Buckley Sandler LLP

SPECIAL ALERT: CFPB DIRECTOR OPINES ON TRID LIABILITY

On December 29, 2015, CFPB Director Richard Cordray issued a letter in response to concerns raised by the Mortgage Bankers Association regarding violations of the CFPB's new TILA-RESPA Integrated Disclosure ("TRID") rule, also known as the Know Before You Owe rule. In an effort to address concerns that technical TRID violations are resulting in extraordinarily high rejection rates by secondary market purchasers of mortgage loans, Director Cordray acknowledged that, "despite best efforts, there inevitably will be inadvertent errors in the early days." However, he suggested that rejections based on "formatting and other minor errors" are "an overreaction to the initial implementation of the new rule" and that the risk to private investors from "good-faith formatting errors and the like" is "negligible." He expressed hope that this issue "will dissipate as the industry gains experience with closings, loan purchases, and examinations."

There is no indication that the letter was issued as an official interpretation under either Section 130(f) of the Truth in Lending Act ("TILA") or Section 19 of the Real Estate Settlement Procedures Act ("RESPA") and as a result it would not appear that Director Cordray's statements are binding on the CFPB, other regulators, or courts.[1] The CFPB could, however, issue an official interpretation specifying the liability (or lack thereof) associated with violations of individual TRID provisions. Furthermore, because that liability depends on the TILA or RESPA authority used by the CFPB to adopt the TRID provision, the CFPB could also adjust the underlying authority to ensure that the CFPB, not the courts, is responsible for assessing compliance with formatting and other technical issues.[2]

Unfortunately, Director Cordray's letter does not – and cannot – address what may be the primary deterrent for secondary market purchasers and securitizers of mortgage loans: the risk that any TRID violation – no matter how minor or technical – will violate unqualified contractual representations that the loans were originated "in compliance with law." After nearly a decade of litigation among market participants (and governmental entities) related to alleged loan defects, investors are wary that any TRID violation could lead to a repurchase or indemnification demand down the road. As a result, even though Director Cordray's letter addresses a lender's or assignee's direct liability under TILA for TRID violations, it cannot address how loan purchasers, securitization trustees, and federal agencies enforcing the False Claims Act or the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") will react to the discovery of technical violations. To address that risk, the CFPB would need to formally declare that, for some period of time, "formatting and other minor errors" are not, in fact, violations.

[1] *See, e.g.*, Decision of the Director (Public Version), *In the Matter of PHH, et al.*, File No. 2014-CFPB-0002, at 17-19 (concluding that HUD letter responding to industry concerns regarding RESPA compliance was "not in such a form as to be binding on any adjudicator" and provided "no protection to PHH in this proceeding" because it was not an official interpretation published in the Federal Register).

[2] In the preamble to the TRID rule, the CFPB stated that the "detailed discussions [in the 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." 78 Fed. Reg. 79730, 79757 (Dec. 31, 2013).

TRID Liability in Private Suits

In response to concerns about the liability of investors in private suits alleging TRID violations, Director Cordray stated that, while the TRID rule incorporates RESPA requirements into TILA's implementing regulation, "it did not change the prior, fundamental principles of liability under either TILA or RESPA." As a general matter, borrowers may file suit for violations of the mortgage disclosure requirements in Part B of TILA but not for violations of RESPA's mortgage disclosure requirements.[3]

In addition, TILA contains several limitations on private suits and damages. As Director Cordray specifically noted, TILA limits the liability (under TILA) of purchasers of mortgage loans (assignees) to violations that are "apparent on the face of the disclosure statement provided in connection with [the] transaction."[4]

TILA also limits statutory damages in private suits. Statutory damages for certain TILA violations can be up to: (1) $4,000 in an individual suit; and (2) the lesser of $1 million or 1% of the creditor's net worth in a class action.[5] Statutory damages are distinct from both actual damages, which are available in all private suits under TILA if the violation caused actual harm to the borrower, and attorney's fees, which are available in any successful action for liability under TILA.[6]

Director Cordray made several statements about the availability of "statutory and class action damages" for TRID violations. First, his letter states that statutory damages are limited to the "failure to provide a closed-set of disclosures." This appears to be a reference to TILA's restriction on statutory damages for violations of the mortgage disclosure requirements in 15 U.S.C. § 1638. Specifically, TILA limits statutory damages for such violations to a subset of the § 1638 disclosures, including the Annual Percentage Rate and finance charge.[7]

Second, the letter states that the § 1638 disclosures "that give rise to statutory and class action damages do not include either the RESPA disclosures [incorporated into TRID] or the new Dodd-Frank Act disclosures [added to § 1638], including the Total Cash to Close and Total Interest Percentage." It further states that "[f]ormatting errors and the like are unlikely to give rise to private liability unless the formatting interferes with the clear and conspicuous disclosure of one of the disclosures listed as giving rise to statutory and class action damages…."

The letter concludes that the risk to private investors from "good-faith formatting errors and the like" is "negligible" and that investors rejecting loans on that basis "would be rejecting loans for reasons unrelated to potential liability associated with the Know Before You Owe [*i.e.*, TRID] mortgage disclosures." However, the letter appears to address only the liability associated with violations of TRID

---

[3] 15 U.S.C. § 1640(a). However, state law may provide private rights of actions for violations of federal law even when the federal law does not.

[4] 15 U.S.C. § 1641(e). A violation is "apparent on the face of the disclosure" if (1) "the disclosure can be determined to be incomplete or inaccurate by a comparison among [a] the disclosure statement, [b] any itemization of the amount financed, [c] the note, or [d] any other disclosure of disbursement;" or (2) "the disclosure statement does not use the terms or format required to be used by [TILA]." *Id*. Because Congress did not amend this provision when requiring the CFPB to create the TRID disclosures, it is not clear how courts and regulators will apply it to TRID loans.

[5] 15 U.S.C. § 1640(a)(2).

[6] 15 U.S.C. § 1640(a)(1), (3).

[7] See the unnumbered paragraph following 15 U.S.C. § 1640(a)(4).

requirements adopted under § 1638, whereas TILA liability extends to all of Part B of the Act.[8] Furthermore, liability under § 1638 is not limited to statutory damages because borrowers may recover actual damages and attorney's fees.[9]

Correcting TRID Violations

Director Cordray explained that, even when a TRID violation carries a private right of action, it is possible to "cure" that violation through prompt corrective action in many cases. The TRID rule allows lenders – and by extension investors – to avoid liability in the following circumstances:

- The creditor discovers a non-numeric clerical error on the Closing Disclosure and provides a corrected Closing Disclosure within 60 days after consummation.[10]
- The consumer pays amounts in excess of the tolerances (limitations) on increases in closing costs, but the creditor refunds the excess amounts and provides a corrected Closing Disclosure to the consumer no later than 60 days after consummation.[11]

TILA provides additional mechanisms for lenders and investors to limit their liability for certain errors. Specifically, TILA states that a creditor or assignee can:

- Avoid civil, administrative, and criminal liability under TILA for "any failure to comply with any requirement imposed under [Part B]" if the creditor or assignee: (a) notifies the consumer of the error within 60 days of discovery (but before an action has been instituted or the borrower notifies the creditor of the error in writing); and (b) "makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower."[12]
- Avoid civil liability or an extended right to rescind under TILA "if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error."[13]

However, these provisions of TILA predate TRID so lenders and investors should perform a careful examination of their application by courts when developing their policies on TRID corrections.

Notably, in his letter on TRID liability, CFPB Director Cordray stated that, "consistent with existing [TILA] principles, liability for statutory and class action damages would be assessed with reference to the final

[8] *See* 15 U.S.C. § 1640(a) (stating that, "[e]xcept as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part [Part B of TILA] … with respect to any person is liable to such person").

[9] *See* 15 U.S.C. § 1640(a) (1)-(4).

[10] 12 C.F.R. § 1026.19(f)(2)(iv).

[11] 12 C.F.R. § 1026.19(f)(2)(v).

[12] 15 U.S.C. § 1640(b).

[13] 15 U.S.C. § 1640(c).

closing disclosure issued, not to the loan estimate, meaning that a corrected closing disclosure could, in many cases, forestall any such private liability." Read broadly, this statement could suggest that, in the CFPB's view, many TILA violations on the Loan Estimate or Closing Disclosure – which are significant issues for early TRID loans – may be "cured" with a corrected Closing Disclosure. While potentially very helpful to resolving concerns about TRID liability, it remains to be seen if courts or regulators will interpret TILA and TRID in this fashion.

Regardless, because the TRID and TILA "cure" provisions are generally conditioned on prompt corrective action, lenders, and investors should continue to perform targeted quality control reviews on closed loans to identify and address errors.

For additional information and resources on the TRID rule, please visit our TRID Resource Center.

* * *

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.

- Benjamin K. Olson, (202) 349-7924
- Clinton R. Rockwell, (310) 424-3901
- Jeffrey P. Naimon, (202) 349-8030
- John P. Kromer, (202) 349-8040
- Joseph M. Kolar, (202) 349-8020
- Jeremiah S. Buckley, (202) 349-8010
- Joseph J. Reilly, (202) 349-7965
- Amanda Raines Lawrence, (202) 349-8089
- Melissa Klimkiewicz, (202) 349-8098
- Jonathan W. Cannon, (310) 424-3903
- Brandy A. Hood, (202) 461-2911
- Steven vonBerg, (202) 524-7893