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Practical Compliance

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In This Issue

Final Rule Amendments: TILA–RESPA Integrated Disclosures

On July 7, 2017, the Consumer Financial Protection Bureau (CFPB) issued its Final Rule on the Amendments to the TILA-RESPA Integrated Disclosure Rule, a.k.a. the "Know Before You Owe" (KBYO) Mortgage Disclosure Rule.

The Final Rule Amendments provide guidance, clarifications, and technical corrections on a broad range of topics. The Final Rule Amendments include substantive changes in three areas, which are the focus of this article:

- Total of Payments – Clarifies Closing Disclosure calculations (i.e., Total Loan Costs), and establishes tolerance provisions for the disclosed CD Total of Payments;
- Housing Assistance Loans - Clarifies §1026.3(h) exemptions from TRID requirements for certain housing assistance loans; and
- Cooperative Units - Extends the rule's coverage to include all cooperative units, regardless of whether they are treated as real property under State law.

In addition, the Final Rule Amendments:

- Provide expanded commentary to facilitate the sharing of disclosures with third parties, such as sellers and real estate brokers; and
- Make extensive technical corrections and clarifications regarding:
  - affiliate charges,
  - calculating cash-to-close table,
  - construction loan instructions,
  - placement of decimal places and rounding,
  - escrow account disclosures,
  - escrow cancellation notices,
  - expiration dates for the closing costs disclosed on the loan estimate,
  - treatment of gift funds,
  - payment ranges on the projected payments table, and
  - informational updates to the loan estimate.

Although some of the Final Rule Amendments may require one-time reprogramming costs, the Bureau does not believe these changes will increase ongoing origination costs, and that these changes will be burden reducing or burden neutral. Further, the Bureau believes that both creditors and consumers will generally benefit from the adopted changes: creditors - through greater clarity, and in some cases, additional optionality, regarding compliance with existing law; and consumers - by receiving more timely and more accurate disclosures.

The Final Rule will take effect 60 days after publication in the Federal Register (FR publication pending as of 07/28/17), with a mandatory compliance date of 10/01/18.

Total of Payments

Prior to the TILA-RESPA Final Rule, the calculation of the Total of Payments was based directly on the finance charge. Thus, the disclosure of the Total of Payments was generally subject to the statutory tolerances for the finance charge and disclosures affected by the finance charge. The TILA-RESPA Final Rule modified the Total of Payments calculation, which introduced ambiguities as to (1) the proper interpretation of "Total Loan Costs", a new component of the calculation, for purposes of the Closing Disclosure (CD), and (2) whether the Total of Payments on the CD is affected by the disclosed finance charge and therefore subject to the same tolerances.

- **Calculation**
  - ***Calculation Redefined:*** TILA-RESPA Final Rule calculation for the Total of Payments (ToP) is based on the principal paid, repayment period and per-diem interest, total loan costs, and if applicable, and all mortgage insurance premiums (prepaid, escrowed, and repayment period). For purposes of the Loan Estimate (LE), the ToP calculations represents these amounts paid in the first five-years of the loan, whereas for the CD, the ToP calculation reflects these amounts paid over the life of the loan.
  - ***Calculation Ambiguities – Total Loan Costs:*** TILA-RESPA Final Rule did not clearly state the CFPB's intent with respect to the "Loan Costs" to be used in these calculations. For the LE ToP calculation, the regulation and commentary indicated that as the LE does not provide for any distinction between Loan Costs that are borrower-paid and those that are paid by others, the Loan Costs used in the LE ToP calculation includes the Total Loan Costs reflected in Section D on Page 2 of the LE, regardless of the party that might ultimately pay for them.

    With respect to the CD ToP calculation, the regulation and commentary basically cross-referenced back to the comparable sections the regulation and commentary regarding the LE. This cross-referencing "shortcut" caused many institutions and software providers to interpret this as meaning that the CD ToP calculation also included all Loan Costs; and not just those that are borrower-paid, and reflected in Section D on Page 2 of the CD. M&M did not interpret this Rule in this manner, and since the implementation of the TILA-RESPA Final Rule, has been advising clients that the Total Loan Costs used in the CD ToP calculation should reflect only the borrower-paid Loan Costs, which are reflected in Section D on Page 2 of the CD.
  - ***Calculation Clarification – Total Loan Costs:*** The Proposed Amendments to the Final Rule, published in the Federal Register on 08/15/16, clarified the CFPB's intent that the Total Loan Costs used in the CD ToP calculation reflects only the borrower-paid Loan Costs, which are reflected in Section D on Page 2 of the CD. This clarification has been carried forward into the Final Rule Amendments, in §1024.38(o)(1), Total of Payments.
- **Tolerance Provisions**

  As previously noted, the TILA-RESPA Final Rule did not address the subject of ToP tolerance provisions, under the new ToP definition, making it unclear as to what, if any, tolerance parameters applied to this "new" disclosure calculation. Because the Final Rule did not provide for a tolerance for the ToP, other than a ToP disclosure error resulting from an error involving the finance charge, a ToP disclosure error resulting from an error in something other than the finance charge could potentially subject a creditor to liability under TILA.

  The Final Rule Amendments include ToP tolerance provisions within §1026.23(g)(1), §1026.23(g)(2), and §1026.23(h)(2), that parallel the tolerances that have previously existed for the finance charge and disclosures affected by the finance charge. Specifically:
  - §1026.23(g)(1)(ii) states that: *The Total of Payments for each transaction subject to § 1026.19(e) and (f) shall be considered accurate for purposes of this section if the disclosed Total of Payments:*

(A) Is understated by no more than 1/2 of 1 percent of the face amount of the note or $100, whichever is greater; or
(B) Is greater than the amount required to be disclosed.

- §1026.23(g)(2)(ii) provides for a one percent tolerance in a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 1026.32), if there is no new advance and no consolidation of existing loans. It states that: *The Total of Payments for each transaction subject to § 1026.19(e) and (f) shall be considered accurate for purposes of this section if the disclosed Total of Payments:*
  (A) Is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or
  (B) *Is greater than the amount required to be disclosed.*
- and §1026.23(h)(2)(ii) states that: *After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the Total of Payments for each transaction subject to § 1026.19(e) and (f) shall be considered accurate for purposes of this section if the disclosed Total of Payments:*
  (A) Is understated by no more than $35; or
  (B) Is greater than the amount required to be disclosed.

In all cases, the tolerance for the ToP disclosure is based on the accuracy of the ToP, taken as a whole, rather than in its component charges.

The Bureau believes that these Final Rule Amendments will benefit creditors, in the limited circumstances where a small, within tolerance, ToP disclosure error occurs. Creditors and their assignees will be less likely to face litigation, and its accompanying costs and risks, resulting from such errors. Further, the Bureau does not believe that creditors will bear any associated costs from the adopted provision, other than from one-time reprogramming costs, for those with proprietary software systems.

Housing Assistance Loans

The TILA-RESPA Final Rule provided a partial exemption for certain low-cost down payment or other types of housing assistance loans originated by housing finance agencies (HFAs), or by creditors that partner with HFAs, and originate loans in accordance with HFA guidelines. The partial exemption was designed to facilitate such low-cost lending by HFAs and their partners in the recognition that such loans provide consumers with significant benefits.

The Final Rule Amendments expand the scope of this partial exemption by clarifying that recording fees and transfer taxes may be charged in these transactions without adversely impacting the loan's eligibility for the partial exemption. Further, the Final Rule Amendments also exclude recording fees and transfer taxes from being counted toward the exemption's 1% limit on costs. With these Amendments, more housing assistance loans will qualify for the partial exemption, which should encourage these loans.

The TILA-RESPA Integrated Disclosure Rule partial exemption at §1026.3(h), which, as cross-referenced at Regulation X §1024.5(d)(2), also provides an exemption from the RESPA disclosures. Under the TILA-RESPA Final Rule, lenders that are not subject to the Rule, and are not eligible for the partial exemption under §1026.3(h), were required to provide the standard RESPA disclosures.

However, with the implementation of the TILA-RESPA Integrated Disclosure Rule, many lenders stopped offering residential mortgage products that are not subject to the Rule, such as reverse mortgages. Lenders that continue to offer such products often do so through separate divisions that do not engage with, or operate on separate systems that do not support, housing assistance loan programs. Further, some vendors and loan originator systems have stopped supporting the RESPA disclosures, so software systems used by HFAs may no longer support the RESPA disclosures, making it necessary to complete RESPA disclosures manually. Manual completion of the disclosures, while compliant, may be costly and error-prone. Given these

developments, there was concern that some lenders would be less willing to work with HFAs and other organizations to continue providing these housing assistance loans.

The Final Rule Amendments revise §1026.3(h)(6) to permit lenders to provide either the TILA disclosures described in §1026.18 or the LE and CD described in §1026.19(e) and (f), respectively, to meet the criteria for the partial exemption, without also having to provide the special information booklet described in §1026.19(g). These loans also qualify for the partial exemption in §1024.5(d)(2) of Regulation X, and lenders are exempted from providing the applicable RESPA disclosures The Bureau believes the flexibility provided by the Final Rule Amendments to §1026.3(h)(6) will further expand consumer access to the partial exemption, and increase the willingness of lenders to work with HFAs and other organizations in providing such loans.

Cooperatives

The TILA-RESPA Final Rule only covered transactions secured by real property, as defined under state law. Cooperatives are sometimes treated as personal property under state law and sometimes as real property. Further, as noted in the section-by-section analysis of §1026.19, State law varies, sometimes even within the same State, as to whether cooperative units are treated as real property. The Final Rule Amendments extend the Rule's coverage to include all cooperative units, creating uniformity by requiring lenders to provide the Integrated Disclosures for all covered transactions secured by cooperative units.

Other Matters - Privacy and Sharing of Information

The Final Rule Amendments contain additional commentary to §1026.38(t)(5)(v) and (vi) clarifying how lender and settlement agents can provide separate disclosure forms to the consumer, the seller, or their respective real estate brokers or other agents.

Specifically, the Commentary to §1026.38(t)(5)(v) states that lenders can either modify the CD form accordingly, or provide separate disclosures to the consumer and to the seller.

Permissible modification of CD forms includes:

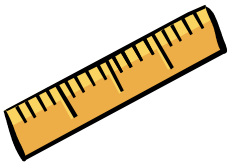
- Leaving the applicable disclosures blank concerning the seller or consumer on the form provided to the other party;
- Omitting the table or label, as applicable, for the disclosure concerning the seller or consumer on the form provided to the other party; or
- Providing the seller, or assisting the settlement agent in providing to the seller, a modified version of the form under §1026.38(t)(5)(vi), as illustrated by form H-25(I) of appendix H.

With respect to lenders providing consumer or seller information to real estate brokers, or other agents of the consumer or seller, the Commentary to §1026.38(t)(5)(vi) states that lenders can make the permissible form modifications discussed in Comment 38(t)(5)(v)-1 to separate consumer and seller information lenders on forms provided to these specified third-parties.

Other Matters - Technical Corrections and Clarifications

As previously noted, the Final Rule Amendments contain extensive technical corrections and clarifications regarding several topics (i.e., affiliate charges, calculating cash-to-close table, construction loan instructions, placement of decimal places and rounding, escrow account disclosures, escrow cancellation notices, expiration dates for the closing costs disclosed on the loan estimate, treatment of gift funds, payment ranges on the projected payments table, and informational updates to the loan estimate) that are too numerous to cover in this article. However, as the mandatory compliance date for the Final Rule Amendments is 10/01/18, we will discuss them in upcoming editions of *Practical Compliance* in a section entitled "TRID-bits".

Short Clips



FDIC Updates Exam Communication Guidance

On 07/26/17, the FDIC issued FIL-31-2017, announcing that the *Risk Management Manual of Examination Policies* had been updated, primarily to implement key directives from its board of directors. The board moved to expand banks' rights to appeal exam decisions and to improve regulatory consistency in exam processes. The new manual instructs examiners that supervisory recommendations must address meaningful concerns, be communicated clearly and in writing in a report of examination or on official FDIC letterhead and discuss corrective action. Supervisory recommendations in ROEs are to be communicated in post-exam materials.

FDIC Revises Affordable Housing Program Guide

On 07/26/17, the FDIC issued FIL-30-2017, announcing the release of a new version of the *Affordable Mortgage Lending Guide, Part II: State Housing Finance Agencies*. The guide is part two of a three-part series covering federal, state and FHLB affordable housing support. Changes to the newest version include product and program updates from state agencies, the addition of a new program and the addition of alternative private mortgage insurance options.

FFIEC CRA & HMDA Website Updates

In the months of June and July, the FFIEC announced following updates to its CRA website and HMDA website:

- On 07/21/17, the 2017 CRA Data Entry Software Release 2 was made available on the CRA website. The free software, designed by the Federal Reserve System, assists respondents in automating the filing of their CRA data, and includes editing features to help verify and analyze the accuracy of the data. The data file created using this software can be submitted by one of the available submission methods listed within the software.
- On 07/07/17, both websites were updated to include the 2017 Census Data Products release, and updates to the 2017 Geocoding System the 2017 Census demographic data based on the 2011 – 2015 five year estimate American Community Survey (ACS).
- On 06/21/17, the Distressed or Underserved Nonmetropolitan Middle-Income Geographies List was made available on the CRA website.

Agencies Issue Proposal to Increase Mandatory CRE Appraisal Thresholds

On 07/19/17, the FDIC, the Board of Governors of the Federal Reserve System (Fed), and the Office of the Comptroller of the Currency (OCC) [the Agencies] jointly issued a notice of proposed rulemaking titled *Real Estate Appraisals (Appraisal NPR)* that will be published in the Federal Register (FR publication pending as of 07/28/17) for a 60-day comment period. The Appraisal NPR proposes to increase the current appraisal threshold for commercial real estate (CRE) transactions from $250,000 to $400,000. The Appraisal NPR addresses comments received during the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) review process.

CFPB Proposes Temporary Adjustments for HMDA Reporting Requirements

On 07/14/17, the CFPB issued a proposal to raise the threshold at which banks are required to report data on home equity lines of credit. Under the rule, banks originating more than 100 HELOCs are generally required to report under HMDA. The proposal would raise that threshold to 500 HELOCs for the calendar years 2018 and 2019, giving the CFPB time to determine if it will make the adjustment permanent. Comments on the proposal are due by July 31, 2017. The Bureau will issue a separate proposal with a longer notice and comment process to consider adjustments to the permanent threshold at a later date.

CFPB Issues Final Rule Curtailing Arbitration Agreements

On 07/10/17, the CFPB issued a Final Rule on Arbitration Agreements. The Final Rule prohibits customers from waiving their ability to participate in class action suits, and limits drastically the use of mandatory arbitration agreements for financial products and services. Banks of all sizes often include mandatory

arbitration clauses in their credit card and deposit account agreements to manage the unpredictable costs of class action lawsuits and ensure prompt resolution of disputes. By limiting the usefulness of arbitration clauses, the Final Rule could ultimately result in arbitration clauses being removed from financial services contracts.

The Final Rule covers products and services provided by depository institutions, nonbank lenders and money transmitters that provide covered products to more than 25 consumers annually. It requires institutions that continue to employ arbitration to submit to the bureau certain claim records, agreements and arbitrator communications related to ongoing arbitrated disputes. The Bureau will publish these redacted records on its website.

The Final Rule was published in the Federal Register on 07/19/17, has an effective date of 09/18/17. The Rule applies only to agreements entered into on or after 03/19/18.

However, on 07/25/17, House lawmakers voted to overturn the CFPB's Final Arbitration Rule, exercising their authority under the Congressional Review Act to reject new federal regulations within 60 legislative days of publication in the Federal Register. A similar measure has been introduced in the Senate.

CFPB Issues TRID Amendments Final Rule, and Additional Proposed Rule

On 07/07/17, the CFPB issued a Final Rule on the Amendments to the TILA-RESPA Integrated Disclosure Rule, *(see lead article)*, along with a separate Proposed Rule with a request for comment on when a creditor may use a closing disclosure instead of a loan estimate to determine if an estimated closing cost was disclosed in good faith.

The Final Rule sets forth guidance, clarifications and technical corrections on a broad range of topics, such as including establishing tolerance provisions for the disclosed Total of Payments; clarify exemptions from TRID requirements for certain housing assistance loans and extending the rule's coverage to all cooperative units; providing expanded commentary to facilitate the sharing of disclosures with third parties, such as sellers and real estate brokers; and making extensive technical corrections and clarifications on topics including affiliate charges, calculating cash-to-close table, construction loan instructions, placement of decimal places and rounding, escrow account disclosures, escrow cancellation notices, expiration dates for the closing costs disclosed on the loan estimate, treatment of gift funds, payment ranges on the projected payments table and informational updates to the loan estimate.

The Final Rule will take effect 60 days after publication in the Federal Register (FR publication pending as of 07/28/17), with a mandatory compliance date of 10/01/18.

The separate Proposed Rule, with request for public comment, addresses when a creditor may use a closing disclosure instead of a loan estimate to determine if an estimated closing cost was disclosed in good faith. The proposal is issued in response to the "black hole" concern raised in earlier comments, and would allow creditors to use either initial or corrected closing disclosures to reflect changes in costs for purposes of determining if an estimated closing cost was disclosed in good faith, regardless of when the closing disclosure is provided relative to consummation. Comments on the proposal will be due 60 days after publication in the Federal Register (FR publication pending as of 07/28/17).

CFPB Proposes Further Changes to Prepaid Rule; Issues Compliance Guide

On 06/29/17, the CFPB's Proposed Rule with request for public comment regarding changes to its final rule on prepaid products, whose implementation has been delayed until 04/01/18, was published in the Federal Register. The Bureau seeks comments on whether to further delay the rule's implementation date due to the time needed to comply with the proposed changes.

Specifically, the Bureau is proposing to revise the error resolution and limited liability provisions of the prepaid rule to clarify that "financial institutions would not be required to resolve errors or limit consumers' liability on unverified prepaid accounts." The CFPB proposed a limited exception to the prepaid rule for credit card accounts linked to "digital wallets" that customers use to store funds, since the credit card accounts are already subject to Regulation Z. The Bureau also proposed several minor

clarifications and technical adjustments. Comments are due by 08/14/17.

The CFPB also released an updated version of its Prepaid Rule Small Entity Compliance Guide, which reflects the delay of the effective date and several elements of additional guidance.

CFPB Issues Policy Guidance on Compliance Dates for Servicing Rule Amendments

On 06/27/17, the CFPB issued Policy Guidance stating that it does not intend to take supervisory or enforcement action for violations of existing Regulation X or Regulation Z resulting from a servicer's early compliance with the 2016 Final Servicing Rule for a period of three days before the applicable effective dates.

Certain amendments to the rule will take effect on Thursday, 10/19/17, while others have a compliance date of Thursday, 04/19/18. Servicers are prohibited from early adoption of some of the 2016 servicing amendments, which is problematic given the midweek compliance deadlines. Under the new Policy Guidance, servicers would be permitted to implement the new rules the Monday before the Thursday effective date. This will allow servicers to update and test their systems over a weekend rather than over a weeknight.

In addition, the CFPB also announced technical corrections to the rule, including those related to official comments and certain periodic statement sample forms, and the CFPB's authority citation for Regulation Z.

Reg. CC Updates – Faster Check Processing and Electronically-Created Items

On 06/15/17, the Fed's Final Rule regarding changes to certain sections of Regulation CC, which implements the Expedited Funds Availability Act, was published in the Federal Register. The changes will update the check collection framework to reflect a system that is now largely electronic-based. The amendments do not address the sections of Regulation CC regarding funds availability schedules or related customer notices. The Final Rule becomes effective on 07/01/18.

In addition to the Final Rule, the Fed issued a Proposed Rule, with request for comment, was published in the Federal Register on 06/02/17. The Fed seeks comments on its proposed amendments to address situations involving a dispute about whether portions of an electronic check have been altered or whether the item is a forgery. In cases where the original paper check is not available, for purposes of determining the burden of proof, it would be assumed that the item has been altered rather than forged. Comments on the proposal are due by 08/01/17.

Agencies Issue Interagency Advisory on Appraiser Availability

On 05/31/17, the Fed, the FDIC, the NCUA, and the OCC issued an Interagency Advisory that highlights two options to help insured depository institutions and bank holding companies facilitate the timely consideration of loan applications, to address concerns over the limited availability of state-certified and -licensed appraisers, particularly in rural areas.

Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) requires appraisals for federally related transactions to be performed by individuals who meet certain state-certification or -licensing requirements. The Advisory cites the following alternatives that may help in areas facing a shortage of appraisers:

- *Temporary Practice Permits*, allows appraisers credentialed in one state to provide their services on a temporary basis in another state experiencing a shortage of appraisers, subject to state law. The advisory also discusses reciprocity, in which one state allows appraisers that are certified or licensed in another state to obtain certification or licensing without having to meet all of the state's certification or licensing standards.
- *Temporary Waivers*, sets aside requirements relating to the certification or licensing of individuals to perform appraisals under Title XI of FIRREA in states or geographic political subdivisions where certain conditions are met. Temporary waivers may be granted when it is determined that there is a scarcity of state-certified or -licensed appraisers leading to significant delays in obtaining an appraisal.

Good to Know

Send your questions to the *answerperson@mandm.consulting*

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

Q: To cost record a mortgage is $175. and the registry charges an additional $2.00 for postage and handling for each instrument. Can we pass this postage and handling fee on to the borrowers, and if so, should it be listed on the CD in recording fees or as a courier fee?

A: Comment 37(g)(2)-2, *Taxes and Other Government Fees / Other Government Charges*, states that *"Any charges or fees imposed by a State or local government that are not transfer taxes are aggregated with recording fees and disclosed under § 1026.37(g)(1)(i)".*

Based on the above Comment, and assuming that the mortgage in the example you cited is the only document being recorded, you would list the itemized fee for recording the mortgage as $175.00, and the aggregate recording fee amount in the column as $177.00.

Q: An appraisal came in lower than anticipated, triggering a .5 hit to the price on a cash-out refinance. Is that an allowable circumstance to lower the closing cost credit?

A: Based on §1026.19(e)(3)(iv) and the related commentary, it is unlikely that this meets the criteria for a "changed circumstance", unless there is an increase in settlement charges / loan costs associated with the increase in interest rate that exceeds the applicable tolerance thresholds. However, even if it qualified as a "changed circumstance", in my opinion, you cannot decrease the amount of the Lender Credit originally disclosed. The only situation where this appears to be allowed is outlined in §1026.19(e)(3)(iv)(D), where the interest rate had not yet been locked, and the borrower then locks the rate due to the lower than anticipated appraised value.

Q: We've had a couple of instances where the borrower didn't indicate during the loan process that they would need a power of attorney at closing. Thus, this was never disclosed on the Loan Estimate. It wasn't until we went to schedule the closing that the borrower indicated they needed a POA. This change resulted in new fees; one to prepare the POA document, and another to record it at the registry of deeds. These fees (i.e., $100 and $34.50, respectively) need to be disclosed on the CD. Would they be in the 10% tolerance category, the zero-tolerance category, or the not subject to tolerance category? Also, where is the best place to list these fees on the CD?

A: Since these additional items represent changes requested by the borrower, you have a bona fide "change in circumstance" under §1026.19(e)(3)(iv)(C). Comment 19(e)(3)(iv)(C)-1, *"Revisions requested by the consumer, Requirements"*, states the following:

> *If the consumer requests revisions to the transaction that affect items disclosed pursuant to § 1026.19(e)(1)(i), and the creditor provides revised disclosures reflecting the consumer's requested changes, the final disclosures are compared to the revised disclosures to determine whether the actual fee has increased above the estimated fee. For example, assume that the consumer decides to grant a power of attorney authorizing a family member to consummate the transaction on the consumer's behalf after the disclosures required under § 1026.19(e)(1)(i) are provided. If the creditor provides revised disclosures reflecting the fee to record the power of attorney, then the actual charges will be compared to the revised charges to determine if the fees have increased.*

Since it sounds like an initial Closing Disclosure has been provided, you can't issue a revised Loan Estimate at this point to comply with Comment 19(e)(3)(iv)(C)-1. However, Comment 19(e)(4)(ii)-1 provides examples where, in such cases, the changes are accomplished via a revised Closing Disclosure. Based on this Comment, the revised disclosure amounts technically become the basis for the good faith determination, and as such, reset the total charge amounts, as applicable, with respect to the tolerance calculations.

In my opinion, the power of attorney documentation fee would be listed in Section C, Services You Shopped For, given the Bank would typically require such documentation had it known about it sooner. The recording fee would not be itemized, but the amount of the fee would be included in the total recording fee amount listed in the column in Section E of the CD.

Q: We currently allow our customers to shop for their attorneys under TRID. Any attorney that is used is subject to vetting to ensure they are qualified to complete the legal work. I've been asked if we can charge a higher processing fee when the customer chooses an attorney that is not on our provider list.

We are finding that we are spending a lot more time on the loan in these situations because of the review of the attorney approval, getting updated insurance policies, the delay/follow up to verify the title search has been done and whether there are any legal issues, etc.

A: Your question brings up a couple of issues that you need to consider:

- First, it sounds like you would be able to justify a higher processing fee in cases where a customer selects an attorney that is not on your provider list. I caution that you make the charge differential "reasonable", so as not to be viewed as an "unearned fee", in violation of §1024.14 of RESPA.
- The other issue relates to your disclosure of the processing fee on the LE & CD. As it is classified as an "origination charge", it is subject to a zero tolerance. Since you are allowing the borrower to shop for an attorney, you don't have any tolerance concerns with the attorney fee when the customer selects one that is not on your provider list. However, I have not read anything that allows for an increase in "associated" charge in such cases.

As such, if you decide to go this route, you might consider disclosing the higher processing fee on the LE, but that you have a process in place to ensure that the "standard" processing fee is charged and disclosed on the CD, where applicable. This will help avoid any tolerance violations of §1026.19(e)(3)(i) of Regulation Z, and will also help avoid any inadvertent violations §1024.14 of RESPA.

Q: We have always provided a Reg. GG Notice to our commercial customers, including municipalities, informing them that illegal internet gambling is prohibited and that they agree that they will not use their account for illegal internet gambling. I am wondering, however, if municipal accounts fall under the category of commercial customers for purposes of Reg. GG, and if we must provide them with this notice?

A: Yes, you do need to include municipal accounts in this group.

Section §233.2(i) of Regulation GG provided the following definition of "commercial customer":

> *Commercial customer means a person that is not a consumer and that contracts with a non-exempt participant in a designated payment system to receive, or otherwise accesses, payment transaction services through that non-exempt participant.*

I find nothing in the regulation that provides any further exemption / exclusion from this definition.

Q: We do not use credit scores in our loan decision process for our residential mortgage lending programs. We do, however, pull credit reports which contain scores. These populate into our LOS, and in the event of a denial, they populate to the Notice of Action Taken. These Notices further indicate we used the score in making our decision, even though we did not. What is the proper way to treat this on the notice in your opinion?

A: There's a section in the preamble of the *Regulation B Final Rule* published in the Federal Register on 07/15/11 entitled Use of a Credit Score which states the following:

> *"Section 1100F of the Dodd-Frank Act requires disclosure if a credit score was used in taking adverse action. A creditor that obtains a credit score and takes adverse action is required to disclose that score, unless the credit score played no role in the adverse action determination. If the credit score was a factor in the adverse action decision, even if it was not a significant factor, the creditor will have used the credit*

score for purposes of section 1100F of the Dodd-Frank Act".

If you can say with certainty that the credit score information obtained plays absolutely no part in the adverse action determination, you should contact your LOS provider to see if they can modify the programming so that the affected section of the Adverse Action Notice populates correctly.

However, if the credit score obtained even minimally contributes to the adverse action determination, that disclosure should be included in the Adverse Action Notice, as noted in the preamble.

Q: We have a borrower in a Purchase transaction that we disclosed $4,500 on the LE for Current Use Tax as necessary. The P & S now dictates the SELLER will pay the tax at closing. We do not prepare the Seller CD, and are not certain how to properly account for this on the Borrower CD? We considered indicating Seller Paid at Closing BUT that will partially populate the Seller side of the Borrower CD and not completely represent the Seller costs. Please advise.

A: The Current Use Tax falls under the category of a Transfer Tax for TRID purposes (basically by not being a recording fee). Your thought on how to record the charge on the Borrower CD is right on target. Comment 38(g)(1)-2 indicates that all transfer taxes paid as part of the transaction are to be itemized accordingly on the Borrower CD on the appropriate line(s) (as many as needed) and in the appropriate paid by borrower-, seller-, other- columns.

Q: Is it required (or maybe best practice) to have a separate provider list for a refinance versus a purchase? A banker friend told us that their bank was written up because they listed a pest inspection and home inspector on their service provider list for a refinance, when those services are not required for a refinance.

A: Having separate provider lists for purchase and refinance transactions is not required under Regulation Z, nor did I find any mention of such a practice one way or another in my online inquiries of the matter. If you want to pursue this approach, but don't wish provide separate listings, you should check with your LOS provider to see if the text of the provider list can be modified / amended to either add a general "as applicable" statement to the list, or to label those services that are applicable to refinance transactions only.

Q: We have a property that is a bed and breakfast, with a detached barn that is used to store equipment. Since the barn is a detached structure, can it be excluded from having flood insurance? Or, is the Bed and Breakfast considered a commercial property, so the detached structure exemption doesn't apply?

A: FEMA's General Rules state that Bed and Breakfast Inns are considered non-residential buildings. As such, you are correct that the detached structure flood insurance exemption does not apply in this case.

I base my opinion on the information provided in the 2013 National Flood Determination Association Presentation (Slide #12) and the FDIC Flood Insurance FAQ Presentation (Slide #13).

Q: Are LE/CDs required on investment property loans? We currently provide a HUD settlement statement on loans involving investment properties, but have heard from some of our peers that they now provide an LE/CD on investment property loans because Freddie has started to require them.

A: It depends. Investment property transactions are subject to Regulation Z and TRID if the transaction is primarily for a consumer purpose. See Comments 26.3(a)-4 & 5 for further clarification on covered / non-covered transactions. However, if an investor is requiring that you have an LE / CD for all investment property transactions, you need to comply with their requirements if you want to have them purchase the loan.

Q: Are we required to have the CD signed by at least one of the borrowers prior to closing? There seem to be differing opinions on this point.

A: You do not necessarily have to have the CD signed prior to closing. However, you must be able to support / document that the borrower received a copy of the CD at least three business days in advance of the closing date.

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.)

07/10/2017 CFPB, Request for Comment - Effectiveness of the Servicing Rule. End of Comment Period.
07/31/2017 CFPB, Proposed Temporary Adjustments to HMDA Reporting Requirements. End of Comment Period.
08/01/2017 Federal Reserve, Regulation CC Proposed Rule on Certain Disputes. End of Comment Period.
08/14/2017 CFPB, Request for Comment - Amendments to Prepaid Rule. End of Comment Period.
09/15/2017 Next Day ACH Program. Effective Date of Phase 2 Implementation.
09/18/2017 CFPB, Arbitration Agreements. Effective date of Final Rule.
09/29/2017 NACHA Rule on Registration of Third-party Senders. Effective date for compliance by ODFIs.
10/01/2017 Military Lending Act Regulation. Sections on credit card accounts become mandatory.
10/19/2017 CFPB, 2016 Mortgage Servicing Rules. Mandatory compliance date for sections of the Final Rule relating to Delinquency, Requests for Information, Force-Placed Insurance disclosures, Early Intervention, Loss Mitigation, Prompt Payment Crediting, and Small Servicers.
01/01/2018 HMDA, Regulation C. Revised transaction coverage and expanded fields effective.
03/19/2018 CFPB, Arbitration Agreements. Mandatory compliance for pre-dispute arbitration agreements entered into on or after this date.
04/01/2018 CFPB, Prepaid Accounts Rule. New Mandatory compliance date for most Reg. E & Reg. Z changes originally scheduled to become effective on 10/01/17.
04/19/2018 CFPB, 2016 Mortgage Servicing Rules. Mandatory compliance date for sections of the Final Rule relating to Successors in Interest, and Periodic Statements.
05/11/2018 FinCEN, CDD / Beneficial Ownership Rules. Mandatory compliance date.
07/01/2018 Federal Reserve, Regulation CC. Effective date of Final Rule reflecting a virtually all-electronic check collection and return environment.
10/01/2018 CFPB, Amendments to the TRID Rules. Mandatory compliance date.
10/01/2018 CFPB, Prepaid Accounts Rule. Mandatory compliance date regarding electronic transaction histories, and for submitting prepaid account agreements to the CFPB.
01/01/2019 HMDA, Regulation C. Effective date for changes to enforcement and reporting provisions.
10/01/2019 CFPB, Prepaid Accounts Rule. Mandatory compliance date for providing the full 24 months of written account transaction history upon request.
01/01/2020 HMDA, Regulation C. Quarterly reporting for high volume reporters starts.

More Important Dates... 2017 M&M Compliance School

It's not too late to register for the 2017 M & M Consulting Compliance School!
Registration is now open to both clients and non-clients, and there is still space available.
Don't miss out by delaying your registrations.

The 2017 *M&M Compliance School* will be held September 19 & 20, 2017 (Tuesday - Wednesday) at the *Doubletree by Hilton* in Milford, Massachusetts (Exit 19 off I-495). The cost for this year's program for clients is $325 for both days!

Please contact Dean Stockford (dstockford@mandm.consulting / (207) 458-8559) for more information.

