indicated it would be permissible for a lender to "sequence" the collection of information to avoid having a premature application, on the other hand, the CFPB has indicated it would be a problem for a lender to refuse to accept such information to avoid triggering the GFE disclosure obligation. In our view, because the regulation itself does NOT contain a "sequencing" safe harbor, lenders should be very cautious about placing too much reliance on this informal guidance. It is our understanding that most lenders do not currently rely on the "catch all" item in any event in determining a complete RESPA application and therefore the new "application" definition should not be overly problematic in terms of implementation of the new rule for such lenders.

The Mortgage Disclosure Improvement Act requirement that a lender wait seven business day after providing the GFE before closing a transaction will continue to apply after August 1, 2015, but will commence upon the lender providing the Loan Estimate to the consumer.

Tolerance Rules Apply to Loan Estimate.

The Loan Estimate retains the same concept of tolerances as currently apply to the GFE. A Loan Estimate is considered in good faith if the “charge paid by or imposed on the consumer does not exceed the amount originally disclosed,” except as follows:

- *Fees subject to 10% tolerance.* A third-party service fee or a recording fee may be estimated and will be considered in good faith if:
 - The aggregate amount of third party charges and recording fees ultimately party services and recording fees 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 charge is not paid to an affiliate of the creditor (or to the creditor); and
 - The consumer is able to shop for the third party service.

These charges will be subject to a 10% aggregate tolerance in the absence of a change of circumstance occurring and the lender timely providing the borrower a revised Loan Estimate.

- *No Applicable Tolerance.* 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 paid into an escrow, impound, reserve, or similar account;
 - Charges paid to third party service providers chosen by the consumer that aren't on the lender's list of service providers; and
 - Charges paid for third party services not required by the creditor (even if such charge is paid to an affiliate of the creditor).
- *Zero tolerance.* Like with the current GFE, changes to the estimate of lender-related charges, such as loan origination fee or charges paid to an affiliate of the lender are NOT permitted, absent a change in circumstance occurring and the lender timely providing the borrower with a revised Loan Estimate. A change of circumstance includes:
 - 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.

Rate Lock Re-disclosure

As with the current GFE, the Loan Estimate is required to be re-disclosed when the interest rate is locked. Originally, the final rule required the Lender to provide this disclosure on the same day as the lock (which is the date the consumer locks the loan with the lender, NOT the date the lender locks the loan with the investor to whom the loan is contemplated to be sold). The January 20, 2015 Clarification adopted by the CFPB requires that the new Loan Estimate re-disclosure resulting from the locking of the rate be provided within the same three business day window of the loan being locked as any other change of circumstances. The revised Loan Estimate would include the revised interest rate, discount points, loan originator charges and credits and all other interest rate dependent charges and terms.

Timing of Other Re-Disclosures

Like the current GFE, the re-disclosure of the Loan Estimate by the lender (other than for the locking of the interest rate) must be made within 3 business days of the lender learning of the basis for the need for the re-disclosure. However, any such re-disclosure (including a disclosure for the locking of the loan) may not be provided on or after the date the lender provides the Closing Disclosure. Accordingly, because the Closing Disclosure must be provided at least 3 business days prior to the closing of the transaction, the Loan Estimate, if re-disclosed, must be provided at least 4 days prior to closing.

Expiration of the Loan Estimate

Like the current GFE, the lender will not be bound to a Loan Estimate if the borrower does not evidence an intent to proceed with the transaction within 10 calendar days of the lender providing the Loan Estimate.

Construction Loans with Extended Settlement Date

Under the CFPB's January 20, 2015 to the Final Rule, the Lender continues to have the ability to include language on the Loan Estimate for a Construction Loan that the lender may issue re-disclosures at any time prior to 60 days before consummation.

The Closing Disclosure

The Closing Disclosure combines the current HUD-1 settlement statement with the disclosures provided in the final TIL statement. For applications taken on or after August 1, 2015, a HUD-1 will no longer be required and the Closing Disclosure will be provided in its place. Unlike the current HUD-1, however, it is formatted to more closely mirror the Loan Estimate to better facilitate a comparison of the estimate with the actual charges. If information is not known despite the creditor exercising reasonable diligence to obtain the information, the creditor may use 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. The Closing Disclosure also incorporates other disclosures, such as the new TILA negative amortization disclosure and the escrow account notices. You will also note that there is a separate SELLER's Closing Disclosure, which is formatted similarly to portions of the current HUD-1, but in a more succinct format.

The Borrower's Closing Disclosure is now 5 pages and is designed to provide a much easier comparison with the Loan Estimate. Page 1 of the Closing Disclosure contains the exact information as Page 1 of the Loan Estimate in the same format. Page 2 contains the details of the transaction (similar to page 2 of the current HUD-1), but is organized by tolerance buckets, with Section A being Loan Origination Charges, Section B being shopable services for which the borrower did NOT shop, and Section C being services for which the Borrower did elect to shop. Section D provides a total of the Borrower paid costs in Sections A, B and C.

The bottom section of Page 2 of the Closing Disclosure details "Other Costs" incurred in connection with the transaction, including taxes and recording fees (Section E), pre-paid items (Section F), escrow items (Section G) and a catch-all "other" category (Section H). Section I totals the Borrower paid Costs for the "Other Costs" category and Section J provides the aggregate total of Borrower costs from Sections D and I. Any lender credits are also placed in Section J. We believe that the placement of the Lender Credit on the same page with the detail of the Borrower's charges should be easier for the borrower to understand than the current HUD-1 placement on different pages.

The third page includes a calculation of the cash needed to close and a summary of the borrower's transaction and seller's transaction.

The fourth and fifth pages contain additional loan disclosures and contact information for the creditor, brokers, and settlement agent. The additional disclosures address:

- Whether the loan is assumable
- Whether it has a demand feature
- Whether there is a negative amortization feature
- Late payment fee information
- The ability to refinance the loan
- Whether servicing of the loan may be transferred
- The responsibility of the creditor to deliver a copy of the appraisal to the borrower
- Escrow requirements
- Whether the lender accepts partial payments
- Tax deductibility
- Loan contract details
- Borrower liability after foreclosure

The fifth page also includes a calculation of the total payments, finance charges, amount financed, and total interest percentage over the term of the loan. Finally, the fifth page also contains a signature block for consumers to confirm receipt of the disclosure.

New Timing Requirement for Closing Disclosure

One of the key changes in the new Combined Disclosures is a new requirement that the Closing Disclosure be RECEIVED by the Borrower at least 3 Business Days prior to Closing (this definition of Business Day is a day other than a Sunday or a Federal legal holiday). 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. However, the creditor 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). We anticipate investors will likely be fairly rigid in their requirements of evidence that the Closing Disclosure was actually received by the Borrower the minimum 3 business days prior to closing so lenders would be wise to establish stringent procedures to confirm such receipt within the required timeframe.

Changes to the Closing Disclosure

One of the primary concerns expressed by the industry with respect to the proposed rule was its requirement of restarting the 3-day waiting period if any changes were made to the Closing Disclosure after it was provided to the borrower. Fortunately, the CFPB relaxed this requirement in the Final Rule. 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, but is NOT required to delay the closing an additional 3 business days unless the following circumstance applies.

Pre-Closing Change Requiring a Delay in Closing

The only changes that require both a re-disclosure AND a new three business day waiting period are:

- 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 an irregular transaction such as one with multiple advances or irregular payment periods, a change of more than 1/4 of 1 percentage point;
- A change in the loan product (such as from an adjustable rate to a fixed rate); or
- The addition of a pre-payment penalty.

Post-Closing Changes to Closing Disclosure

The lender is permitted to make certain changes to the Closing Disclosure post-closing under certain circumstances.

- 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 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. If the Closing Disclosure contains non-numeric clerical errors, the creditor must provide a corrected Closing Disclosure no later than 60 days after consummation.
- *Curing Tolerance Violations.* If the estimated costs disclosed on the Loan Estimate increase 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.

RECORDKEEPING

The final rule generally requires creditors to retain records evidencing compliance with the Loan Estimate and Closing Disclosure requirements for three years from the later of closing or when the disclosure is required. Consistent with existing RESPA requirements, a creditor must, however, retain the Closing Disclosure and all related documents for five years after closing.

RESOURCES FOR COMPLIANCE

The CFPB has attempted to be very proactive in addressing questions and providing compliance assistance. On their website, they have posted a number of documents that provide assistance in formulating an implementation plan for the new disclosures. These resources include the following:

- A Small Entity Compliance Guide, which is located at the following address: http://files.consumerfinance.gov/f/201409_cfpb_tila-respa-integrated-disclosure-rule-compliance-guide.pdf
- A Guide to the new Disclosure Forms, which is located at http://files.consumerfinance.gov/f/201409_cfpb_tila-respa-integrated-disclosure-guide-to-form.pdf
- A timeline example showing the interplay of the timing rules, which is located at http://files.consumerfinance.gov/f/201409_cfpb_tila-respa-integration-disclosure-timeline-example.pdf
- The blank forms, along with completed samples for various loan and transaction types, which are located on the CFPB website at <http://www.consumerfinance.gov/regulatory-implementation/tila-respa/#disclosures>

The CFPB has also conducted four roundtables, where they have answered various questions regarding this change. We anticipate that the CFPB may offer additional guidance and we will therefor supplement this information as additional resources become available.

We know that August 1, 2015 will be here before we know it. We are happy to assist you and your lending partners in navigating the new regulatory waters. Please contact any of our lawyers if we can assist you.

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