# Special Alert: CFPB Finalizes Amendments to Know Before You Owe/TRID Rule and Proposes Additional Changes to Address "Black Hole"

On Friday, the CFPB issued amendments to the KBYO/TRID rule. The Bureau billed the changes as clarifying and technical in nature but stated that the final rule "also makes a limited number of additional substantive changes where the Bureau has identified discrete solutions to specific implementation challenges." The rule becomes effective 60 days after it is published in the *Federal Register*, but compliance is not mandatory until October 1, 2018.

Importantly, however, instead of finalizing proposed amendments to address the "black hole" that prevents creditors from resetting tolerances using the Closing Disclosure except in very limited circumstances, the Bureau issued a concurrent proposal to address the issue. The proposal would close the black hole by allowing creditors to reset tolerances using the Closing Disclosure regardless of when closing is scheduled to occur, although the Bureau sought comment on whether doing so would have unintended consequences. Comments on the proposal must be received 60 days after it is published in the *Federal Register*.

Most of the dozens of other changes proposed last year have been finalized, although some proposed amendments were not adopted and many others were modified to address concerns and feedback from commenters. As we noted last year, the changes appear to resolve a number of significant ambiguities that have generated concerns about the liability of lenders and purchasers of mortgage loans and, as a result, hampered loan sales. However, it will be necessary in many cases to revise existing systems and practices to comply with the amended rule.

Although the amendments are too voluminous and technical to be summarized comprehensively, we have highlighted a number of the more significant changes below:

- **Written List of Providers (WLP).** Last year's proposed rule included a number of amendments relating to the WLP, most of which were intended to clarify and simplify disclosure requirements. The Bureau finalized some of these amendments, while modifying or abandoning others in response to concerns raised by commenters. For example, the CFPB finalized a proposed clarification that changes may be made to Form H-27 without losing safe harbor protections as long as the changes do not affect the substance, clarity, or meaningful sequence of the form. In the final amendments, the Bureau also added an example confirming that deleting the estimated fee amounts column is a permissible change.

However, the Bureau chose *not* to adopt proposals to:

- 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. The Bureau instead opted to clarify that whether a service is shoppable is "determined based on all the relevant facts and circumstances," noting that this "is a balanced approach to preclude the weakening of the consumer protection interests implicit in the written list of providers while avoiding a significant increase in compliance cost and administrative burden."
- Clarify that the WLP must specifically identify services for which the consumer must shop, 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. The Bureau instead clarified that the WLP is "not required … to provide a detailed breakdown of all related fees that are not themselves required by the creditor but that may be charged to the consumer such as a notary fee, title search fee, or other ancillary and administrative services needed to perform or provide the settlement service required by the creditor." The preamble to the final amendments also confirms that "typographical errors regarding a settlement service … do not subject the charges for such service to the zero percent tolerance category when determining good faith, unless the error interferes with the consumer's ability to shop."

- **"No tolerance" fees remain "no tolerance" even if paid to an affiliate.** Consistent with the proposal and prior informal guidance from CFPB staff, the final amendments clarify that fees for certain products and services 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, as long as the original estimates are not unreasonably low. These products and services are 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 (as long as the WLP was actually provided); and charges paid for services not required by the lender (such as owner's title insurance).
- **Disclosing reductions in costs after issuing the initial Loan Estimate does not reset tolerances downward.** In the preamble to the final amendments, the Bureau responded to requests for clarification regarding the impact on tolerance baselines when a creditor decreases an estimated charge on a revised Loan Estimate or Closing Disclosure. The Bureau explained that tolerance determinations are made by comparing "the charge paid by or imposed on the consumer" to either "the amount originally disclosed" or, in certain circumstances, a revised estimate that resets tolerances. However, "the rule does not require the creditor to use a revised estimate for purposes of determining good faith." Therefore, "if a creditor decreases an estimated charge on a revised Loan Estimate or Closing Disclosure, the creditor is not required to use the decreased estimate for purposes of determining good faith; the creditor may

determine good faith by comparing the charge paid by or imposed on the consumer versus the amount originally disclosed."

- **Closing costs must be "bona fide."** The Bureau also finalized a new requirement that charges must be "bona fide," regardless of whether they are paid to an affiliate, and clarified that this requirement "is expressly limited to determining good faith for purposes of § 1026.19(e)(1)(i)." The final rule provides that a charge is "bona fide" if it is lawful and for services that are actually performed. In finalizing this requirement, the Bureau sidestepped comments suggesting that it was attempting to circumvent the Supreme Court's holding in *Freeman v. Quicken Loans* that Section 8(b) of RESPA does not prohibit a single provider's retention of an unearned fee. The Bureau responded to these comments by stating that it was not relying on Section 8(b) to adopt the amendment.
- **Redisclosure after Rate Lock**. The Bureau finalized what it characterized as "technical amendments" to § 1026.19(e)(3)(iv)(D), and in doing so, confirmed its position that a creditor must always issue a revised Loan Estimate after the interest rate is initially locked if the Closing Disclosure has not yet been issued, even if the creditor does not wish to reset tolerances on points, credits, and other "interest rate dependent charges." In response to comments suggesting that redisclosure obligations under § 1026.19(e)(3)(iv)(D) are not triggered unless the creditor sought to "use a revised estimate of a charge instead of the estimate of the charge originally disclosed" for purpose of calculating tolerances pursuant to § 1026.19(e)(3)(iv), the Bureau stated only that "§ 1026.19(e)(3)(iv)(D) explicitly requires the creditor to provide a revised Loan Estimate when the initial Loan Estimate did not disclose an interest rate subject to a rate lock agreement, even if the terms and charges disclosed are the same."
  The Bureau also finalized an official interpretation stating that, once the Closing Disclosure has been issued and a revised Loan Estimate can no longer be used, the creditor must issue a corrected Closing Disclosure consistent with the timing requirements in § 1026.19(f) if the rate lock causes the Closing Disclosure to become inaccurate.
- **Tolerance for the Total of Payments disclosure that parallels existing finance charge tolerances**. The Bureau adopted the proposed amendment that the Total of Payments disclosure will generally be considered accurate for rescission and other purposes if it is greater than the amount required to be disclosed (i.e., if the Total of Payment is overstated). For understatements, the amendments generally provide that the disclosure is accurate if understated by no more than $100, although different accuracy standards apply depending on the type and delinquency status of the loan.
- **Partial exemption for certain down payment and homeowner assistance programs expanded**. The Bureau finalized as proposed an expansion of the partial exemption for certain down payment and homeowner assistance programs so that recording fees and transfer taxes will be excluded from the 1% threshold of total costs payable by the consumer at consummation. The final rule also gives creditors greater flexibility by, for example, allowing them to provide the

TRID disclosures instead of the pre-TRID disclosures under § 1026.18 without losing an exemption from the requirement to provide RESPA disclosures.

- **The KBYO/TRID rule will apply 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 final rule provides further discussion on existing privacy requirements under the Gramm-Leach-Bliley Act, Regulation P, and state law.
- **Post-closing escrow cancellation and partial payment disclosures.** The final rule clarifies that the post-consummation escrow cancellation and partial payment disclosures must be provided beginning on October 1, 2018 for all pre- and post-TRID loans to which the disclosures otherwise apply, regardless of the application date. Until October 2018, 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**. As clarified in the final rule, disclosures affected by per-diem interest are accurate if the disclosure is based on the best information reasonably available when the disclosure documents are made. 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 "if the only changes that would be required to be disclosed in the corrected disclosure are changes to per-diem interest and any disclosures affected by the change in per-diem interest, even if the amount of per-diem interest actually paid by the consumer differs from the amount disclosed." However, the Bureau responded to comments indicating confusion regarding these requirements by clarifying that these disclosures must be updated if the creditor is providing a corrected Closing Disclosure for other reasons.
- **Tolerance cure disclosures and principal curtailments**. The final rule (1) clarifies how principal curtailments may be disclosed; and (2) permits disclosure of a principal curtailment instead of a lender credit when providing a tolerance cure. In response to comments, the final amendments provide greater flexibility for certain requirements (e.g., the Bureau removed language suggesting that creditors could only disclose a principal curtailment in certain circumstances) but more prescriptive rules for others (e.g., the final rule limits where principal curtailments may be disclosed and states what information must accompany the disclosure).
- **Expiration date**. The final rule clarifies 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. The Bureau further clarified that voluntarily extending the expiration date of a Loan Estimate, either orally or in writing, allows the consumer a longer period to indicate an intent to proceed; therefore, if the consumer indicates an intent to proceed within the extended period, the creditor must use the charges disclosed in the Loan

Estimate when determining good faith and tolerances, unless Regulation Z otherwise allows the creditor to reset tolerances.

- **Seller credits.** The final rule adopts the proposal to clarify that specific seller credits may be reflected on the Loan Estimate by either disclosing the cost of the service and an offsetting seller credit or excluding the amounts paid by the seller altogether. For example, if "the seller has agreed to pay half of a $100 required pest inspection fee, the creditor may either disclose the required pest inspection fee as $100 under § 1026.37(f) with a $50 seller credit disclosed under § 1026.37(h)(1)(vi) or disclose the required pest inspection fee as $50 under § 1026.37(f), reflecting the specific seller credit in the amount disclosed for the pest inspection fee."
- **Calculating Cash to Close table**. The final rule also includes a number of clarifications and revisions regarding completion of the Calculating Cash to Close table.
- **Simultaneous subordinate lien transactions.** The final rule incorporates a number of amendments to clarify how simultaneous subordinate lien transactions should be disclosed.
- **Construction loans**. The final rule includes clarifications on how construction loans should be disclosed, including a number of additions to Appendix D and relevant cross-references throughout. In particular, the amendments 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, a new requirement provides that they must be disclosed in an addendum to both the Loan Estimate and Closing Disclosure under the heading "Inspection and Handling Fees Collected After Closing."
- **Limiting where construction costs, existing lien payoffs, and unsecured debt payoffs may be disclosed**. The Bureau reversed course from its proposal regarding disclosure of construction costs, existing lien payoffs, and unsecured debt payoffs. The Bureau initially proposed that these costs must be disclosed under "H. Other" but, after a number of commenters expressed concern about the requirement, it decided to instead require disclosure of these fees in the Summaries of Transactions table for the standard Closing Disclosure or the Payoffs and Payments table for the alternative Closing Disclosure. The rule also clarifies how the costs must be disclosed on the Loan Estimate, providing different instructions depending on the specific transaction type.
- **Escrow disclosures on page 4 of the Closing Disclosure**. The instructions for completing the Escrow Disclosure are modified in the final rule so that: (1) mortgage insurance premiums may be disclosed with the escrow account if creditors establish an escrow account to pay mortgage insurance premiums; and (2) creditors have flexibility in calculating the "Escrowed Property Costs over Year 1" disclosure to calculate costs "over Year 1" based on either the 12-month period beginning with the initial payment or the period beginning with consummation.
- **"Borrower" disclosure on Closing Disclosure is limited to consumers applying for credit**. The final rule states that only the name and mailing address of persons to whom the credit is offered or extended are disclosed in the "Borrower" disclosure on page 1 of the Closing Disclosure. This represents a reversal from the proposed rule, which would have clarified that all "consumers"

who have a right to rescind must be disclosed as borrowers on the Closing Disclosure. However, the rule retains flexibility to include a signature line for non-borrower consumers in rescindable transactions.

- **Sample completed forms retain model form status**. The Bureau abandoned its proposal to designate the completed model forms as "samples," which would have removed the safe harbor protections that apply when creditors rely on them. In doing so, the Bureau acknowledged that "use of an appropriate sample form, if properly completed with accurate content, constitutes compliance with the requirements of §§ 1026.37 or 1026.38 and associated commentary, as applicable." However, the amendments did not make any changes to the forms themselves.

The rule 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
- 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
- Informational updates to the Loan Estimate

If you have questions about the rule or other related issues, please visit our TRID Resource Center, Consumer Financial Protection Bureau practice page, or contact a Buckley Sandler attorney with whom you have worked in the past.