



## WHITE PAPER

### Closing Disclosure: Deep Dive – Pages Four and Five

Jonathan Foxx \*

This is the sixth and final article of a six-part series devoted to TILA-RESPA Integration Disclosure. In this sixth part, I will discuss [Page Four](#) and [Page Five](#). Through a review of important highlights, I invite you to join me in a deep dive into the intricate features of the Closing Disclosure.

In the first article, I discussed the mission of TILA-RESPA Integration and the Loan Estimate (LE).<sup>1</sup> The second article introduced and treated the numerous features of the Closing Disclosure (CD).<sup>2</sup> These two articles (viz., on the Loan Estimate and Closing Disclosure, respectively) were accompanied by separate, detailed tables to be used for certain itemized categories and action requirements. In the third article, I provided the salient features of the Loan Estimate, in considerable detail.<sup>3</sup> In the fourth article, I took you through Page One and Page Two of the Closing Disclosure.<sup>4</sup> The fifth article was devoted to Page Three, which outlined the sections for *Calculating the Cash to Close* and *Summaries of Transactions*.<sup>5</sup>

I would suggest that you read all the articles in this series in order to better understand the TILA-RESPA Integration Disclosure (TRID) rule promulgated by the Consumer Financial Protection Bureau (“CFPB” or “Bureau”).

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This series on TILA-RESPA is meant to be informative, though it is not intended to be comprehensive. It is always prudent to research areas of particular interest with respect to the regulatory mandates. If assistance is needed, Lenders Compliance Group is a resource. Indeed, we recently established two proactive paths toward a TRID knowledgebase:

(1) We established the TEAM TRID™ task force,<sup>6</sup> a relatively inexpensive, cost-effective way to get TRID integration implementation done efficiently (viz., [www.teamtrid.com](http://www.teamtrid.com)); and importantly

(2) We established TRIDHotline.com,<sup>7</sup> an *entirely free online service*, manned by our task force, to assist people with their questions about TRID. We want to listen to their compliance needs (viz., [www.tridhotline.com](http://www.tridhotline.com)).

Please consider my analysis carefully. Follow along with a copy of the Closing Disclosure. I will provide, where helpful, some information as **SUGGESTED GUIDANCE**. Allow a few hours to consider this explication. And as I have admonished all along, make notes, raise questions, and seek answers from competent compliance professionals!

Hopefully, you will have read the previous five articles. Now we will continue a detailed review of Page Four and Page Five of the Closing Disclosure, a two-page set of tables set forth under the rubric *Additional Information About This Loan*. The fourth page of the Closing Disclosure, with the general heading, Additional Information About This Loan, includes the sections entitled *Loan Disclosures*, *Adjustable Payments (AP) Table*, and *Adjustable Interest Rate (AIR) Table*.

#### PAGE FOUR

Regulation Z<sup>8</sup> requires Page Four of the Closing Disclosure to contain from one to three tables, depending on the type of product:

- A “Loan Disclosure” table, which addresses various requirements in or arising from the legal obligation, including assumption, demand feature, late payment, negative amortization, partial payments, security interest, and escrow account information.
- The Adjustable Payments (AP) table that also appears on Page Four of the Loan Estimate, as applicable.
- The Adjustable Interest Rate (AIR) table that also appears on Page Four of the Loan Estimate, as applicable.

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## LOAN DISCLOSURES

### LOAN DISCLOSURES TABLE

The Loan Disclosures table provides disclosures mandated by statute, including three disclosures added to TILA by the Dodd-Frank Act.<sup>9</sup>

#### Assumption

This is the first item in the Loan Disclosures table. It is labeled *Assumption*,<sup>10</sup> and mirrors the assumption disclosure on the Loan Estimate.<sup>11</sup> The only difference is the replacement of “we” with “your lender.” Form H-25 offers this text for the disclosure:

##### Assumption

If you sell or transfer this property to another person, your lender

- will allow, under certain conditions, this person to assume this loan on the original terms.
- will not allow assumption of this loan on the original terms.

#### Demand Feature

The second item in the Loan Disclosure table is labeled *Demand Feature* and is intended to satisfy TILA requirements.<sup>12</sup> Regulation Z requires the creditor to disclose whether the legal obligation permits the creditor to demand early repayment of the loan and, if so, a statement that the consumer should review the loan document for more details.<sup>13</sup> Form H-25 offers this text for the disclosure:

##### Demand Feature

Your loan

- has a demand feature, which permits your lender to require early repayment of the loan. You should review your note for details.
- does not have a demand feature.

#### ***SUGGESTED GUIDANCE***

The type of demand feature triggering these disclosures includes only those demand features contemplated by the parties as part of the legal obligation.<sup>14</sup> For example, this provision does not apply to transactions that convert to a demand status as a result of the consumer’s default. A due-on-sale clause is not considered a demand feature.

#### Late Payment

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The third item in the Loan Disclosure table, labeled *Late Payment*, discloses any dollar charge or percentage amount that may be imposed due to a late payment, other than a deferral or extension charge.<sup>15</sup> The creditor must disclose the statement which details the late payment charge stated as dollar amount or percentage of the late payment amount, and the number of days a payment may be late to trigger the late payment fee.<sup>16</sup> This is similar to the feature regarding the Loan Estimate requirement. Form H-25 offers this text for the disclosure:

Late Payment

If your payment is more than \_\_\_ days late, your lender will charge a late fee of \_\_\_\_\_.

**Negative Amortization**

The fourth item in the Loan Disclosures table, labeled *Negative Amortization (Increase in Loan Amount)* provides that no creditor may extend credit to a borrower in connection with a transaction secured by a dwelling or residential real property that includes a dwelling, other than a reverse mortgage, that provides for or permits a payment plan that may result in negative amortization unless the creditor provides the consumer with a notice that the transaction may or will result in negative amortization.<sup>17</sup>

A statement must be provided about whether the regular periodic payment may cause the principal balance to increase.<sup>18</sup> The disclosure applies to all transactions subject to disclosure integration.

If the regular periodic payment does not cover all of the interest due, the creditor must state that:

- the principal balance will increase,
- the principal balance will likely exceed the original loan amount, and
- the increases in the principal balance will lower the consumer's equity in the property.

If the consumer has the option of making regular periodic payments that do not cover all of the interest accrued each month, the creditor must include a statement that, if the consumer chooses that option, the principal balance may exceed the original loan amount and that increases in the principal balance decrease the consumer's equity in the property. Form H-25 offers this text for this disclosure:

Negative Amortization (Increase in Loan Amount)

Under your loan terms, you

are scheduled to make monthly payments that do not pay all of the interest due that

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month. As a result, your loan amount will increase (negatively amortize), and your loan amount will likely become larger than your original loan amount. Increases in your loan amount lower the equity you have in this property.

- may have monthly payments that do not pay all of the interest due that month. If you do, your loan amount will increase (negatively amortize), and, as a result, your loan amount may become larger than your original loan amount. Increases in your loan amount lower the equity you have in this property.
- do not have a negative amortization feature.

## **Partial Payments**

The fifth item in the Loan Disclosures table, labeled *Partial Payments* provides that, in the case of any residential mortgage loan, the creditor must disclose, prior to settlement or at the time a person becomes the creditor for an existing loan,<sup>19</sup> the creditor's policy regarding the acceptance of partial payments, and if partial payments are accepted, how the payments will be applied to the loan and whether the payments will be placed in escrow.<sup>20</sup> The creditor must disclose a statement of whether the creditor accepts periodic payments less than the full amount due.<sup>21</sup> If the creditor may accept partial payments, and apply the payments to the consumer's loan, or if the creditor may hold the payments in a separate account until the consumer pays the rest of the payment, or if the creditor does not accept any partial payments, then the disclosure must state that fact. The creditor also must include a statement that, if the loan is sold, the new lender may have a different policy.

It is clear that the Bureau decided to alter the statutory requirement because it would have required a detailed disclosure of the many variations of partial-payment processing, resulting in information overload. There are disclosure requirements that apply after consummation,<sup>22</sup> <sup>23</sup> implemented as part of the CFPB's January 2013 Servicing Rule. Form H-25 offers this text for the disclosure:

### Partial Payments

Your lender

- may accept payments that are less than the full amount due (partial payments) and apply them to your loan.
- may hold them in a separate account until you pay the rest of the payment, and then apply the full payment to your loan.
- does not accept any partial payments.

If this loan is sold, your new lender may have a different policy.

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## Security Interest

The sixth item in the Loan Disclosures table, labeled Security Interest requires the creditor to provide a statement that a security interest has been taken in the property securing the transaction or in property not purchased as part of the transaction by item or type.<sup>24</sup> The creditor must disclose that the creditor will take a security interest in the property, that the consumer is granting a security interest in that property, the address of the property (or other location information, such as a lot, square, or similar number, if no street address exists), the zip code in which the property is located, and a statement that the consumer may lose the property if he or she does not make payments or satisfy other requirements of the legal obligation.<sup>25</sup> Form H-25(B) illustrates the completion of this disclosure, as follows:

### Security Interest

You are granting a security interest in

[456 Somewhere Avenue, Anytown, ST 12345]

You may lose this property if you do not make your payments or satisfy other obligations for this loan.

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- For transactions secured by a consumer's interest in a timeshare plan, Regulation Z permits the creditor to disclose as "other location information" a lot, square, or other such number or other legal description assigned by the local governing authority, or if no number or description is available, the name of the time share property or properties with a designation indicating that the property is an interest in a timeshare plan.<sup>26</sup>
- If personal property also secures the transaction, a description of that property may be disclosed. When the personal property description does not fit in the space on form H-25, the creditor may use an addendum to disclose the property.<sup>27</sup>
- Even though this is not addressed by the Comments, Regulation Z presumably would also allow an addendum if the descriptions for multiple real properties do not fit in the space allocated on the Closing Disclosure. The Comments allow such an addendum for the Loan Estimate, but for real property only.<sup>28</sup> I do not believe a different rule would apply to the Closing Disclosure, that is, it seems reasonable to take the position that the Comments (1) address only the use of addenda for personal property because of the specific, different treatment the Comments provide personal property in the Loan Estimate versus the Closing Disclosure, and (2) they inadvertently overlook the use of addenda for real property descriptions.<sup>29</sup> In other words, it seems that the Bureau's comments (and preamble to the Rule) assume addenda may be used for multiple real properties if the property listing or description does not fit in the space allocated on form H-25.

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- The creditor should insert the property description using italics to emphasize that the italicized information has been completed by the creditor.<sup>30</sup>
- The creditor complies with the requirements regarding “Escrowed Property Costs over Year 1” and “Monthly Escrow Payment” if the creditor bases the numerical disclosures on amounts derived from the escrow account analysis required under RESPA.<sup>31</sup>
- If the consumer’s escrowed costs do not include homeowner’s association fees, but the creditor knows the consumer is likely to pay, say, \$1,000 in homeowner’s association fees, then the creditor must disclose the fee as part of “Non-Escrowed Property Costs over Year 1.”
- When the creditor does not impose a fee for not establishing an escrow account, the “Escrow Waiver Fee” disclosure must be left blank.

### **ADJUSTABLE PAYMENT (AP) TABLE**

Page Four of the Closing Disclosure must include two other tables, as applicable.<sup>32</sup> The first is the *Adjustable Payment (AP) Table*, the same table that appears on the Loan Estimate, which the creditor must include if, under the terms of the legal obligation, the principal and interest payment may adjust without a corresponding adjustment to the interest rate or if the loan is a seasonal payment product.

The table must contain:

- The periodic payment at the first adjustment of the payment,
- The number of the earliest payment that could reflect an adjustment to the amount of the periodic payment,
- The maximum possible principal and interest payment,
- The number of the earliest payment that could reflect the maximum possible periodic payment, and
- An affirmative or negative statement of whether the loan has an interest-only payment option, step-payment period, or seasonal payment period and the length of that period and payments affected.<sup>33</sup>

### **ADJUSTABLE INTEREST RATE (AIR) TABLE**

The second table is the *Adjustable Interest Rate (AIR) Table*, the same table that appears on the Loan Estimate, which the creditor must include if, under the terms of the legal obligation, the interest rate may adjust after consummation.

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The table must include:

- The index and margin if the interest rate will adjust according to an index beyond the control of the creditor,
- The amount of scheduled adjustments and their frequency if the interest rate will change based on something other than an index beyond the control of the creditor (such as a “step-rate” product),
- The interest rate at consummation,
- The minimum and maximum possible interest rates after consummation of the loan after any introductory or teaser rate expires,
- The maximum possible change in the interest rate at the first adjustment,
- The maximum possible change for subsequent interest rate adjustments,
- The month after consummation when the interest rate may first change (counted from the date interest begins to accrue for the first periodic principal and interest payment), and
- The frequency of subsequent interest rate adjustments.<sup>34</sup>

## PAGE FIVE

The fifth and last page of the Closing Disclosure contains a *Questions?* box and an optional *Confirm Receipt* signature section. The three tables are labeled *Loan Calculations*, *Other Disclosures*, and *Contact Information*.<sup>35</sup>

### LOAN CALCULATIONS

The creditor must disclose in a separate table, labeled *Loan Calculations*, information required regarding the “Total of Payments,” “Finance Charge,” “Amount Financed,” “Annual Percentage Rate,” and “Total Interest Percentage.”<sup>36</sup>

#### Total of Payments

The first item in the Loan Calculations table is the Total of Payments with a statement that it is the “Total you will have paid after you make all payments of principal, interest, mortgage insurance, and loan costs, as scheduled.”<sup>37</sup>

The revised Total of Payments is calculated in the same manner as the “In 5 Years” disclosure on the Loan Estimate,<sup>38</sup> except that the Total of Payments reflects the total payments through the end of the loan term instead of five years. The amount includes principal, interest, mortgage insurance (including any prepaid or escrowed mortgage insurance), and the Loan Costs disclosed in the Closing Costs Details on Page Two of the

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Closing Disclosure.

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This differs from the method of calculating Total of Payments under Regulation Z, which adds the Amount Financed and the Finance Charge.<sup>39</sup> Creditors may not modify the descriptive statement (not even for variable-rate transactions), and may not omit the Total of Payments disclosure in single-payment transactions or demand obligations that have no alternative maturity date.<sup>40</sup>

Finance Charge

The second item in the Loan Calculations table is the Finance Charge with this statement: “The dollar amount the loan will cost you.” This disclosure is identical to the Finance Charge disclosure required under Regulation Z,<sup>41</sup> except that Regulation Z does not allow creditors to modify the descriptive statement for variable-rate transactions (with a phrase indicating that the disclosed amount is subject to change) and does not require (or allow) creditors to disclose the finance charge (and the APR) more conspicuously than any other required disclosure other than the creditor’s identity.<sup>42</sup>

Under Regulation Z, the disclosed Finance Charge and other disclosures affected by the disclosed Finance Charge (including the Amount Financed and the APR) are treated as accurate if the amount disclosed as the Finance Charge is understated by no more than \$100 or is greater than the amount required to be disclosed.<sup>43</sup>

Amount Financed

The third item in the Loan Calculations table is the Amount Financed with a statement that “The loan amount available after paying your upfront finance charge.” Regulation Z requires the creditor or closing agent to calculate the amount in accordance with the Regulation Z requirements.<sup>44</sup>

Annual Percentage Rate

The fourth item in the Loan Calculations table is the Annual Percentage Rate (APR) with a statement that “Your costs over the loan expressed as a rate. This is not your interest rate.”

***SUGGESTED GUIDANCE***

Regulation Z does not require the APR to be disclosed more conspicuously than other required disclosures.<sup>45</sup> <sup>46</sup> TRID does not change the APR calculation, set forth in Appendix

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### Total Interest Percentage

The fifth item in the Loan Calculations table is the *Total Interest Percentage (TIP)*, with a statement that “The total amount of interest that you will pay over the loan term as a percentage of your loan amount.” Dodd-Frank Act<sup>47</sup> added this requirement to TILA.<sup>48</sup>

Creditors must disclose the TIP on Page Three of the Loan Estimate.<sup>49</sup>

### **SUGGESTED GUIDANCE**

When the creditor determines an initial interest rate without using the index or formula for later rate adjustments, the disclosure should reflect a composite annual percentage rate based on the initial rate for as long as it is charged and, for the remainder of the term, the rate that would have been applied using the index or formula at the time of consummation.<sup>50</sup>

## **OTHER DISCLOSURES**

The creditor is required to disclose, in a separate table labeled “Other Disclosures,” information regarding appraisals, contract details, liability after foreclosure, refinancing, and tax deductions.<sup>51</sup> Let’s give some consideration to each of these categories.

### Appraisal

The Dodd-Frank Act amended Equal Credit Opportunity Act (ECOA)<sup>52</sup> to require the creditor to provide the consumer with a copy of any written appraisal obtained for a loan that is or will be secured by a first lien on a dwelling, and also added a requirement that the creditor disclose that right to the consumer at the time of application, which the Bureau implemented in its January 2013 ECOA Appraisals Rule.<sup>53</sup> The Dodd-Frank Act also was amended to require creditors to provide consumers with an appraisal copy at least three days prior to consummation of certain higher-risk mortgages,<sup>54</sup> which the Bureau implemented for higher-priced mortgage loans (HPMLs).<sup>55</sup>

The Bureau has harmonized these appraisal notice requirements,<sup>56</sup> for the Loan Estimate,<sup>57</sup> and for the Closing Disclosure, with a disclosure labeled *Appraisal*. The Appraisal disclosure is required only for loans subject to transactions that are or will be secured by first liens on dwellings and HPMLs.<sup>58 59</sup> It may (but need not be) omitted for other loans. The Appraisal disclosure in the Other Disclosures reminds consumers of their

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right to receive a copy of an appraisal conducted for their loan, with the following text:

#### Appraisal

If the property was appraised for your loan, your lender is required to give you a copy at no additional cost at least three days before closing. If you have not yet received it, please contact your lender at the information listed below.

The reference to “information listed below” in the Appraisal disclosure relates to the *Questions?* box (viz., contacting the lender).

#### Contract Details

The second item in the Other Disclosures table, labeled *Contract Details* requires the creditor to provide a statement that “[t]he consumer should refer to the appropriate document for any information such document provides about nonpayment, default, the right to accelerate the maturity of the debt, and prepayment rebates and penalties.”<sup>60 61 62</sup>

Form H-25 provides this disclosure:

#### Contract Details

See your note and security instrument for information about

- what happens if you fail to make your payments,
- what is a default on the loan,
- situations in which your lender can require only repayment of the loan, and
- the rules for making payments before they are due.

#### Liability after Foreclosure

The third item in the Other Disclosures table, labeled *Liability after Foreclosure*, follows up on the “Liability after Foreclosure” disclosure on Page Three of the Loan Estimate. The Liability after Foreclosure disclosure implements TILA,<sup>63</sup> as was added by Dodd-Frank Act.<sup>64</sup> The statute generally requires the creditor to provide a written notice to the consumer describing the protection provided by the applicable state’s anti-deficiency law and the significance for the consumer of the loss of that protection, for refinance transactions only. Regulation Z requires the disclosure for all disclosure integration transactions, not just refinances.<sup>65</sup> The disclosure mentions that state law may protect the consumer from liability for the unpaid balance, that any protection afforded under state law may be lost if the consumer refinances or incurs additional debt, and that the consumer should consult an attorney for additional information. If state law does not

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protect the consumer from liability for the unpaid balance, the creditor must disclose that fact by checking the appropriate box.

#### ***SUGGESTED GUIDANCE***

- Whether the consumer is afforded protection from liability in a foreclosure varies by state; Regulation Z requires the creditor to provide a general description of the applicable state's requirements, by checking one of the check boxes in the disclosure.<sup>66</sup>
- Any type of protection afforded by state law, other than a statute of limitations, requires a statement that state law may protect the consumer from liability for the unpaid balance.<sup>67</sup>
- The Bureau does not believe that the high-level disclosure constitutes the practice of law.<sup>68</sup>

Form H-25 provides the following disclosure:

#### Liability after Foreclosure

If your lender forecloses on this property and the foreclosure does not cover the amount of unpaid balance on the loan,

- state law may protect you from liability for the unpaid balance. If you refinance or take on any additional debt on the property, you may lose the protection and have to pay any debt remaining even after foreclosure. You may want to consult a lawyer for more information.
- state law does not protect you from liability for the unpaid balance.

#### Refinance

The fourth item in the Other Disclosures table, labeled *Refinance* requires the creditor to disclose the same "Refinance" language that appears on Page Three of the Loan Estimate.<sup>69 70</sup> The following disclosure in H-25 states:

#### Refinance

Refinancing this loan will depend on your future financial situation, the property value, and market conditions. You may not be able to refinance this loan.

#### Tax Deductions

The fifth and final item in the Other Disclosures table, labeled *Tax Deductions* requires the creditor to disclose certain tax implications for a consumer credit transaction secured

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by the principal dwelling of the consumer in which the loan amount may exceed the fair market value of the collateral.<sup>71</sup> This requirement must be implemented for all transactions subject to disclosure integration.<sup>72</sup> It requires the creditor to state that, if the consumer borrows more than the value of the property, the interest on the loan amount above the market value is not deductible from federal income taxes. The disclosure must include a statement advising the consumer to consult a tax professional for additional information. Form H-25 provides the following disclosure:

#### Tax Deductions

If you borrow more than this property is worth, the interest on the loan amount above this property's fair market value is not deductible from your federal income taxes. You should consult a tax advisor for more information.

#### **QUESTIONS NOTICE**

Under the Loan Calculations table, the creditor must include a statement directing the consumer to use the Contact Information table if he or she has any questions about the loan terms or costs, and a reference to the Bureau's web site to get more information or make a complaint.<sup>73</sup> The regulation requires a prominent question mark to appear in this disclosure. If the creditor or closing agent deviates from the depiction of the question mark shown on form H-25, it must comply with the applicable statute's description of the size and location of the question mark, and the creditor or closing agent otherwise must comply with any other permissible changes to the form of the Closing Disclosure.<sup>74 75</sup>

#### **CONTACT INFORMATION TABLE**

The Closing Disclosure must contain a *Contact Information* table<sup>76</sup> which requires the following contact information for each creditor (under the subheading "Lender"), mortgage broker (under the subheading "Mortgage Broker"), consumer's real estate broker (under the subheading "Real Estate Broker (B)," seller's real estate broker (under the subheading "Real Estate Broker (S)," and settlement agent (under the subheading "Settlement Agent") participating in the transaction:

- Name of the person, labeled "Name"
- Address, labeled "Address"
- Nationwide Mortgage Licensing System & Registry (NMLSR ID) identification number, labeled "NMLS ID"
- Name of the natural person who is the primary contact for the consumer with the person, labeled "Contact"
- NMLSR ID, labeled "Contact NMLS ID," or, if none, the license number or other unique identifier issued by the applicable jurisdiction or regulating body with which the person is

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licensed and/or registered labeled “Contact License ID” with the two-letter abbreviation for the state of the applicable jurisdiction or regulatory body shown before the word “License” in the label, for the natural person

- Email address for the natural person, labeled “Email”
- Telephone number for the natural person, labeled “Phone”

#### ***SUGGESTED GUIDANCE***

- Addresses. The address is the identified party’s place of business where the primary contact for the transaction is located (usually the local office), rather than a general corporate headquarters address.<sup>77</sup>
- Primary Contact. The primary contact working at the identified party is the individual who interacts most frequently with the consumer and who has an NMLSR identification number or, if none, a license number or other unique identifier.<sup>78</sup>
- Contacts. In general, the contact information at the top of page 3 of the Loan Estimate apply to this Closing Disclosure table.<sup>79</sup>
- Blanks. Inapplicable items must be left blank, not marked “N/A.”<sup>80</sup>
- General Addresses. Disclosure of a general number or email address for the lender, mortgage broker, real estate broker, or settlement agent, as applicable, satisfies this requirement if no such information is generally available for the natural person.<sup>81</sup>
- Multiple Persons. If the transaction involves more than one of the five categories of persons in the transaction (such as two sellers’ real estate brokers splitting a commission), the space in the Contract Information table may be altered to accommodate the information for the additional person, provided that the information required on Page Five is disclosed on the same page as illustrated by form H-25. If the space on form H-25 does not accommodate the addition, an additional table may be provided on a separate page, with an appropriate reference on Page Five to the additional table. A creditor or closing agent may, instead, omit a column on the table that does not apply or, if necessary, replace an inapplicable column with the contact information for the additional person.<sup>82</sup>
- Names. The person’s legal name (i.e., the name used for registration, incorporation, or chartering purposes), the person’s trade name, if any, or an abbreviation of the person’s legal name or trade name must be disclosed, so long as the disclosure is clear and conspicuous, that is, sufficiently distinct.<sup>83</sup>

#### **CONFIRM RECEIPT**

The statement required by Regulation Z<sup>84</sup> above the signature lines reads: “By signing, you are

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only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form.”

***SUGGESTED GUIDANCE***

- If the creditor believes the signature line and accompanying statement are confusing, it may omit them at the creditor’s option.
- Regarding consumers in rescindable transactions, the definition of consumer includes a non-applicant co-owner of a principal dwelling, and the Closing Disclosure must be given to each consumer who has a right to rescind, including each non-applicant co-owner.<sup>85</sup>
- To the extent that consumers’ names do not fit on the space allocated for a signature on form H-24, an additional page may be added to the Closing Disclosure.<sup>86</sup>

**CONCLUSION OF THE SIX-PART SERIES**

This six-part series has provided a broad, introductory overview of TILA-RESPA Integration Disclosure. TRID is so extensive and involves such a significant generational change in disclosure that there will be a continual need to understand both its current and future implications. Even now, on the cusp of TRID implementation, the Bureau is providing written announcements, rule updates, and webinar responses to TRID’s implementation challenges.

Examinations and enforcement are right around the corner! The importance of complying with the specialized requirements cannot be overstated. Failure to comply with TRID’s precise and detailed rules may lead to significant liability and litigation risk, under both TILA and RESPA, as well as other statutes, such as the Equal Credit Opportunity Act, state and federal UDAAP statutes, and state mini-TILA and mini-RESPA statutes.

Keep in mind that TRID introduced a new feature to TILA and RESPA enforcement. RESPA does not provide private rights of action for violations of Sections 4 and 5, regarding Good Faith Estimates, Settlement Statements, and Special Information Booklets. But TRID ‘moved’ some of the RESPA Section 4 and 5 requirements that previously appeared in RESPA’s Regulation X to TILA’s Regulation Z. The effect of this change was an expansion of RESPA liability, by bringing those provisions into the purview of the Truth in Lending Act, which provides for a private right of action.

Clearly, a probable factor motivating the movement in this direction, instead of from TILA to RESPA, was the more robust civil penalty regime offered by TILA. Closing agents concerned about additional liability seem to be finding some comfort in the Bureau’s statement that it does not

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believe a settlement agent's provision of the Closing Disclosure exposes the agent to civil liability under TILA<sup>87</sup> so long as the agent is not also functioning as a creditor under TILA<sup>88</sup>. Mortgage brokers appear to find the same comfort regarding their involvement in providing Loan Estimates.

When TRID was proposed and comments were elicited from the public, commenters expressed concern that TRID's combination of RESPA and TILA disclosure requirements would invite consumers to bring lawsuits seeking TILA remedies for RESPA violations. Hoping to block this path to litigation, they asked the CFPB to specify which provisions of Regulation Z, as affected by TRID, relate to TILA requirements and which relate to RESPA requirements. One commenter suggested that the CFPB should implement the TILA disclosure requirements in Regulation Z and the RESPA disclosure requirements in Regulation X to discourage litigation invoking TILA's liability scheme for RESPA violations.

However, in the Final Rule the CFPB responded in this way:

*"While the final regulations and official interpretations do not specify which provisions relate to TILA requirements and which relate to RESPA requirements, the section-by-section analysis of the final rule contains a detailed discussion of the statutory authority for each of the integrated disclosure provisions... [T]he authority for the integrated disclosure provisions is based on specific disclosure mandates in TILA and RESPA, as well as certain rulemaking and exception authorities granted to the [CFPB] by TILA, RESPA, and the Dodd-Frank Act. The details of the [CFPB's] use of such authority are described in the section-by-section analysis. The [CFPB] believes these detailed discussions of the statutory authority for each of the integrated disclosure provisions provide sufficient guidance for industry, consumers, and the courts regarding the liability issues raised by the commenters."*<sup>89</sup> (My emphasis.)

I have yet to make my peace with this statement. The notion of "sufficient guidance" seems to be the exact coordinate where litigation will aim its 'test case' missile.

In my view, "sufficient guidance" means an item-by-item analysis of the integrated disclosures explaining each statutory source for the disclosure item, any prior implementation of that requirement, the Bureau's research into the effectiveness of that disclosure from both a consumer and industry perspective, the CFPB's alteration (if applicable) of the statutory requirement or previous regulatory implementation of the requirement to respond to its research, its reasons for implementing that disclosure as part of TILA-RESPA disclosure

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integration, and the statutory support for including the final version of the disclosure. Frankly, in most cases, the ultimate statutory support rests on a specific requirement stated in TILA, RESPA and/or the Dodd-Frank Act, further supported by the regulatory flexibility offered in TILA Section 105(a) (sometimes also TILA Section 105(f)), RESPA Section 19(a), and the Dodd-Frank Act Sections 1032(a) and 1405(b).

In other words, the CFPB relied for the most part on the ‘regulatory flexibility’ given by these provisions because it found it necessary to reconcile differences between the RESPA and TILA statutes, and between sometimes differing provisions within the TILA statute itself. The Bureau also found it appropriate to alter many of the statutory requirements (even discarding some). Thus, many resulting disclosure items are not derived solely from one statute or the other but from one or more statutory starting points and the broad rulemaking authority given the CFPB by TILA, RESPA and the Dodd-Frank Act. Unraveling the final result to separate a RESPA claim from a TILA claim will prove difficult. These authorities give the Bureau an extraordinary amount of freedom to adopt disclosure requirements and constraints on consumer credit terms and conditions, including requirements different from those specified in any statute affecting mortgage loans.

It is inevitable that market participants and the courts will assume that a private action under TILA is available to challenge noncompliance with certain disclosure items.

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<sup>1</sup> Foxx, Jonathan, *RESPA/TILA Integration – Part I: Overview and Loan Estimate*, pp 28-54, National Mortgage Professional, October 2014

<sup>2</sup> Foxx, Jonathan, *RESPA/TILA Integration – Part II: Closing Disclosure and Action Plan*, pp 26-50, National Mortgage Professional, December 2014

<sup>3</sup> Foxx, Jonathan, *Loan Estimate: Deep Dive (Part III)*, pp 40-75, National Mortgage Professional, June 2015

<sup>4</sup> Foxx, Jonathan, *Closing Disclosure: Deep Dive – Pages One and Two (Part IV)*, pp 40-82, National Mortgage Professional, July 2015

<sup>5</sup> Foxx, Jonathan, *Closing Disclosure: Deep Dive – Page Three (Part V)*, pp 56-78, National Mortgage Professional, August 2015

<sup>6</sup> [www.teamtrid.com](http://www.teamtrid.com)

<sup>7</sup> [www.tridhotline.com](http://www.tridhotline.com)

<sup>8</sup> Regulation Z §§ 1026.38(l)-(n)

<sup>9</sup> Regulation Z § 1026.38(l)

<sup>10</sup> Required by TILA § 128(a)(13)

<sup>11</sup> Required by Regulation Z § 1026.37(m)(2)

<sup>12</sup> TILA § 128(a)(12)

<sup>13</sup> Regulation Z § 1026.38(l)(2) incorporates certain of the requirements of Regulation Z § 1026.18(i) and (p). Comment 38(l)(2)-1 refers to Comment 18(i)-2 for a description of demand features that trigger this disclosure requirement.

<sup>14</sup> Regulation Z § 1026.18(i) - Commentary; § 1026.38(l)(2)

<sup>15</sup> TILA § 128(a)(10)

<sup>16</sup> Regulation Z 1026.38(l)(3). Also, Regulation Z § 1026.37(m)(4) [similar to § 1026.18(l)]

<sup>17</sup> TILA § 129C(f), added by Dodd-Frank Act § 1414(a)

<sup>18</sup> Regulation Z § 1026.38(l)(4)

<sup>19</sup> TILA § 129C(h) uses the phrase “in the case of a person becoming a creditor with respect to an existing residential mortgage loan, at the time such person becomes a creditor ....” This phrase is meaningless in light of TILA’s definition of “creditor,” which refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness. (See TILA § 103(g) and Regulation Z § 1026.2(a)(17).) Congress presumably meant “servicer” instead of “creditor.”

<sup>20</sup> TILA § 129C(h), added by Dodd-Frank Act § 1414(d)

<sup>21</sup> Regulation Z § 1026.38(l)(5)

<sup>22</sup> TILA § 129C(h)

<sup>23</sup> Regulation Z § 1026.39

<sup>24</sup> TILA § 128(a)(9)

<sup>25</sup> Regulation Z § 1026.18(m), also Regulation Z § 1026.38(l)(6)

<sup>26</sup> Comment 38(l)(6)-1

<sup>27</sup> Comment 38(l)(6)-2. The Comment addresses only the use of an addendum for personal property, as does Comment 38(a)(3)(vi)-1, which allows an addendum to describe the property address required by Regulation Z

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§ 1026.38(a)(3)(vi) on Page One of the Closing Disclosure if the description does not fit in the space allocated on form H-25. The creditor may use one addendum to combine these Page One and Page Four personal property disclosures.

<sup>28</sup> Comment 37(a)(6)-2

<sup>29</sup> Comments 37(a)(6)-2, 38(a)(3)(vi)-1, and 38(l)(6)-2. See 78 FR 79729, 80001-80002 (December 31, 2013)

<sup>30</sup> 78 FR 79729, 80030 (December 31, 2013)

<sup>31</sup> Regulation X § 1024.17

<sup>32</sup> Regulation Z § 1026.38(m) and (n)

<sup>33</sup> Comment 38(m)-1 directs creditors to the commentary to § 1026.37(i) for guidance on this disclosure table.

<sup>34</sup> Comment 38(n)-1 directs creditors to the commentary to § 1026.37(j) for guidance on this disclosure table.

<sup>35</sup> Regulation Z § 1026.38(o)-(s)

<sup>36</sup> Regulation Z § 1026.38(o); see also TILA § 128(a)(2)-(5), (8), (17), (19)

<sup>37</sup> This is a modification made by the Bureau, to wit, modifying the existing “Total of Payments” disclosure, set forth in TILA § 128(a)(5) and Regulation Z § 1026.18(h).

<sup>38</sup> Regulation Z § 1026.37(l)(1)(i), see also § 10.02[2][b] and Comment 38(o)(1)-1).

<sup>39</sup> Regulation Z § 1026.18(h)

<sup>40</sup> Contrast with Comments 18(h)-1, -3, and -4

<sup>41</sup> Regulation Z § 1026.18(d)

<sup>42</sup> Regulation Z § 1026.38(o)(2); See also § 1026.17(a)(2).

<sup>43</sup> Regulation Z § 1026.38(o)(2). The finance charge continues to be calculated in accordance with the requirements of § 1026.4 and its commentary. See Comments 38(o)(2)-1 and -2.

<sup>44</sup> Regulation Z § 1026.38(o)(3). See also § 1026.18(b) and its commentary.

<sup>45</sup> Regulation Z § 1026.38(o)(4)

<sup>46</sup> As differentiated from Regulation Z § 1026.17(a)(2).

<sup>47</sup> Dodd-Frank Act § 1419

<sup>48</sup> TILA § 128(a)(19)

<sup>49</sup> Comment 38(o)(5)-1. See § 1026.37(l)(3) and its commentary.

<sup>50</sup> Regulation Z § 1026.38(o)(5)

<sup>51</sup> Regulation Z § 1026.38(p)

<sup>52</sup> Equal Credit Opportunity Act (ECOA) §§ 701(e)

<sup>53</sup> Regulation B, 12 CFR § 1002.14

<sup>54</sup> TILA §§ 129H(c)-(d)

<sup>55</sup> Regulation Z § 1026.35(c)(6)

<sup>56</sup> Regulation Z § 1026.37(m)(1)

<sup>57</sup> Regulation Z § 1026.38(p)(1)

<sup>58</sup> ECOA § 701(e)

<sup>59</sup> TILA § 129H

<sup>60</sup> TILA § 128(a)(12)

<sup>61</sup> Regulation Z § 1026.18(p)

<sup>62</sup> Regulation Z § 1026.38(p)(2)

<sup>63</sup> TILA § 129C(g)

<sup>64</sup> Dodd-Frank Act § 1414(c)

<sup>65</sup> Regulation Z § 1026.38(p)(3)

<sup>66</sup> Comment 38(p)(3)-1

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<sup>67</sup> Idem  
<sup>68</sup> 78 FR 79729, 80047 (December 31, 2013)  
<sup>69</sup> TILA § 128(b)(2)(C)(ii)  
<sup>70</sup> Regulation Z § 1026.37(m)(5); also § 1026.38(p)(4)  
<sup>71</sup> TILA § 128(a)(15), which was added by the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*  
<sup>72</sup> Regulation Z § 1026.38(p)(5)  
<sup>73</sup> Regulation Z § 1026.38(q)  
<sup>74</sup> Regulation Z § 1026.38(q)  
<sup>75</sup> Regulation Z § 1026.38(t)(5). See Comment 38(q)(3)-1.  
<sup>76</sup> Regulation Z § 1026.38(r)  
<sup>77</sup> Comment 38(r)-3  
<sup>78</sup> Comment 38(r)-6  
<sup>79</sup> Regulation Z § 1026.37(k). See Comments.  
<sup>80</sup> Comment 38(r)-1  
<sup>81</sup> Comment 38(r)-7  
<sup>82</sup> Comment 18(r)-1  
<sup>83</sup> Comment 38(r)-2  
<sup>84</sup> Regulation Z § 1026.38(s)  
<sup>85</sup> For the definition of “consumer,” see Regulation Z § 1026.2(a)(11)  
<sup>86</sup> Comment 38(s)-1 (referring to Comment 37(n)-2); Comment 38(t)(5)-4  
<sup>87</sup> TILA Section 130  
<sup>88</sup> TILA Sections 130 and 131  
<sup>89</sup> Bureau of Consumer Financial Protection, *12 CFR Parts 1024 and 1026, Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), Action: Final rule; official interpretation*, pp100-101 [Docket No. CFPB-2012-0028]

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