

# TRID or RESPA/TILA Implementation

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# I. INTRODUCTION

## A. Background

### 1. RESPA

- Anti-kickback – Eliminate abusive practices that drive up cost of product to consumers
- Consumer disclosure – Give buyers and sellers full disclosure of costs of transaction

### 2. TILA

- Informed use of credit – Disclosure of credit terms
- Cost of credit calculations – Annual percentage rate and finance charge
- Projected payment schedule – Allow consumers to compare pricing among competitors

# I. INTRODUCTION

## A. Background (cont'd)

### 3. Similar timing of disclosure

- Both require disclosure three days after application
- Both require final disclosure shortly before consummation

### 4. But that's where similarities end

- Forms contain overlapping information
- Inconsistent language
- Burdensome for lenders to provide
- Difficult for consumers to understand

# I. INTRODUCTION

## B. Modern History

1. Congress said, “We’ll take it from here.”
  - Section 1032(f) of Dodd-Frank Act requires CFPB to propose a regulation that combines RESPA-TILA disclosures within one year of transfer
2. Know Before You Owe
  - CFPB undertakes 18-month effort to get it right
3. Consumer testing and focus groups
  - Interactive comment process
  - Numerous sample forms analyzed
  - Public outreach
4. CFPB convenes Small Business Panel
5. July 9, 2012 Proposed Rule
  - 1,099 pages long
  - Multiple LE and CD prototypes

# FINAL REGULATION ISSUED 11-20-13

## Goals of New Rule

1. Easier-to-use mortgage disclosure forms
2. Improve consumer understanding
3. Aid comparison shopping
4. Prevent surprises at closing table

# FINAL REGULATION ISSUED 11-20-13

## Two New Forms

### 1. The Loan Estimate

- Provided to consumers within three business days after submission of loan application
- Replaces early TIL statement and GFE
- Provides summary of key loan terms and estimates of loan and closing costs
- Idea to promote comparison shopping

### 2. The Closing Disclosure

- Received by consumers three business days before consummation
- Replaces final TIL statement and HUD-1 Settlement Statement
- Provides detailed accounting of transactions

Effective Date – August 1, 2015

# Pre-approvals & Pre-qualifications

- “The creditor or other person shall not require a consumer to submit documents verifying information related to the consumer's application before providing the [Loan Estimate].” 12 C.F.R. 1026.19(e)(2)(iii).
- Are pre-qualifications and pre-approvals allowed under the new rule?
  - CFPB addressed in preamble to the final rule (78 Fed. Reg. 79730, 79767 (Dec. 31, 2013):

[T]he Bureau does not believe that the definition of application will restrict creditors' ability to provide pre-qualification cost estimates or grant pre-approvals. The Bureau believes that creditors could provide pre-qualification estimates and grant pre-approvals without obtaining all of the six specific items of information that make up the definition of application. Specifically, the Bureau believes that there is little need for creditors to gather specific information about the loan transaction, such as the property address or loan amount sought, to make pre-qualification estimates because pre-qualification estimates and pre-approvals are not subject to the tolerance rules in § 1026.19(e)(3) and are generally for a range of loan amounts and property values. In fact, comments made by a national trade association representing community banks asked that the Bureau designate “property address” as an optional item in the definition of application for purchase transactions. This suggests to the Bureau that creditors may not need the “property address” to issue pre-qualification estimates.

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# TIMING OF TRID FORMS



# TOP TAKEAWAYS IN FINAL RULE

## Timing of Disclosures

### Loan Estimate:

- “Application” trigger
- Three business days after Application
- Seven business days prior to consummation
- Waiver of waiting period permitted in *bona fide* financial emergencies
  - Written statement by consumer
  - No printed forms
- Re-disclose within three business days of change

# TOP TAKEAWAYS IN FINAL RULE

## Timing of Disclosures (*cont'd*)

### Closing Disclosure:

- Consumer must receive three business days before consummation
  - Unless
    - *Bona fide* personal financial emergency
    - Written statement by consumer
    - Printed forms prohibited
- Seller must receive no later than day of consummation

# TOP TAKEAWAYS IN FINAL RULE

## Timing of Disclosures *(cont'd)*

### **Closing Disclosure:**

- If Closing Disclosure becomes inaccurate before closing, provide corrected disclosure at or before consummation
  - Still must be able to inspect one business day prior to consummation
- Limited changes require a new three-business-day waiting period:
  - Changes above APR tolerance
  - Change to loan product
  - Addition of prepayment penalty
- This is a change from proposed rule
  - Changes in dollar amounts \$100 or greater would have required a new waiting period.

# TOP TAKEAWAYS IN FINAL RULE

## Timing of Disclosures (cont'd)

### Closing Disclosure:

- Changes post-closing require revised Closing Disclosure:
  - Event related to settlement 30 days after closing and to an amount paid by consumer and/or seller = re-disclose 30 days after learning event occurred
  - Non-numeric clerical errors = re-disclose 60 days after consummation
  - Variation (tolerance) violation occurs = refund and re-disclose 60 days after consummation

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# TOLERANCES

# TOP TAKEAWAYS IN FINAL RULE

## Variations...the New Tolerances

- Concept of “tolerances” nowhere to be found in RESPA (though TILA adopts tolerances to facilitate compliance)
- Current Reg X creates three “Tolerance Buckets”
  - 1024.7(e)(1) Zero Tolerance
  - 1024.7(e)(2) 10% Tolerance
  - 1024.7(e)(3) No Tolerance
- Final Rule avoids the “T” word
  - “Good Faith Estimate” is essentially defined as the disclosure of the actual amount charged to a consumer at closing

# TOP TAKEAWAYS IN FINAL RULE

## Variations...the New Tolerances *(cont'd)*

### Tolerances now called “Variations”

- No variations (Zero Bucket) expanded to include:
  - Affiliate charges
  - Fees paid to unaffiliated SSP that consumer cannot shop for
- Limited increases (10% Bucket)
  - Charge paid to unaffiliated SSP selected from creditor's SSPL
- Variations permitted (No Tolerance Bucket)
  - SSP shopped for by consumer
  - Prepaid interest
  - Property insurance premiums
  - Escrow amounts, impound reserves

# TOP TAKEAWAYS IN FINAL RULE

## Variations...the New Tolerances *(cont'd)*

- No Tolerance does not mean No Tolerance
  - Creditor still on the hook under No Tolerance Bucket
  - “Best information reasonably available to the Creditor”
  - Don’t get off scot-free if you intentionally lowball prepaid interest, escrow amounts, etc.
- Changed circumstances still exist to permit revisions to Loan Estimate fees





## Revised Estimates & Changed Circumstance

Issuing revised estimates of charges on the Loan Estimate is allowed in six circumstances:

- Changed circumstances affecting settlement charges
- Changed circumstances affecting eligibility
- Revisions requested by the consumer
- Interest rate dependent charges
- Intent to proceed is more than 10 days after provision of disclosures
- Delayed settlement date on a construction loan\*



## Changed Circumstance *(cont'd)*

A “Changed Circumstance” is defined as:

1. Extraordinary event beyond the control of an interested party or other unexpected event specific to the consumer/transaction.
1. Information specific to the consumer or transaction that the creditor relied on when providing the disclosure was, or becomes, inaccurate.
1. New information specific to the consumer or transaction that the creditor didn't rely upon when providing the original disclosure becomes available.



## **Changed Circumstance (*cont'd*)**

Changed Circumstances Affecting Settlement Charges Occurs When:

- A valid COC causes a “No Variation” estimated charge to increase;

Or

- A valid COC causes the total “Limited Variation” estimated charges to increase by more than 10%.

Changed Circumstance Affecting Eligibility Occurs When:

- A valid COC affecting the consumer’s creditworthiness or value of the security causes the consumer to be ineligible for a previously disclosed charge.



## Issuing Revised Disclosures

- Generally, revised estimates must be issued within *three business days* of receiving information supporting the revision.
  - *\*\*However\*\* if the reason for revision is due to the points or lender credits changing as a result of a rate lock, the creditor is to provide the revised version on the lock date. 1026.19(e)(3)(iv)(D)*
- The revised disclosures must be received by the consumer no later than 4 business days prior to consummation
- A creditor **cannot** provide a revised Loan Estimate on or after the date the Closing Disclosure is provided

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# TITLE ISSUES AFFECTING TITLE INSURANCE INDUSTRY

# TOP TAKEAWAYS IN FINAL RULE

## Top Issues Affecting Title Insurance Industry

1. Simultaneous Issue
  - Loan and owners title policies purchased in same transaction
  - TRID requires inaccurate disclosure of title premiums
2. Who provides Closing disclosure to consumers?
3. Difference between consummation and closing
4. Grace Period
  - Can we get one



# TOP TAKEAWAYS IN FINAL RULE

## Top Issues Affecting Title Insurance Industry *(cont'd)*

### 1. Simultaneous Issue

**Issue:** In approximately half of the states, consumers entitled to a discount on lenders title insurance policy (LTP) when owner's title policy (OTP) simultaneously issued

**Concern:** CFPB insists that the full LTP be shown on Loan Estimate and Closing Disclosure – even though by virtue of a simultaneous issue rate LTP is substantially discounted

At the same time, CFPB permits the owner's title policy to be shown at a lower rate than the actual rate

# TOP TAKEAWAYS IN FINAL RULE

## Top Issues Affecting Title Insurance Industry *(cont'd)*

### Under the Rule

OTP shown as \$350

\$815 OTP Premium + \$290 LTP simultaneous premium

- (minus) Full LTP of \$755

LTP shown as Full LTP \$755

### In Realty

OTP actual charge is \$815

LTP actual charge is \$290

- Dollars equal out, but that is not the point



# TOP TAKEAWAYS IN FINAL RULE

## Top Issues Affecting Title Insurance Industry (cont'd)

### 2. Who Provides Closing Disclosure?

#### 1. 3 Options

- (i) Lender prepares and provides
- (ii) Title Company prepares and provides
- (iii) Hybrid arrangement
  - Lender prepares and provides
  - with data supplied by title company
  - technology interface
- Creditor still on the hook

#### 2. Settlement Agent still must prepare and provide Closing Disclosure to Seller

- Must provide copy of Seller CD to creditor

# TOP TAKEAWAYS IN FINAL RULE

## Top Issues Affecting Title Insurance Industry (cont'd)

### 3. Difference Between Consummation and Closing Dates

1. Rule requires CD be provided to consumer within 3 business days of **consummation**
2. Consummation date is the date upon which the consumer is obligated on the loan
  - Typically date note is signed
3. In most states consummation occurs at the closing table
  - Consummation and closing occur simultaneously
4. However, in Western states consummation occurs prior to date closing docs executed

# TOP TAKEAWAYS IN FINAL RULE

## Top Issues Affecting Title Insurance Industry *(cont'd)*

### 4. Grace Period (Get out of Jail Free Card)

1. In 2010 HUD approved 6 month grace period when new GFE and HUD-1 enacted
  - Allow lenders and other providers time to get acclimated
2. CFPB has been approached by settlement service industry (including mortgage, title and realtors) to allow a similar grace period
  - Afterall, new forms may not be used until August 1
  - So far CFPB silent on an enforcement break

# Delayed Closings

- Final revised Loan Estimate must be received by consumer no later than four specific business days before consummation
  - If there are less than four specific business days between the time the revised Loan Estimate would be provided and consummation, tolerances can be reset using Closing Disclosure [Comment 19(e)(4)(ii)-1]
  - “If the event occurs after the first Closing Disclosure has been provided to the consumer (i.e., within the three-business-day waiting period before consummation), the creditor may use revised charges on the Closing Disclosure provided to the consumer at consummation, and compare those amounts to the amounts charged for purposes of determining good faith and tolerance. (Comment 19(e)(4)(ii)-1) [Small Entity Compliance Guide § 9.5]
  - Creditor can use final Closing Disclosure to reset tolerances for changed circumstances that occur 7-8 specific business days before closing
- But if closing date is significantly delayed after initial Closing Disclosure provided, a revised Closing Disclosure may or may not reset the tolerances
  - Example: If defect discovered during walkthrough and closing is delayed by two weeks for repairs, lender cannot impose a rate lock extension fee

# Delayed Closings

6	7	8 SIX BUS. DAYS BF. CLOSING	9 FIVE BUS. DAYS BF. CLOSING	10 FOUR BUS. DAYS BF. CLOSING	11 THREE BUS. DAYS BF. CLOSING	12 TWO BUS. DAYS BF. CLOSING
		Initial CD mailed based on expected closing date of 9/15.			Initial CD presumed received (closing may occur on 9/15)	BUS. DAYS BF. CLOSING
13	14 ONE BUS. DAY BF. CLOSING	15 Original CLOSING DATE	16	17	18	19
	CLOSING DATE DELAYED UNTIL 9/29. Rate lock extension fee incurred causing increase to zero tolerance fee. Revised disclosures could have been provided on final CD at a closing on 9/22 or earlier, but closing was delayed by too many days so tolerances cannot be reset.	[closing moved back to 9/29]		[Revised LE with lock extension fee would have been due]		Not "Open for Bus." Day
20	21	22	23	24	25	26
		[Last day to close with CD reflecting rate lock fee]				TWO BUS. DAYS BF. NEW CLOSING Not "Open for Bus." Day
27	28	29 Closing	30			
		Final CD must be provided				



## Post-Consummation Cures

- All references in the rule are to the *Consummation* date, not the *Closing* date.
  - Consummation date is defined as the time that the consumer becomes *contractually obligated* on the transaction. This is not necessarily the same as settlement date or closing date and is *dependent upon specific state law*.
- Changes due to Clerical Errors
  - Creditors must provide revised Closing Disclosures even to correct non-numerical, or 'clerical' errors within 60 calendar days after consummation
  - A "clerical error" is one that does not affect a numerical disclosure nor does it affect the timing, delivery, or other requirements imposed by 1026.19(e) or (f).



## Post-Consummation Cures *(cont'd)*

- Change in costs paid by the consumer
  - If an event in connection with the settlement occurs within 30 calendar days after consummation that causes the Closing Disclosure to become inaccurate, and it results in a change to the amount paid by the consumer from what was previously disclosed, the creditor must take corrective action.
  - The creditor shall deliver, or place in the mail, the corrected Closing Disclosure no later than 30 days after receiving information sufficient to establish the event occurred.
- If amounts paid by the consumer exceed the amounts allowable under the good faith analysis, the creditor shall refund the excess no later than 60 calendar days after consummation.



## Post-Sale Communication with Investors

- The new 30 and 60 day post-consummation correction requirements create obligations on lenders that may continue after the loan is sold to the investor.
- Investors are very likely to conduct their own comparison between the Loan Estimate and Closing Disclosure either pre or post-purchase.
  - If the Investor discovers errors requiring the issuance of a revised disclosure or refund, the burden will be on the original creditor to get this done.
  - *Do you have robust QC processes in place to sample each loan prior to sale?*





## Post-Sale Communication with Investors (cont'd)

- If a creditor self-detects an error post-sale to an investor, the creditor is not relieved from taking corrective action.
  - The Creditor should ensure open communication with the investor about corrections and have processes in place to provide all required updates to the investor in a timely manner, such as revised Closing Disclosures and evidence of refunds, if applicable.
  - Failure to ensure corrections are completed within the 30 and 60 day time frames may substantially increase a creditor's repurchase risk.
- Understand each investors updated client guides and requirements with regard to 'supporting documentation,' especially regarding change of circumstance and re-disclosed Loan Estimates.

# Liability

- **Liability Today:** Two different statutes with two different liability schemes

	TILA	RESPA
Private right of action?	Yes for violations of TILA Part B	No (for GFE/HUD-1)
Damages?	Yes for actual damages and statutory penalties up to \$4,000 for certain disclosures (e.g., APR, finance charge)	n/a
Attorney's fees and costs?	Yes	n/a
Assignee liability?	Yes for violations apparent on the face of the disclosure and assigned documents (e.g., note)	n/a

# Liability

- **Liability on August 1**

- Neither Congress nor the CFPB clearly defined liability under the integrated TILA and RESPA disclosures
- CFPB states only that each provision of the rule carries the same liability as the statute on which it is based
  - TILA liability for requirements based on TILA
  - RESPA liability for requirements based on RESPA
- Each provision relies on TILA, RESPA, and Dodd-Frank
  - But only a private right of action for violations of TILA Part B
  - Most TILA authority cited from Part A

# Liability

- Most TRID provisions adopted under TILA sec. 105(a) in Part A, which grants the CFPB authority to issue such regulations “as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith”
- But, for example, tolerances:
  - In 2010, HUD interpreted the “good faith estimate” requirement in RESPA to limit variations between estimated settlement charges on the GFE and actual settlement charges on the HUD-1
  - CFPB adopted tolerances under TILA’s good faith estimate requirement in Part B, creating a private right of action