M&M CONSULTING | Partners in Risk Management

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Practical Compliance

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In This Issue

TRID – The First 100 Days!

On January 11, 2016, the TILA-RESPA Integrated Disclosure rule (TRID) reached the 100 day milestone. You can often learn a lot by examining what has transpired over the first 100 days of any new venture; so let's see what we can learn from our experience to date with TRID!

Questions Anyone?

As expected, the M&M *Answer Person* service was inundated with questions in the weeks immediately following TRID's effective date. The TRID requirements were new to all, so many questions required a fair amount of research before responses were provided. Fast forward 100 days, and you might anticipate that TRID's dust would have settled a bit, and that there would be fewer TRID related questions or issues on any given day. In actuality, little has changed. The dust is still flying, the number of questions and issues has not diminished, many of which still require additional research, and there are no definitive answers to certain questions at this point. Based on the TRID experiences and issues at your own institutions, this probably comes as no surprise.

How Did We Get Here?

A number of factors have contributed to the ongoing TRID related questions and issues. For example:

- *Trying to apply pre-TRID rules and practices in a post-TRID world* - Perhaps the best illustration of this involves the revised Loan Estimate (LE). Prior to TRID, the comparable disclosure for settlement costs was the Good Faith Estimate (GFE). §1024.7(f)(2) of Regulation X (RESPA) addresses changed circumstances affecting the loan as follows:

  "(2) Changed circumstances affecting loan. If changed circumstances result in a change in the borrower's eligibility for the specific loan terms identified in the GFE, the loan originator may provide a revised GFE to the borrower. If a revised GFE is to be provided, the loan originator must do so within 3 business days of receiving information sufficient to establish changed circumstances. The revised GFE may increase charges for services listed on the GFE only to the extent that the changed circumstances affecting the loan actually resulted in higher charges."

  RESPA does not contain an *Official Interpretation* to §1024.7(f)(2).

  Lenders would send a revised GFE for this type of changed circumstance reflecting the increased charges, which would be used for comparison to the actual charges reflected on the HUD-1 Settlement Statement.

For TRID loans, the comparable provision §1024.7(f)(2) of Regulation X is found in §1026.19(e)(3)(iv)(B) of Regulation Z, which states:

> *"B. Changed circumstance affecting eligibility.*
> *The consumer is ineligible for an estimated charge previously disclosed because a changed circumstance, as defined under paragraph (e)(3)(iv)(A) of this section, affected the consumer's creditworthiness or the value of the security for the loan."*

While this provision appears to mirror the comparable RESPA provision, Regulation Z contains an *Official Interpretation* to 19(e)(3)(iv)(B), which ties this type of change in circumstance to changes resulting in increases above the applicable tolerances. It states in part:

> *"1. Requirement.*
> *If changed circumstances cause a change in the consumer's eligibility for specific loan terms disclosed pursuant to § 1026.19(e)(1)(i) and revised disclosures are provided because the change in eligibility resulted in increased cost for a settlement service beyond the applicable tolerance threshold, the charge paid by or imposed on the consumer for the settlement service for which cost increased due to the change in eligibility is compared to the revised estimated cost for the settlement service to determine if the actual fee has increased above the estimated fee."*

Remember, the Closing Disclosure (CD) has a "comparison" section for tolerance calculations. Thus, if a lender sends a revised LE based on this type of changed circumstance, and the increased charges relating to the change do not exceed the applicable tolerance, then the charges reflected on the initial LE must be utilized used to calculate tolerances with the amounts reflected on the CD.

- *Lack of Formal Guidance* – We could not have reasonably expected the CFPB to have identified and fully addressed / clarified the proper disclosure of items for every possible scenario prior to TRID going into effect. However, in the absence of such guidance, lenders are left to make their own best-guess informed decisions on how to disclose certain items, which could be subsequently deemed by examiners as inappropriate by examiners. We would hope that the CFPB issues an FAQ to address these issues, but the CFPB has not formally announced if and when it intends to publish such an FAQ.

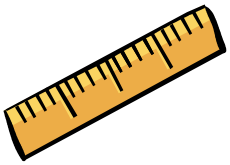
  Perhaps the best example where the lack of guidance has adversely affected lenders is construction loans. Many lenders have shied away from construction loans since TRID went into effect due to disclosure questions and concerns, and the lack of guidance provided. The CFPB recently published the *January 2016 Construction Loan Factsheet*, which it was hoped would provide some definitive guidance on the handling construction loans under TRID. Unfortunately, the *January 2016 Construction Loan Factsheet* provided little, if any, meaningful guidance.

- *Correct Disclosure defies "Common Sense"* – Anyone who has been in the compliance field for any length of time knows that regulatory requirements and common sense / logic do not necessarily go hand in hand. TRID is no exception. One such example that may have you convinced that you've done something wrong, or that your LOS is not properly configured involves the description of the Product for certain adjustable rate mortgages; where, for example, what you classify as a 5/1 ARM is listed on the Loan Estimate as a 0/1 adjustable rate loan. This occurs if the initial rate for the loan does not meet the definition of an "introductory rate", and is clarified in *Comment §1026.37(a)(10)(1)(i)* as being the correct Product description for such loans. Good luck trying to explain that to a customer!

The Next 100 Days and Beyond

The changes in disclosure requirements resulting from TRID are significant. It will take time to "unlearn" the practices and requirements of the pre-TRID rules, and apply the new requirements as if the old rules never existed. It will also take time for the CFPB to make revisions to Regulation Z, add Official Interpretations, and/or issue FAQs (hopefully not too long). Until such time, we, as compliance professionals, must continue to make informed decisions on how best to comply with these regulations. TRID is not the first major regulatory change we've faced, nor will it be the last (did we mention that the new HMDA changes are just around the corner?) We'll get through these regulatory challenges just fine. We always do.

Short Clips



Technical Corrections to the TRID Rules

On December 24, the CFPB published in the Federal Register a final rule making technical corrections to the TRID rules which took effect in October. None of these are intended to make substantive changes, but are to replace information inadvertently omitted in the publication of the final rule. The corrections were *effective* when published on Christmas Eve. The only change to the regulation itself is the first one which added two bullets back to the standard section on determining the APR. The remainder are all in the Commentary. The following are quick summaries of the information revised or reinstated. The current rule both at the CFPB and the eCFR contain these additions. You can see the regulation as it was in December at the eCFR by electing the Browse/Search button and entering the date to be displayed.

- §1026.22(a)(5) Determination of Annual Percentage Rate- Reinserted two bullets (i) and (ii) regarding when the APR is considered accurate. In the published version paragraph (5) stopped at the colon (:), so these two paragraphs merely restate the standard language.
- Supplement I- Official Interpretations-1026.17(c)(1) Basis of Disclosures and Use of Estimates-Legal Obligation. Paragraphs (2),(4),(10),(11) and (12) are revised. Again generally, the examples in each paragraph regarding open end agreements which came after the colon (:) were omitted and are being reinserted. In the case of paragraph (10) part of the beginning of the paragraph was missing as well regarding discounted and premium variable rate transactions, and a further example iv was added explaining that when the interest rate is set based on a formula, and the index changes prior to closing, but the creditor honors the quoted rate, that is not considered a discounted rate.
- Supplement I- Official Interpretations-1026.17(c)(4) paragraph 1 on Payment schedule irregularities was revised to reinsert omitted examples.
- Supplement I- Official Interpretations-1026.17(g) Mail or telephone orders- The two conditions for when the disclosures may be delayed until the account is opened were reinserted.
- Supplement I- Official Interpretations-1026.18(g) Payment Schedule-Paragraph 4 in the earlier printed edition included the exception but had omitted the opening paragraph explaining how to disclose the timing of payments. That has now been re-entered.
- Supplement I- Official Interpretations Appendix D-Multiple Advance Construction Loans-The Official Interpretations went only as far as paragraph 6, and this revision puts back paragraph 7 which describes the interaction of 1026.18, with 1026.37 and 1026.38 (the new TRID sections) for these multiple advance construction loans whether treated as single closings or two closings.

Semi-Annual Regulatory Agenda-CFPB

On December 15, the CFPB published its six month update for the Regulatory Agenda for Fall 2015 describing current status and expected action on various regulations through Fall 2016. The agenda is always somewhat obsolete by the time published. The current iteration indicates it is current through September 2015. The full Unified Agenda for federal agencies can be found at reginfo.gov. Topics on which final rules are anticipated include: Prepaid Accounts under Regulation E and Regulation Z, Regulation CC Funds Availability, and updates to the Mortgage Servicing rules in Regulation Z and RESPA.

CFPB Adds to E-Regs

For those of you who prefer an interactive format online, the CFPB has been steadily adding to its list of such regulations. Currently at the CFPB platform we find 19 of the standard regulations from Regulation B through Regulation Z and Regulation DD, with the most recent 6 posted in early December. While the official regulations can be found either at the e-CFR or through FedSys, generally in Title 12 of the Code of

Federal Regulations, these more hyperlinked versions may prove more accessible for some.

Prudent Risk Management for CRE Lending

The three Federal Banking Agencies (FDIC, OCC and Federal Reserve) issued an interagency statement dated December 18, 2015 to highlight prudent risk management practices for Commercial Real Estate Lending. The statement provides a reminder of the regulations which apply to CRE, and the concerns when competitive pressures increase. The Agencies observed "certain risk management practices at some institutions that cause concern, including a greater number of underwriting policy exceptions and insufficient monitoring of market conditions to assess the risks associated with these concentrations."

CFPB Announced HMDA Asset Threshold

The asset-size exemption for banks, savings associations, and credit unions will remain at $44 million. As a result, these institutions with assets of $44 million or less as of December 31, 2015, are exempt from collecting HMDA data starting January 1, 2016. An institution's exemption from collecting data in 2016 does not affect its responsibility to report the data it was required to collect in 2015. The final rule amending the commentary to Reg. C was in the Federal Register on December 23.

Asset Threshold Reduced for Escrows on HPMLs

The CFPB published in the Federal Register on December 23 a change in the asset size threshold for certain creditors to qualify for an exemption to the requirement to establish an escrow account for a higher-priced mortgage loan. The exemption threshold is adjusted to decrease to $2.052 billion from $2.060 billion. Thus, creditors with assets of less than $2.052 billion (including assets of certain affiliates) as of December 31, 2015, are exempt, if other requirements of Regulation Z also are met, from establishing escrow accounts for higher-priced mortgage loans *effective* January 1, 2016. The adjustment to the escrows exemption asset-size threshold will also decrease a similar threshold for small-creditor portfolio and balloon-payment qualified mortgages. The amendment is to the Regulation Z Official Interpretations to Section 1026.35.

CRA Asset Size Threshold Adjusted

The OCC, the Board, and the FDIC amended their Community Reinvestment Act (CRA) regulations to adjust the asset-size thresholds used to define "small bank" or "small savings association" and "intermediate small bank" or "intermediate small savings association." *Effective* January 1, 2016, banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than $1.216 billion are small banks or small savings associations. Small banks and small savings associations with assets of at least $304 million as of December 31 of both of the prior two calendar years and less than $1.216 billion as of December 31 of either of the prior two calendar years are intermediate small banks or intermediate small savings associations. The amendment to Regulation BB was in the Federal Register on December 29, 2015.

FTC Statement on Deceptive Advertising

On December 22, 2015, the FTC released an enforcement policy statement explaining how established consumer protection principles apply to different advertising formats, including "native" ads that look like surrounding non-advertising content. The statement reminds businesses of the need for ads to be clearly recognizable, even when embedded in the surrounding material. The statement and an accompanying document by the FTC may provide guidance to M&M clients: Enforcement Policy Statement on Deceptively Formatted Advertisements and Native Advertising: A Guide for Business.

Privacy Notices–and the FAST Act

In December Congress passed the Fixing America's Surface Transportation Act to be known as the "FAST" Act. The President signed it December 4, at which point it became *effective* law. Buried in that monster transportation bill was a small change to the old Gramm-Leach-Bliley requirements for privacy notices.

Section 75001 of the FAST Act amends Section 503 of GLBA providing an exception to the requirement for financial institutions to send annual copies of their privacy notice. For any institution that 1) only shares non-public information as permitted in GLBA, not being

required to give an opt-out, and that 2) has not changed its policy since the notice in the prior year, the annual notice does not need to be sent.

Now, here's the rub. The law has changed, but the various regulations that implement GLBA have not been updated. The regulations still require providing at least the minimal notice that the policy is available. We have been advising clients to abide by the regulation until changed as we stated in the special section at the end of the **Practical Compliance** calendar last month. However, since then the National Association of Federal Credit Unions (NAFCU) stated in their post of December 22, that a spokesperson from the CFPB had responded to them saying the CFPB recognized that the law became effective on enactment, and that the CFPB was "conveying to its supervision and enforcement staff that the law is effective immediately so that no financial institution is expected to comply with the superseded regulatory requirements." In addition, the NCUA posted in January letter 16-CU-03 which says that as long as no changes have been made and no opt out required, no notice is needed. And further states:

> NCUA examiners will only expect annual privacy notices to be provided if your credit union does not meet the new requirements described in this letter. NCUA staff will consult with Consumer Financial Protection Bureau staff as CFPB works to implement the FAST Act's amendment to GLBA and address interactions with other laws, such as the Fair Credit Reporting Act.

We have not found similar statements from the other agencies as yet, but are hopeful the CFPB will move quickly.

Definitions: Rural & Underserved, Small Creditor

In the October edition of **Practical Compliance** we alerted our readers to the upcoming change in definitions to be *effective* in January 2016. The final rule was published in the Federal Register on October 2. The definitions impact small creditors with regard to Ability to Repay, Qualified Mortgages, and escrow requirements. The CFPB provided a Summary of the changes which is a helpful road map.

In two instances within the lengthy amendments, exceptions due to expire were extended to April 1, 2016:

- The Rule also changes the sunset date of the temporary provision for balloon-payment qualified mortgage loans available to small creditors even if they do not operate predominantly in rural or underserved areas. The Rule will permit such balloon-payment qualified mortgages for transactions with applications received before April 1, 2016.
- As with the temporary provision for balloon-payment qualified mortgages, the temporary exception regarding balloon-payment features in high-cost mortgages will apply to transactions for which an application was received before April 1, 2016.

Of course, come April, the ability to make those mortgages may expire for some smaller creditors that were able to meet the needs of their customers in that manner. Meanwhile, another change has taken place. In the recently passed FAST Act, discussed above regarding the Privacy notices, another slight amendment was made in Section 89003; the Truth In Lending Act was amended to remove the word "predominantly" from "operates predominantly in rural or underserved areas" in sections 129C and 129D of the TILA. Currently, Regulation Z requires the small creditor be "predominantly" in such areas to qualify for certain exceptions. The CFPB has consistently said that means more than 50%. The regulation still must be amended to conform to the new definition, and the manner of determining what it means to be operating in such areas will need to be explained. Once that is done, the exception for many small creditors could become larger indeed. We hope that will come prior to April 1.

M&M Compliance Group News

Marcy Rodrigue was recently promoted to Assistant Vice President, with primary responsibilities over BSA and AML validations and controls.

Roy Thattacherry joined M&M in January as a Compliance Consultant. Roy has more than 21 years of experience in consumer regulatory

compliance and auditing, and was most recently with TD Bank as a Senior Audit Manager.

Martha Howell has retired from M&M after 13 years of dedicated service. Her contributions to the company, including her efforts with this newsletter, are many. While we will all greatly miss her, we also wish her a long, happy, and healthy retirement! Thank you, Martha!

Proposals–Not Final Rules

CFPB Requests Comments on HMDA Resubmission Guidelines

Regulators currently follow standard guidelines published by the CFPB for determining when an institution is required to resubmit the HMDA LAR for the reporting year, based on the number of fields found with errors during and audit or exam.

The HMDA reporting requirements were recently expanded greatly to take effect in another year. The Bureau is considering whether changes to its HMDA Resubmission Guidelines may be appropriate for HMDA data that will be submitted. On January 12 in the Federal Register, the Bureau requested information from the public on what changes to the Bureau's Resubmission Guidelines may be needed. *Comments* are due by March 14, 2016.

In the States

Connecticut:

Debt Adjustment as Money Transmission

On January 6, the Consumer Credit Division of the Department of Banking in Connecticut posted a memorandum outlining the overlap of two activities which may require two separate licenses in the State. Effective March 1, 2016, persons engaged in activities that meet the definition of both "debt adjustment" and "money transmission" will be required to obtain both licenses in Connecticut unless exempt from licensure. The Connecticut statutes define "debt adjustment" as "for or with the expectation of a fee, commission or other valuable consideration, receiving, as agent of a debtor, money or evidences thereof for the purpose of distributing such money or evidences thereof among creditors in full or partial payment of obligations of the debtor". Likewise, Connecticut law considers persons receiving funds from consumers for future transmission to creditors to be engaged in the business of money transmission. Connecticut will be enforcing those definitions, which may potentially impact financial institutions with customers engaged in such business.

Connecticut: Interest on Escrows and Rent Security Deposits

On December 7, 2015 the Commissioner of the Connecticut Department of Banking announced the deposit index to be 0.08% *effective* in 2016. The deposit index is used to determine the interest rates required by statute to be paid for various accounts. The index is based on average rates paid on savings deposits and must be determined annually by the Banking Commissioner. Based on the index, the minimum rate for escrows, which is rounded to the nearest 1/10th, will be .10% in 2016. The minimum rate for rental security deposits will be 0.08%.

Massachusetts Right to Cure Period Reverts Back to 90 Days

On January 1, 2016, the Massachusetts "*Right to Cure*" statutory notice once again became a 90 day notice. We have heard that the Division of Banks has been working on revisions to the regulations, including the right to cure notice form (209 CMR 56.04) and the right to request a modified mortgage loan (209 CMR 56.09).

New Hampshire: Interest on Escrows

The N.H. Deputy Bank Commissioner announced the minimum interest rate payable on amounts in escrow accounts maintained for the payment of taxes or insurance premiums related to loans on property secured by real estate mortgages. The escrow rate *effective* for the period February 1, 2016 through July 31, 2016 is 0.00%.

Good to Know

Send your questions to the answerperson@mmconsulting.info

Sending requests to the above address gets you a written response to your questions. Emails sent to the answer person are received five days a week.

Q: I have a HMDA question regarding a specific transaction from this past quarter; a $6,000,000 loan we made to a company that owns and manages a community. There are 38 buildings in the community with a total of 114 units; my question has to do whether to classify the property type as 1-4 family or multi family. None of the buildings have more than 4 units; however, my concern is reporting a $6,000,000, non-owner occupied loan as 1-4 family, especially in the area the community is locate. It would certainly misrepresent the transaction.

I was wondering what your opinion would be for reporting this transaction on the HMDA LAR?

A: You have a couple of options, and can go with whichever one works best for you. However, regardless of the option selected, the transaction(s) would be reflected on the LAR as 1-4 family.

- You can report it as a single entry on the LAR. We are assuming that as there are 38 buildings, there are also multiple addresses involved. You can pick one of them to use for geocoding purposes. This might cause a "quality error", and could also cause the transaction to stand out for examiner selection. However, the transaction is still accurately reflected on the LAR, it's just outside the typical parameters. We don't see this option as causing you any real problem.

- Assuming each building has a different address, you could also report this loan on the LAR using 38 entries; one for each property (building) address; using a main LAR number followed by -1 through -38 to tie them all together; and pro-rate the loan amount for each based on the total loan amount.

Q: A few months ago we decided to accept loan payments by credit card, in certain circumstances only. Up until now, we have absorbed the fee that the credit card company charges and not passed it along to the customer. After further consideration, we have decided to revise this procedure and I have a couple of questions:

1. Are we allowed to pass this charge off to the customer as a fee?
2. Are we allowed to up charge this fee?

In other words, if the credit card company charges us a fee of 1.6% of the amount charged, can we charge the customer 2.6% keeping the additional 1% as our fee for processing the transaction? If so, what do we need to disclose to the customer and where do we need to disclose it, remembering that this isn't a service we advertise and is not readily available for all mortgage payments.

A: While this practice is permissible in some parts of the country, it is specifically prohibited in Maine, Massachusetts, New York, and Connecticut (as well as in six other states). Other states are reportedly considering similar bans.

The bank would basically be acting like a merchant who accepts credit card payments, so we believe these rules and restrictions would apply in this case.

We could not find many institutions that openly advertised accepting credit card payments for other types of loans. We found references about certain larger banks accepting such payments in the past, but they have since discontinued the practice. It sounds like there may have been some UDAP issues which led them to stop.

Q: When a person is refinancing a loan with no pay off involved our LOS system is printing Home Equity in the product description of the LE. If we put a number in liabilities to be paid off then it says refinance. Does the LE have to state the loan is a Home Equity if there are no mortgages to be paid off and it is a refinance? Is this the standard on the LE?

A: Your system is handling the loan appropriately. It complies with the "Purpose" definition criteria set forth in *§1026.37(a)(9)* and the associated Official Interpretations *(see below)*. Basically, the "Home Equity" purpose is the required default value when the loan does not fit the definitional requirements for purchase, refinance, or construction, which are also provided within *§1026.37(a)(9)*.

Regulation - §1026.37(a)(9)(iv) - Home equity loan.

If the credit is not for one of the purposes described in paragraphs (a)(9)(i) through (iii) of this section, the creditor shall disclose that the loan is a "Home Equity Loan."

Official Interpretation to 37(a)(9) - Purpose.

1. *General. Section 1026.37(a)(9) requires disclosure of the consumer's intended use of the credit. In ascertaining the consumer's intended use, §1026.37(a)(9) requires the creditor to consider all relevant information known to the creditor at the time of the disclosure. If the purpose is not known, the creditor may rely on the consumer's stated purpose. The following examples illustrate when each of the permissible purposes should be disclosed.*

1. iv. *Home equity loan. The creditor is required to disclose that the credit is for a "home equity loan" if the creditor intends to extend credit for any purpose other than a purchase, refinancing, or construction. This disclosure applies whether the loan is secured by a first or subordinate lien.*

Q: I have a question regarding Home Equity Lines of Credit (dwelling-secured) and Late Fees. After reviewing various sections of Mass General Law, it appears to me that a late fee can be charged on a HELOC when it's disclosed before an account is opened *(Chapter 140D, Section 11)*, and also when it's included in loan documents *(Chapter 183, Section 59)*.

However, it also appears to me that if this information is not disclosed before an account is opened and in the loan documents, then a change of terms notice regarding the delinquency charge can be sent at least thirty days prior to a customer being charged *(Chapter 140, Section 114B)*. Am I interpreting these laws correctly?

A: *§1026.40(f)(3)* of Regulation Z prohibits you from making any such change to an existing HELOC. You can only establish this late charge provisions for new accounts, after updating the note and disclosures accordingly. As *§1026.40(f)(3)* is beneficial to the consumer, without doing a formal search, we can't imagine that the MGLs would allow for anything to the contrary. Even if it did, Reg. Z would prevail in this instance.

Important Dates– Don't Forget!

(Generally we retain the prior month, and go forward for at least a year as known. Dates are either effective dates of final rules, or end of the comment period for proposed rules.)

12/07/2015 FDIC Compliance Examination Manual. Updated reflect recent supervisory guidance.
01/01/2016 Flood Insurance Regulations. Escrow rules effective.
01/01/2016 Regulation Z. Small Creditor, Rural and Underserved Areas definitions revised.
01/01/2016 Rural and Underserved Counties lists at the CFPB for 2016.
01/01/2016 Regulation Z. Higher Priced Mortgage Loan Appraisal Threshold $25,500.
01/01/2016 HMDA, Regulation C. Asset Size Exemption Threshold remains at $44 million.
01/01/2016 CRA, Regulation BB. CRA asset-size thresholds for small and intermediate-small institutions.
01/25/2016 FinCEN Proposed Rule-CDD. Regulatory Impact Assessment & Initial Flexibility Analysis.
02/08/2016 NCUA Proposed Rule–Chartering and Field of Membership Manual. Comprehensive revision.
10/01/2017 Military Lending Act Regulation. Sections on credit card accounts become mandatory.
01/01/2017 HMDA, Regulation C. Low volume institutions further excluded from coverage.
01/01/2018 HMDA, Regulation C. Revised transaction coverage and expanded fields effective.
01/01/2019 HMDA, Regulation C. Quarterly reporting starts.

