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McGlinchey Stafford and Youngblood & Associates PLLC

CLIENT ALERT

CFPB 'Black Hole' Fix and Amendments to the TILA/RESPA Integrated Disclosure Rule (TRID 2.0)

On April 26th, the Consumer Financial Protection Bureau (CFPB) issued a final rule (the Black Hole Rule) to simplify perhaps the most complicated component of TRID, which the industry has called the 'black hole.' This restriction has kept creditors from resetting fee tolerances for events that occur after a Closing Disclosure (CD) has been delivered, except in very limited circumstances that require a lender to disclose a revised CD and close a loan within a very short time frame after the changed circumstance occurred.

Under current law, if a lender has delivered a CD and an event occurs that would have been a 'change of circumstance' to allow a lender to change baseline fees if no CD had been issued, the lender could disclose new baseline fees on a revised CD. However, the lender also had to meet two timing requirements: first, the revised CD had to be delivered within three business days of the lender learning of the change of circumstance, and second, the loan must close within three business days of the borrower's receipt of the revised CD.

Suffice it to say that the effect of these timing limits resulted in problems for the industry, along with unnecessary delays, expenses and even denied applications for some borrowers. It may have caused some lenders to delay delivery of a CD until the minimum required disclosure of the CD three business days before closing.

The Black Hole Rule removes the second timing requirement entirely. A lender may reset the baseline of fees affected by a changed circumstance by delivering an initial or revised CD within three business days of learning of the changed circumstance, and the loan may close at any time after that. The additional requirement to give an additional three business day waiting period before closing after disclosing a loan product change, addition of a prepayment penalty or change in APR greater than 1/8% remains.

The Black Hole Rule takes effect on June 1, 2018. For loans closed soon after the effective date that would have been subject to the 'black hole' before the Black Hole Rule took effect, we recommend that lenders verify with their investors that purchase guidelines have been updated to reflect the new, more permissive rule.

In July of last year, the CFPB issued a final rule amending and clarifying its 2015 TILA/RESPA Integrated Disclosure Rule, or TRID. Some in the industry are calling the amendments 'TRID 2.0.' We are currently in a period where compliance is optional (although we have seen some investors require compliance with some of the amendments now), and compliance becomes mandatory for applications taken on or after October 1, 2018.

The TRID 2.0 Rule is almost as important for what it does not address as for what it does address. It did not address the 'black hole' at all, other than to request further public comment, but that has now been corrected with the issuance of the Black Hole Rule described above. The industry has been requesting clarity on penalties for non-compliance and perhaps a method for curing technical violations. The TRID 2.0 Rule does not address these industry concerns.

Many of the clarifications in the TRID 2.0 Rule confirm existing industry best practices and common investor requirements. For example, the TRID 2.0 Rule confirms that TRID applies to loans on cooperative properties, whether or not state law treats cooperatives as real property under state law. Down payment loans have a partial exemption to TRID, but only if they have certain characteristics, one of which is that a calculated 'total of fees' paid by the borrower at closing cannot exceed one percent of the loan amount. The TRID 2.0 Rule gives guidance that a lender can disclose the loan under TRID, in case it does not qualify at closing because of a 'total of fees' over one percent, and also with a TIL, in case it does qualify, and then close under the disclosure that applies when the lender makes a final determination on the partial exemption before closing.

Much of the TRID 2.0 Rule deals with disclosure of closing costs. For example, it confirms that a service provider list using a model form provided by the CFPB can exclude specific fee amounts required services, probably because the amounts should already appear on the LE, and are already subject to the 'best information reasonably available' standard. Fees on the LE not subject to tolerance under TRID (such as property insurance premiums) are still not subject to tolerance, even if the provider is an affiliate of the lender. The TRID 2.0 Rule confirms that a required fee on the LE for services rendered by a non-affiliate third party is subject to an aggregate ten percent fee tolerance, even if the service is not listed on the service provider list so that the borrower was not given the opportunity to shop for that service.

The TRID 2.0 Rule clarifies that a lender can deliver an 'informational' LE that updates charges and loan information not subject to tolerance, but that the fees disclosed must still comply with the 'best information reasonably available' standard. The TRID 2.0 Rule confirms that delivery of an LE at interest rate lock is required, even if the fees disclosed do not change. An LE delivered after the borrower has indicated an intent to proceed with the transaction should leave a blank instead of the Rate Lock statement 'All other estimated closing costs expire on ______.'

The TRID 2.0 Rule also includes clarifications on completion of the CD. The 'Borrower' listed at the top of the first page of the CD should include only 'persons to whom credit is extended,' but the CD should still be delivered to (and may include signature lines for) all persons with a right to rescind under federal law. Delivery of a revised post-consummation CD is not required if the only correction is per-diem interest. However, if delivery of a revised CD is required after consummation for another reason, the lender should also correct the per-diem interest disclosed.

The Escrow Account box in the Additional Information section on page 4 of the CD has caused lenders some problems. It requires disclosure of estimated property taxes and insurance 'over Year 1' of the loan. While the intent may have been to disclose a full year's expenses, most escrowed loans would only require eleven payments 'over Year 1.' The Rule clarifies that the disclosure is deemed to be accurate if it includes either the twelve months after consummation (usually eleven payments) or the twelve-month period beginning with the first payment (usually twelve payments).

The TRID 2.0 Rule confirms that the tolerance of the Total of Payments line in the Loan Calculations section on the last page of the CD matches the tolerance for the finance charge. In other words, it is deemed to be accurate if it understates the Total of Payments by no more than $100, or is more than the amount required to be disclosed.

Finally, in a construction loan context, there is a new requirement where the lender collects construction-related fees, such as inspection fees, after closing. The fees would presumably arise because of events that occur after closing, and cannot be adequately disclosed on the CD, which only has columns for fees paid 'at closing' and 'before closing.' As a result, the Rule requires the lender to deliver an addendum to the CD called 'Inspection and Handling Fees Collected after Closing' that itemizes the fees and amounts. There is no set form for the addendum, although it should meet the TRID 'clear and conspicuous' disclosure standard, and may use the format of an addendum permitted for use with the LE where the form does not include sufficient space to itemize each charge.

There are other developments related to TRID that have not yet come to fruition. In February, the U.S. House passed the TRID Improvement Act to simplify disclosure of title policy premiums. Promulgated title rates in many states (including Texas) offer a discount on a lender's policy when an owner's policy is issued at the same time. TRID currently requires the discount to be shown on the CD on the owner's policy, even though the title company will simultaneously disclose the discount on the lender's policy. The TRID Improvement Act would allow lenders to disclose the actual fees charged with discounts on the CD, so that the federal disclosures will match the disclosures given by title companies. Unfortunately, the bill is stuck in the Senate Banking Committee, and it's not clear that it will ever come up for a vote in the full Senate.

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