Special Alert: CFPB Proposes Amendments to Know Before You Owe/TRID Rule

On Friday, the CFPB issued its much anticipated proposal to amend the KBYO/TRID rule. The CFPB crowded dozens of proposed changes into the almost 300 page proposal, most of which are highly technical and require careful examination. As the Bureau has signaled since its intention to issue amendments was first announced, the proposal is not intended "to revisit major policy decisions" because "[t]he Bureau is reluctant to entertain major changes that could involve substantial reprogramming of systems so soon after the October 2015 effective date or to otherwise distract from industry's intense and very productive efforts to resolve outstanding implementation issues." However, it has "proposed a handful of substantive changes where it has identified a potential discrete solution to a specific implementation challenge."

If finalized, the amendments should resolve a number of significant ambiguities that have generated concerns about the liability of lenders and purchasers of mortgage loans and hampered loan sales, particularly the so-called "Black Hole" that can arise when closing is unexpectedly delayed. However, because it is unclear in most cases whether the Bureau intends the amendments to apply only prospectively and because the amendments would not alter the provisions for "curing" errors, these liability concerns will remain for loans originated prior to the effective date of the amendments. Furthermore, because the industry has been forced to make loans since October 2015 despite these ambiguities, it will be necessary in many cases to revise existing systems and practices to comply with the amended rule. Finally, in some cases, the Bureau seems to have gone beyond resolving ambiguities and is instead seeking to make targeted policy changes to the rule.

Although the proposed amendments are too voluminous and technical to be summarized comprehensively, we have highlighted a number of the more significant proposed changes below. Note that the CFPB specifically requested feedback on a number of the issues addressed in the proposal. Comments are due on or before October 18, 2016.

NO CHANGES TO "CURES" FOR ERRORS

In a clear rejection of industry requests, the Bureau states that it is "not proposing additional cure provisions." The Bureau explains that:

> The Bureau has spent substantial time considering industry requests to define further procedures for curing errors made in Loan Estimates or Closing Disclosures. The Bureau has worked steadily with industry to explain the cure provisions adopted in the TILA-RESPA Final Rule as well as TILA's existing provisions for cure. The Bureau is concerned that further definition of cure provisions would not be practicable without substantially undermining incentives for compliance with the rule. The Bureau believes that further defining cure provisions would be extraordinarily complex. Accordingly, the Bureau is focusing this rulemaking process on facilitating compliance with the TILA-RESPA Rule in an expeditious manner so that all consumers receive disclosures that conform to the requirements of the rule.

For a detailed discussion of liability and cures under the KBYO/TRID rule, please click here.

PROPOSED AMENDMENTS

- **Closing the "Black Hole."** Under the current rule, strict timing requirements appear to limit the ability of a lender to pass on the cost of a rate lock extension or certain other charges that arise after the Closing Disclosure has been provided, even if those charges are requested by the borrower and would have been permissible before the Closing Disclosure was provided. As a result, this period between issuance of the Closing Disclosure and closing has been called "the

Black Hole." The CFPB's proposal seeks to address concerns that this aspect of the rule could result in cancelled transactions by making amendments to the official interpretations.

Specifically, the amended interpretations would state that, "[i]f there are fewer than four business days between the time the revised version of the disclosures is required to be provided under § 1026.19(e)(4)(i) [i.e., three business days after the creditor learns of the change] and consummation or the Closing Disclosure required by § 1026.19(f)(1) has already been provided to the consumer, creditors comply with the requirements of § 1026.19(e)(4) (to provide a revised estimate under § 1026.19(e)(3)(iv) for the purpose of determining good faith under § 1026.19(e)(3)(i) and (ii)) if the revised disclosures are reflected in the corrected disclosures provided under § 1026.19(f)(2)(i) or (2)(ii), subject to the other requirements of § 1026.19(e)(4)(i)." (Emphasis added.)

It appears that this amendment would close the "Black Hole" in most cases by also allowing creditors to reset tolerances using a Closing Disclosure at any time during the process as long as a corrected Closing Disclosure is issued within three business days of learning about the change. (Note that the three-business-day requirement would be new because, under the current rule, it appears that the corrected Closing Disclosure can be provided at closing, as long as the timing requirements are satisfied.) However, as discussed below, this guidance may not apply to rate locks because § 1026.19(e)(4)(i) specifically excludes tolerance resets based on rate locks under § 1026.19(e)(3)(iv)(D). In addition, creditors should be mindful of the logistical challenges associated with issuing a corrected Closing Disclosure prior to closing (e.g., if the corrected Closing Disclosure must be mailed before closing, the borrower may not receive it until after closing).

- **Redisclosure after Rate Lock**. Currently, the rule states that, if a creditor wishes to reset tolerances on points, credits, and other "interest rate dependent charges" as a result of a rate lock, it must provide a revised disclosure "[n]o later than three business days after the date the interest rate is locked." However, because this requirement is a condition of the creditor resetting tolerances, it appears that the rule does not require a revised disclosure if the rate is locked but the associated points do not increase and credits do not decrease.

  However, the proposed changes to the commentary suggest that the CFPB may wish to require a revised disclosure for all rate locks, regardless of whether tolerances are reset. Specifically, the preamble to the proposal states that "[s]ection 1026.19(e)(3)(iv)(D) requires the creditor to provide a revised Loan Estimate to the consumer no later than three business days after the date the interest rate is locked" without referencing the fact that § 1026.19(e)(3)(iv)(D) is contingent on the creditor's "use [of] a revised estimate of a charge instead of the estimate of the charge originally disclosed" for purpose of calculating tolerances under § 1026.19(e)(3)(iv). Although not specifically discussed in the preamble, the Bureau also proposes to remove the first sentence from comment 19(e)(3)(iv)(D)-1, which states that "[i]f the interest rate is not locked when the disclosures required by § 1026.19(e)(1)(i) are provided, a valid reason for revision exists when the interest rate is subsequently locked."

  The Bureau goes on to state that "there is uncertainty as to how a creditor complies with § 1026.19(e)(3)(iv)(D) and provides a revised Loan Estimate if the interest rate is locked after

the Closing Disclosure has been provided." The Bureau proposes to add an official interpretation stating that the creditor may not provide a revised Loan Estimate on or after the date the creditor provides the Closing Disclosure and that the creditor must issue a corrected Closing Disclosure consistent with the timing requirements in § 1026.19(f) if the rate lock causes the initial Closing Disclosure to become inaccurate. Notably, however, this guidance does not authorize the creditor to reset tolerances using the Closing Disclosure and the Bureau did not propose to amend § 1026.19(e)(4)(i), which specifically excludes rate locks under § 1026.19(e)(3)(iv)(D) from the list of tolerance reset events requiring redisclosure. This may be because the Bureau views § 1026.19(e)(3)(iv)(D) as imposing an independent disclosure requirement but did not realize that its solution to the "Black Hole" excluded rate locks. If so, additional clarification may be needed in the final rule.

- **Written List of Providers ("WLP")**. The written list of settlement service providers that must accompany the initial Loan Estimate has been the source of substantial confusion. The proposal would clarify that the WLP must specifically identify a service if the particular charge for that service is payable by the consumer, unless the creditor knows that the service is provided as part of a package or combination of settlement services offered by a single service provider and the consumer is permitted to shop for all services in the package. It also clarifies in the commentary that the model form for the WLP in H-27 is not required, but that "creditors using it properly will be deemed to be in compliance with § 1026.19(e)(1)(vi)(C)."

  The proposal also seeks to change the applicable tolerances when the WLP is not provided. Specifically, the proposed rule would narrow from 10% to zero the applicable tolerance limitation when the creditor permits the consumer to shop for a service but fails to provide a WLP. Currently, comment 19(e)(3)(iii)-2 states that the 10% tolerance applies in such circumstances. However, the Bureau is proposing to apply the zero tolerance instead because "[t]he Bureau believes that a creditor did not permit a consumer to shop if the creditor failed to provide a written list of providers." Although the Bureau states that this is a clarification, it appears to be a substantive shift in policy that should apply only prospectively.

- **"No tolerance" fees remain "no tolerance" even if paid to an affiliate as long as they are "bona fide."** The proposal seeks to prospectively clarify that property insurance premiums, amounts placed into an escrow, impound, reserve, or similar account, charges for required shoppable services when the borrower selects a provider that is not on the WLP, and charges paid for services not required by the lender (such as owner's title insurance) are still excluded from the zero and 10% tolerances by § 1026.19(e)(3)(iii) even if the provider is an affiliate of the lender or loan originator. However, the Bureau proposed to add a requirement that such charges must be "bona fide," regardless of whether they are paid to an affiliate. To be bona fide, the charge must be lawful and for services that are actually performed. The purpose of this "bona fide" requirement is not entirely clear.

- **Tolerance for the Total of Payments disclosure that parallels existing finance charge tolerances**. The Total of Payments disclosure would generally be considered accurate for rescission purposes if it is greater than the amount required to be disclosed (i.e., if the Total of Payment is overstated). For understatements, different accuracy standards apply depending on the type and delinquency status of the loan. For most loans, the disclosure would be

considered accurate if it is understated by no more than ½ of 1% of the face amount of the note or $100, whichever is greater. However, for refinance transactions with a new creditor that are not subject to high-cost loan requirements where there is no new advance and no consolidation of existing loans, the disclosure would be considered accurate for rescission purposes if it is understated by no more than 1% of the face amount of the note or $100, whichever is greater. Finally, after the initiation of foreclosure on the consumer's principal dwelling, the disclosure would be considered accurate for rescission purposes if it is understated by no more than $35.

- **Expansion of the partial exemption for certain down payment and homeowner assistance programs** "to clarify that transfer taxes may be payable by the consumer at consummation without losing eligibility for the partial exemption and to exclude recording fees and transfer taxes from the 1-percent threshold of total costs payable by the consumer at consummation." However, the Bureau is seeking comment on whether this change creates the potential for abuse and whether transactions originated by a housing finance agency should be completely exempt from Regulation Z.

- **Application of the KBYO/TRID rule to all loans secured by cooperative units, whether or not they are considered real property under state law**.

- **Clarification regarding sharing of disclosures with realtors and other parties**. In addition to amending the official interpretations regarding a creditor's ability to leave certain information blank, the preamble to the proposal notes that there are exceptions to the notice and opt-out requirements under the Gramm-Leach-Bliley Act ("GLBA"), including when the financial institution shares its customer's non-public personal information (1) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; and (2) because the institution is "required, or [it] is a usual, appropriate, or acceptable method, to provide the customer or the customer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product."

- **Post-closing escrow cancellation and partial payment disclosures**. This change would clarify that the post-consummation escrow cancellation and partial payment disclosures apply regardless of the application date for the loan. Because this was not clear in the current rule, the Bureau is proposing to require these disclosures beginning on October 1, 2017 for all pre- and post-TRID loans to which the disclosures otherwise apply, regardless of the application date. Until October 2017, the creditor is required to provide the disclosures for all loans with application dates on or after October 3, 2015, and is permitted to provide them for loans with application dates before then.

- **Per diem interest & post-consummation Closing Disclosures**. The proposal seeks to clarify that, even if an amount actually paid by the consumer for per diem interest differs from the amount disclosed, a creditor is not required to provide a post-consummation Closing Disclosure for any disclosure that is accurate under § 1026.17(c)(2)(ii). Section 1026.17(c)(2)(ii) states that disclosures affected by per-diem interest are accurate if the disclosure is based on the information known to the creditor when the disclosure documents are prepared for consummation of the transaction.

- **Tolerance cure disclosures and principal curtailments**. The Bureau proposes several changes to (1) clarify how principal curtailments may be disclosed; and (2) permit disclosure of a principal curtailment instead of a lender credit when providing a tolerance cure. Although the preamble states that the Bureau is proposing to amend comment 38(h)(3)-2 to reflect these changes, the actual text of the proposed comment appears to be missing from the proposal.

- **Expiration date**. The Bureau proposes to clarify that the expiration date disclosed on the initial Loan Estimate should be left blank on any revised Loan Estimates provided after the consumer has indicated an intent to proceed.

- **Seller credits.** The Bureau proposes to clarify that specific seller credits may either be disclosed on the seller credits line or reflected in Seller-Paid column for the specific item on the Closing Disclosure.

- **Calculating Cash to Close table**. The proposal also includes a number of clarifications and revisions regarding completion of the Calculating Cash to Close table.

- **Simultaneous subordinate lien transactions**. The Bureau proposes a number of amendments to clarify how simultaneous subordinate lien transactions should be disclosed.

- **Construction loans**. The proposal includes clarifications on how construction loans should be disclosed, including a number of additions to Appendix D as well as relevant cross-references throughout. In particular, the proposed rule would clarify that construction loan inspection and handling fees are loan costs associated with the construction transaction for purposes of §1026.37(f). If the fees are collected after consummation, the proposal would impose a new requirement that they be disclosed in an addendum to both the Loan Estimate and Closing Disclosure under the heading "Inspection and Handling Fees Collected After Closing."

- **Requiring construction costs, existing lien payoffs, and unsecured debt payoffs to be disclosed under "H. Other**." Currently, these fees may, but are not required to be, disclosed under H. Other. The proposed rule would require that they be disclosed in this section on both the Loan Estimate and Closing Disclosure unless they are disclosed under § 1026.37(h)(2)(iii) on the optional alternative calculating cash to close table. The Bureau believes this will enhance consumer understanding and notes that the disclosures will be subject to the determination of good faith under § 1026.19(e)(3)(iii)(E) as long as they are "bona fide."

- **Escrow disclosures on page 4 of the Closing Disclosure**. The Bureau proposes changes to the Escrow Disclosure to: (1) permit mortgage insurance premiums to be disclosed with the escrow account if creditors establish an escrow account to pay mortgage insurance premiums; and (2) clarify how to calculate the "Escrowed Property Costs over Year 1" disclosure.

The proposal includes a number of other changes that address a variety of topics that the Bureau describes as minor changes and technical corrections, including:

- decimal places and rounding;

- escrow cancellation notices;
- gift funds;
- the “In 5 Years” calculation;
- lender credits;
- lenders’ and settlement agents’ respective responsibilities;
- model forms;
- non-obligor consumers;
- payment ranges on the Projected Payments table;
- the payoffs and payments table;
- payoffs with a purchase loan;
- disclosure and good-faith determination of property taxes and property value;
- recording fees;
- the Summaries of Transactions table;
- the Total Interest Percentage (TIP) calculation;
- trusts; and
- informational updates to the Loan Estimate.

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

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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.

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