2020 CFPB TRID DEVELOPMENTS

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INTRODUCTION

The year 2020 marked the five-year anniversary of the TILA-RESPA Integrated Disclosure rule (TRID Rule).[1] While the year passed without any additional formal rulemaking from the Consumer Financial Protection Bureau (Bureau or CFPB), the Bureau did issue clarifying guidance in several important areas throughout the year. Some of the guidance was specific to the time (i.e., in the midst of the COVID-19 pandemic), while other guidance addressed issues of longstanding concern under the Rule.[2]

I. COVID-19 TRID GUIDANCE

On May 4, 2020, the CFPB published in the *Federal Register* an interpretive rule that addressed two TRID-related issues arising from the COVID-19 pandemic.[3] The first issue dealt with the Rule's pre-consummation timing requirements; the second issue addressed the Rule's definition of "changed circumstances."

Except for timeshare transactions, the TRID Rule requires a creditor to deliver or place in the mail a Loan Estimate no later than the seventh business day before consummation.[4] A consumer also must receive an initial Closing Disclosure no later than three business days before consummation.[5] The same three business-day, pre-consummation advance delivery

1. CFPB Regulation Z, 12 C.F.R. §§ 1026.19(e), (f), 1026.37, 1026.38 (2020).
2. Kathleen L. Kraninger, *Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment*, BUREAU OF CONSUMER FIN. PROT. (2020) https://files.consumerfinance.gov/f/documents/cfpb_trid-rule-assessment_report.pdf (highlighting public comments on continuing pain points with the Rule that could be the subject of future rulemaking).
3. 85 Fed. Reg. 26,319 (May 4, 2020).
4. 12 C.F.R. § 1026.19(e)(1)(iii)(B), (C).
5. *Id* § 1026.19(f)(1)(ii)(A), (B).

requirement also applies to revised Closing Disclosures in certain circumstances (namely, where the annual percentage rate has become inaccurate, where the loan product has changed, or if a prepayment penalty has been added to the transaction).[6]

In each of the situations described above, after receiving the initial Loan Estimate, initial Closing Disclosure, or revised Closing Disclosure, as applicable, the consumer may modify or waive the waiting period and proceed to closing if the consumer determines that he or she needs the loan for a "*bona fide* personal financial emergency."[7] In the interpretive rule, the Bureau recognized that the pandemic may create situations where a consumer has a *bona fide* personal financial emergency, such that a waiver or modification of the waiting period may be appropriate.[8] Specifically, the Bureau stated: (1) if a consumer determines the loan is needed for a *bona fide* personal financial emergency, (2) the consumer's dated and written statement identifies that the financial need is due to the COVID-19 pandemic, and (3) the emergency necessitates consummating the transaction before the end of the applicable waiting period, then the consumer has a *bona fide* personal financial emergency that would permit a modification or waiver of the timing requirements.[9]

Notwithstanding the Bureau's guidance, it is doubtful that this clarification spurred a surge in consumers seeking and creditors granting COVID-related modifications or waivers of the timing requirements. First, the commentary clarifies, and the interpretive rule does not change, that whether a *bona fide* personal financial emergency exists is determined by the circumstances of the individual consumer's situation.[10] Second, the one example provided in the commentary of a *bona fide* personal financial emergency (the imminent sale of a consumer's home at foreclosure, where the foreclosure will proceed unless loan proceeds are made available to the consumer during the waiting period)[11] illustrates the high bar that must be cleared. Third, due to the first two reasons, the secondary market has historically prohibited waivers or modifications of waiting periods, or only allowed them in the most extreme circumstances.

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6. *Id.* § 1026.19(f)(2)(ii) (noting that for other pre-consummation changes to transaction terms, a revised Closing Disclosure need only be provided so that the consumer receives it at or before).
7. *Id.* § 1026.19(e)(1)(v); *id.* § 1026.19(f)(1)(iv) (stating that to effectuate a modification or waiver, the consumer must give the creditor a dated written statement that describes the emergency, modifies or waives the waiting period, and is signed by all consumers who are primarily liable on the legal obligation).
8. *See* 85 Fed. Reg. at 26,320.
9. *See id.* (applying the same analysis to the post-consummation rescission period for rescindable transactions).
10. Commentary, CFPB Official Interpretations ¶ 19(e)(1)(v)-1; Commentary, CFPB Official Interpretations ¶ 19(f)(1)(iv)-1.
11. *Id.*

The second aspect of the Bureau's interpretive rule, which addresses the ability of creditors to use the TRID Rule's "changed circumstances" provision to reset fee tolerances, was undoubtedly more widely relied on by the industry during the height of the pandemic. For settlement charges that are subject to specific tolerance limits,[12] the TRID Rule permits a creditor to use revised estimates of such costs in limited circumstances.[13] One such situation is where the amount of the settlement charge previously disclosed has increased due to "changed circumstances," a term defined to include an "extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction,"[14] such as a war or natural disaster.[15]

In the interpretive rule, the Bureau acknowledged that the economic disruptions and shortages caused by the COVID-19 pandemic impact the ability of industry participants to provide accurate estimates of some settlement charges in certain cases.[16] To address this, the Bureau confirmed that the pandemic is an "extraordinary event" as that term is used in the definition of changed circumstances and may provide the basis for a creditor to use an increased settlement charge for tolerance purposes in appropriate cases.[17] The Bureau indicated, for example, that a creditor may provide a revised estimate of an appraisal fee where the amount originally disclosed was based on a reasonable market price at the time of the estimate, but the actual appraisal fee was higher because of a shortage of appraisers due to the effects of COVID-19.[18] It is important to note, however, that this example illustrates the fact-sensitive nature of the issue. If the creditor was aware (or should have been aware) at the time the initial Loan Estimate was prepared that there was a COVID-caused appraiser shortage in the area where the property was located, providing an estimate for the appraisal fee based on normal market conditions presumably would not have been in good faith; thus, the appraiser shortage could not be used as a basis to subsequently increase the appraisal fee.

II. Disclosure of Creditor-Paid Costs

In February 2020, the Bureau added a series of questions and answers to its TILA-RESPA Integrated Disclosure FAQs (TRID FAQs)[19] that address

12. *See* 12 C.F.R. § 1026.19(e)(3)(i), (ii).
13. *See id.*§ 1026.19(e)(3)(iv).
14. *Id.* § 1026.19(e)(3)(iv)(A)(1).
15. Commentary, CFPB Official Interpretations ¶ 19(e)(3)(iv)(A)-2.
16. 85 Fed. Reg. at 26,321.
17. *Id.*
18. *Id.*
19. *TILA-RESPA Integrated Disclosure FAQs*, Consumer Fin. Prot. Bureau (May 14, 2021) https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/tila-respa-integrated-disclosure-faqs/.

one of the TRID Rule's murkier aspects—the disclosure requirements for settlement costs that are paid by the creditor. Given the prevalence of "no cost" and partial "no cost" loans in the marketplace, it is somewhat surprising that the TRID Rule does not specifically address whether and under what circumstances settlement costs that are paid by the creditor must be disclosed on the Loan Estimate and Closing Disclosure.

The original preamble to the TRID Rule does touch on this issue in a few places, without providing definitive guidance. For instance, in response to industry commenters who argued that settlement costs that are offset by lender credits should not have to be itemized on the Loan Estimate, the Bureau stated:

> [S]ection 1419 of the Dodd-Frank Act amended TILA section 128(a) to require, in the case of a residential mortgage loan, disclosure of the aggregate amount of settlement charges for all settlement services provided in connection with the loan and the aggregate amount of other fees or required payments in connection with the loan. 15 U.S.C. 1638(a)(17). . . . If any settlement charges are not included on the Loan Estimate because they are paid from an increased interest rate or from a contractually provided credit or rebate from the creditor, then the aggregate amount of settlement charges for all settlement services provided in connection with the loan would not be disclosed on the Loan Estimate, thereby frustrating the requirement of section 1419 of the Dodd-Frank Act. Eliminating some settlement charges from the Loan Estimate also would reduce the ability of consumers to identify the settlement services that they could shop for, to negotiate the charges, and to compare such services and charges between creditors. See Kleimann Testing Report at 288. The Bureau believes that, to improve consumer understanding of the nature and charges associated with the transaction, consumers should be provided information on the services required by the creditor, and the cost of those services, even if the creditor is providing credits to offset the cost of those required services.[20]

Elsewhere in the original preamble, in response to an argument "no cost" loans should be exempt from the fee tolerance rules, the Bureau stated:

> The Bureau does not believe that it would be appropriate to exempt "no cost" loans from § 1026.19(e)(3)(i). "No cost" loans must comply with the current limitations on settlement charge increases set forth in Regulation X. Additionally, the text of § 1026.19(e)(3)(i) indicates that the general rule applies to both charges that are paid by the consumer, and charges that are imposed on the consumer. In a "no cost" loan transaction, closing costs may not be paid by the consumer because they are financed by the creditor, but are nonetheless imposed on the consumer. The Bureau also believes that consumers should receive reliable cost estimates for "no cost" loans so the consumer could use the Loan Estimate to compare such

20. 78 Fed. Reg. at 79,730, 79,951–52 (Dec. 31, 2013).

loans, where the closing costs are financed, with loans that do not finance closing costs.[21]

In the amended TRID FAQs, however, the Bureau clarifies that for purposes of the Loan Estimate, whether a creditor-paid settlement cost must be disclosed hinges on whether the creditor is "absorbing" the cost or merely "offsetting" the cost.[22] As support for this position, the Bureau points to comment 37(g)(6)(ii)-2, which provides that when a portion or all of the closing costs are "offset" by a credit or rebate from the creditor, the creditor must disclose such credit or rebate as a lender credit on the Loan Estimate.[23] Since the lender credit must be disclosed in such a case, the corresponding settlement costs that will be paid by the lender credit must also be disclosed.

In contrast, if the creditor will "absorb" certain settlement costs, then those costs need not be disclosed on the Loan Estimate.[24] Alternatively, the creditor may choose to disclose "absorbed" costs but must then also disclose a corresponding lender credit.[25] However, in such a case, the Bureau's FAQ cautions creditors on the TRID Rule's restrictions on decreasing lender credits.[26]

The apparent flexibility that creditors have on the Loan Estimate to treat settlement costs as either "offset" or "absorbed" is illustrated by the following example the Bureau provides:

> [A]ssume a creditor will require an appraisal, credit report, flood determination, title search, and lender's title insurance policy in connection with a particular mortgage loan transaction. Further assume, that the creditor will incur attorney fees for loan documentation and recording fees in connection with the transaction. If, based on the best information reasonably available, the consumer will only pay an application fee of $500 and the creditor will absorb all other costs, the creditor is not required to disclose the appraisal fee, credit report fee, flood determination fee, title search fee, lender's title insurance policy premiums, attorney fees for loan documentation, and recording fees on the Loan Estimate. Conversely, if the creditor agrees to provide a lender credit sufficient to offset all of these charges, except the application fee, the creditor must

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21. *Id.* at 79,825.
22. *See Lender Credits*, Consumer Fin. Prot. Bureau, Question 3 (May 14, 2021) https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/tila-respa-integrated-disclosure-faqs/.
23. Commentary, CFPB Official Interpretations ¶ 37(g)(6)(ii)-2.
24. *See Lender Credits*, Consumer Fin. Prot. Bureau, Question 3 (May 14, 2021) https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/tila-respa-integrated-disclosure-faqs/.
25. *Id.*
26. *Id.*

disclose the charges in the Loan Costs table and Other Costs table, as applicable, and include a corresponding total amount in the Lender Credits disclosure on the Loan Estimate.[27]

Importantly, however, the Bureau also makes clear that this flexibility does not extend to the Closing Disclosure. A creditor-paid settlement cost incurred in connection with the transaction, regardless of whether the cost has been "offset" or "absorbed" by the creditor, must be disclosed on the Closing Disclosure with the amount of the charge shown in the Paid by Others column.[28] This difference in treatment between the Loan Estimate and Closing Disclosure appears to be driven by the fact that the two documents serve different purposes. The Loan Estimate is principally a tool designed to allow consumers to comparison shop among different lenders. In contrast, the Closing Disclosure must reflect "all loan costs associated with the transaction," regardless of whether the cost is paid by the consumer, by the creditor, or by a third party.[29]

III. Total of Payments Calculation Clarification

In June 2020, the Bureau clarified in its TRID FAQs that a creditor should account for negative prepaid interest as a negative number when calculating a loan's Total of Payments (TOP) disclosure.[30] This was an especially welcome clarification, considering that in its comprehensive updates to the TRID Rule in 2017 the Bureau expressly clarified that negative prepaid interest should be included as a negative value when calculating the Total Interest Percentage (TIP) disclosure but did not include any similar statement with respect to the TOP disclosure.[31]

Negative prepaid interest typically occurs when a loan is scheduled to close at the end of the month, but the closing is delayed into the next month. Since interest on mortgage loans normally is paid in arrears, if the loan documents are not redrawn, instead of the consumer paying only a few days of per diem interest for a closing near the end of the month, the consumer will actually receive a credit for per diem interest when the closing occurs in the following month equal to the amount of daily interest that accrued before consummation occurred.

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27. *Id.*

28. *See Lender Credits*, Consumer Fin. Prot. Bureau, Question 4 (May 14, 2021) https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/tila-respa-integrated-disclosure-faqs/.

29. *See* CFPB Regulation Z, 12 C.F.R. § 1026.38(f) (2020).

30. *See Total of Payment Disclosure,* Consumer Fin. Prot. Bureau, Question 2 (May 14, 2021) https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/tila-respa-integrated-disclosure-faqs/.

31. *See* 82 Fed. Reg. 37,656, 37,784 (Aug. 11, 2017) (amending Commentary, CFPB Official Interpretations ¶ 37(l)(3)-1).

IV. Title Insurance Disclosures

In June 2020, the Bureau also released a document titled "Factsheet: TRID Title Insurance Disclosures," which provides an overview of the TRID Rule's unique requirements for disclosure of the cost of lender's and owner's title insurance on the Loan Estimate and Closing Disclosure.[32] The TRID Rule contains special disclosure requirements for the cost of lender's and owner's title insurance in purchase transactions. These requirements have been a sharp source of controversy, owing to the fact that they often result in the itemized amounts of lender's and owner's title insurance disclosed on the Loan Estimate and Closing Disclosure differing from the actual rates advertised by title underwriters and agents and, in some cases, required disclosures under state law.[33] Specifically, the TRID Rule requires a creditor to always disclose the full cost of the lender's title policy, without accounting for any discount that may be available if the consumer elects to purchase owner's title insurance from the same insurer (i.e., a simultaneous issue discount).[34] Then, in order to ensure that the total amount of premium for the lender's and owner's title policies is not over-disclosed, the creditor must calculate and disclose the owner's title premium by taking the full owner's title premium, adding any simultaneous issue premium for the lender's policy, and then subtracting the full premium for the lender's policy.[35] The Bureau's intent was to ensure that a consumer in a purchase transaction always sees the full cost of the required lender's title policy because the consumer is not normally required to purchase an owner's title policy (and thus may not receive a simultaneous issue discount on the lender's policy).[36]

Those in the industry who were hoping that the Factsheet would provide some relief from these disclosure requirements will be disappointed. Instead, the Bureau reaffirmed the disclosure requirements and provided a set of examples for how to make the disclosures, which depends on

32. *See generally Fact Sheet: TRID Title Insurance Disclosures*, Consumer Fin. Prot. Bureau (Jun. 9, 2020) https://files.consumerfinance.gov/f/documents/cfpb_tila-respa_title-insurance-disclosures-factsheet.pdf.

33. *See, e.g.*, 78 Fed. Reg. at 79,730, 79,963–65 (Dec. 31, 2013) (discussing industry comments).

34. Commentary, CFPB Official Interpretations ¶ 37(f)(2)-4; Commentary, CFPB Official Interpretations ¶ 38(f)(2)-1.

35. Commentary, CFPB Official Interpretations ¶ 37(g)(4)-2.ii.; Commentary, CFPB Official Interpretations ¶ 38(g)(4)-2.

36. *See* 78 Fed. Reg. at 79,963 ("If the simultaneous issuance calculations are disclosed, the amount disclosed for a lender's title insurance policy would be negligible or zero. In an instance where the consumer declines an owner's title insurance policy, the lender's title insurance policy premium can increase substantially, resulting in a higher total amount of closing costs than can be anticipated by the consumer.").

whether a simultaneous rate was available.[37] The Bureau also addressed the concept of "negative owner's title insurance" and confirmed that if the required calculation generates a negative value for the amount of the owner's title premium, the negative value must be disclosed.[38]

37. *See Fact Sheet: TRID Title Insurance Disclosures*, Consumer Fin. Prot. Bureau 5–6 (Jun. 9, 2020) https://files.consumerfinance.gov/f/documents/cfpb_tila-respa_title-insurance-disclosures-factsheet.pdf.
38. *Id*. at 7–8 (explaining that a negative value for owner's title insurance will result if the full premium for the lender's policy is greater than the sum of the owner's policy premium and the simultaneous issue rate for the lender's policy).