Loan Estimate: Deep Dive

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This third article of a four-part series beckons us to a deep dive into the Loan Estimate.

In the first article, I discussed the mission of TILA-RESPA Integration and the **Loan Estimate (LE)**.[1] The second article introduced and treated the numerous features of the **Closing Disclosure (CD)**.[2] Each of the foregoing articles were accompanied by detailed tables to be used for certain itemized categories and action requirements.

The final and fourth article will provide an extensive analysis of the Closing Disclosure.

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).

One of the reasons I have written this series is to cut through the information noise. My concern stems from the nearly profiteering stance of the flourishing punditry to opine on TRID. This approach to learning seems to have become the norm recently at conferences, conventions, webinars, seminars, lectures, and pricey city-to-city forums. Indeed, also, people with no real experience in directing regulatory compliance, though having some training background, seem to hang out their TRID webinar shingle. I view the latter as but shills for generating leads for their affiliated pundits.

Attendees sometimes leave these convocations and *ad hoc* caboodles more confused than

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beforehand. Occasionally, they call my firm and want to know who has the correct view, Mr. Pundit A or Ms. Pundit B. I have noticed recently that certain pundits that previously, freely offered advice on TRID are now charging fees for their webinars or offering their guidance, for a fee, via well-known webinar purveyors and online audio/visual enablers. I offer these reflections not as exculpation, rather as expiation, since I have been on panels, and given lectures and webinars, alongside many members of the conscientious punditocracy.

But I happen to think that TRID is too important, being a generational change in disclosure, to hog the helpful information about TRID by charging a fee just so somebody could attend and possibly learn something about it. With that in mind, my firm recently did two proactive things: (1) we established the TEAM TRID™ task force,[3] a relatively inexpensive, cost-effective way to get TRID integration implementation done efficiently; and importantly (2) we established TRIDHotline.com,[4] 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!

In my view, these two foregoing measures help to address the challenge we face as we head toward the compliance effective date of August 1, 2015. I want to do what I can to ensure that we all are ready! "Ready" means ready for everybody, since the stability of the residential mortgage loan originations industry and the financial protection of the consumer depend on understanding and implementing the many features of the TRID rule.

Hopefully, you will have read the previous two articles (i.e., Part I and Part II). Now we will embark on a detailed review of the new disclosures, beginning in this third article with the Loan Estimate.

Let's get real close to the Loan Estimate. In this article I will not discuss pre-application estimates and worksheets in detail, except to mention that a creditor or other person may choose to provide a consumer with a written preliminary estimate of terms or costs specific to that consumer before providing the Loan Estimate. If it does so, the creditor or other person must clearly and conspicuously state at the top of the front of the first page of the estimate in a font size no smaller than 12-point: "Your actual rate, payment, and costs could be higher. Get an official Loan Estimate before choosing a loan."[5] Furthermore, the estimate may not be made with headings, content, and format substantially similar to the Loan Estimate or Closing Disclosure.[6]

So let's focus on the Loan Estimate, since I plan to take you solely through the Loan Estimate in considerable detail. I will discuss salient highlights of the Loan Estimate, though I caution you to realize that this review is not exhaustive or comprehensive, given that the TRID rule contains very complex disclosure requirements, far more involved, byzantine, elaborate, incisive, and potentially enigmatic than the compendiary features of it discussed herein.

Please follow my analysis carefully. Allow at least two hours to consider this elucidation. Make notes, raise questions, seek answers from competent compliance professionals!

HIGHLIGHTS

LOAN ESTIMATE FORM

For any federally related mortgage loan,[7] the Loan Estimate must be made using the model form set forth in Exhibit H - Form H-24 in the CFPB's Federal Register issuance.[8] TRID does not require the use of the model form for non-RESPA transactions; that is, those subject to the integrated disclosures because they are subject to TILA and secured by real property but are not subject to RESPA.[9] There are numerous text, structure, and field descriptions associated with the LE disclosure. Thus, it would be wise not to deviate from the model provided.

For those non-RESPA loans, the disclosures must be made with headings, content and format substantially similar to form H-24. Use of model form H-24, properly completed with accurate content, would constitute compliance for those loans.[10]

According to the CFPB, the Loan Estimate integrates at least seven pages of disclosures, including:

- Three pages of the RESPA Good Faith Estimate;
- Two pages typically used for early TILA disclosures;
- One page typically used for the appraisal notice under the Equal Credit Opportunity Act;
- One page typically used for the servicing disclosure.

The Loan Estimate also incorporates disclosures of:

- The total interest percentage (TIP);[11]
- The aggregate amount of loan charges and closing costs the consumer must pay at consummation;[12]
- For refinances, the anti-deficiency protection notice;[13]
- The homeowner's insurance disclosure.[14]

TRID imposes strict specifications for the Loan Estimate. For instance, unless otherwise specifically provided, a disclosure that does not apply to a transaction should be left blank, not marked "not applicable" or "N/A," and, as a general rule, may not be deleted.[15]

There are special rules for certain disclosures. For example, the Adjustable Payment and

Adjustable Interest Rate tables may be included only when applicable to the transaction and otherwise must be excluded.[16]

The importance of complying with the specialized requirements cannot be overstated: *failure to comply with the 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 unfair, deceptive or abusive acts or practices (UDAAP) statutes, and State mini-TILA and mini-RESPA statutes.

Given the rigid features of the LE, I suggest that a creditor should use Form H-24 for all loans covered by the TRID rule, even if the loan is not a RESPA loan. TRID permits providing a cover letter so long as the Loan Estimate is provided separately from the cover letter.[17] Creditors may not add pages in between the pages of the Loan Estimate, or at the end of the Loan Estimate, except as permitted by Regulation Z.[18] Creditors may not add information not required by TILA Regulation Z. If the creditor devises its own form for loans not subject to RESPA, it must be very careful to compare that form to Form H-24 and ensure that each difference is carefully examined and justified. TRID does not permit any deviations from form H-24 for forms optimized to be shown on a computer screen or tablet.

TIMING AND RECEIPT

The creditor or mortgage broker must provide (either give or mail) the Loan Estimate to the consumer no later than 3 business days after receiving the consumer's application for a mortgage loan. The standard definition of "business day" applies (i.e., a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions).[19] A mortgage broker that gives a Loan Estimate must comply with all the Loan Estimate requirements as if it were the creditor.[20]

If the LE is not delivered in person, "receipt" occurs three business days after the Loan Estimate has been delivered or placed in the mail. Alternatively, the creditor may rely on evidence (i.e., a signed receipt for overnight delivery) that the consumer received the disclosures earlier than the end of the three business days.[21]

One question that comes up often is how to manage the timing with respect to electronic delivery. The 3-business-day period applies to methods of electronic delivery, such as email. Thus, if a creditor sends a Loan Estimate by email on a Monday, the consumer is considered to have received the disclosures on a Thursday, unless the creditor relies on evidence that the consumer received the emailed disclosures earlier (such as an acknowledgment of email receipt). Creditors relying on electronic delivery methods must comply with the consumer consent and other applicable provisions of the E-Sign Act.[22]

Irrespective of E-Sign consent provisions, we advise our clients to consider:

- Whether procedures are needed to deal with electronic disclosures returned undelivered;
- Whether electronic disclosures are provided in a form that can be retained;
- The duration of electronic notices or disclosures available to consumers through the financial institution's systems;
- Establishing a process to appropriately respond to consumer requests for paper copies of electronic notices and disclosures;
- Dealing with changes in hardware or software that may create a risk that consumers will no longer be able to access or retain electronic disclosures; and
- Ensuring their electronic disclosures comply with the timing, format, content, and recordkeeping requirements of the underlying substantive rule (i.e., Regulation Z).

The creditor or broker must provide the Loan Estimate to the consumer no later than the seventh business day before consummation of the transaction (except for time-share transactions).[23]

There is a more specific "business day" definition (viz., includes non-holiday Saturdays) that applies to the requirement that the Loan Estimate be provided at least 7 business days before consummation. The term "consummation" means the time when the consumer becomes contractually obligated on the credit transaction. This 7-day period begins when the creditor delivers the Loan Estimate or places it in the mail, not when the consumer receives or is considered to have received the disclosures.[24] In this definition, excepting only timeshare transactions, "business day" is all calendar days except Sundays and legal national public holidays (i.e., New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day).

A question I often get is: how do these two different definitions of "business day" affect the proper disclosure timing? The 3-business-day period is timed from receipt of an application, whereas the 7-business-day waiting period begins when the creditor delivers the Loan Estimate or places it in the mail, not when the consumer receives or is considered to have received it.

The consumer may modify or waive the 7-day waiting period if he or she determines that the loan is needed to meet a *bona fide personal financial emergency*. Any modification or waiver may not occur until after a Loan Estimate has been received. To modify or waive the 7-day waiting period, the consumer must give the creditor a dated written statement describing the emergency, specifically modifying or waiving the 7-day period, and bearing the signature of all consumers who are primarily liable.

DELIVERY: HOW AND BY WHOM

Regulation Z allows either the creditor or a mortgage broker to provide the Loan Estimate.[25] This rule closely reflects the requirements under RESPA's Regulation X,[26] including:

- If a mortgage broker receives an application, either the creditor or the broker must provide a Loan Estimate within 3 business days of receipt.
- If the mortgage broker provides the Loan Estimate, the mortgage broker must comply with all applicable requirements as if it were the creditor.
- The creditor must ensure that the Loan Estimate is provided in accordance with all the applicable requirements.
- Disclosures provided by a mortgage broker in accordance with the requirements satisfy the creditor's obligation.
- If a mortgage broker issues a Loan Estimate, the broker also must comply with the 3-year record retention requirements.[27]
- The creditor is not permitted to issue a separate Loan Estimate or revised disclosures to correct a mortgage broker's error.[28] The creditor is expected to maintain communications with the broker to ensure that the broker is acting in place of the creditor (even if the creditor does not know about the broker's involvement until after the Loan Estimate has been given).[29]
- Either the creditor or the mortgage broker may provide revised Loan Estimates based on any of the six legitimate reasons for revisions.
- Mortgage brokers are not required to get authorization from creditors before providing Loan Estimates.
- Creditors are bound by the terms of the Loan Estimate, subject to one of the six legitimate reasons for revisions, whether or not the creditor has authorized the mortgage broker to provide the Loan Estimate.
- The regulation does not explicitly require a mortgage broker to provide application information to the creditor nor establish other conditions brokers must satisfy before they issue a Loan Estimate. The regulation considers the creditor to be in the best position to set requirements contractually.

To emphasize: *even if a mortgage broker provides the Loan Estimate, the creditor remains responsible for complying with all requirements concerning provision of the form; and a broker that provides a Loan Estimate also is required to comply with all requirements regarding the Loan Estimate as if it were the creditor*.[30]

APPLICATION DEFINITION

TRID formally does away with the catch-all, seventh information item. Six information items are needed to constitute an application. A creditor may provide a Loan Estimate without receiving all of the six items of information that comprise an "application" within the meaning of Regulation Z. But if it does this, the receipt of any of the missing items does not constitute a "changed circumstance" to justify a revised Loan Estimate.

Prior to providing the Loan Estimate, a creditor may collect, but may not require, documentation verifying information provided by the consumer in the application. For example, a creditor may not require a purchase and sale agreement before providing a Loan Estimate for purchase transactions but it may accept a copy if the applicant voluntarily offers it.

A creditor need not provide a Loan Estimate if it declines the loan or the consumer withdraws the application within the 3-business-day period. However, if the creditor fails to provide the Loan Estimate and then later consummates the transaction on the terms originally applied for, then the creditor has not complied with the TRID Rule. Therefore, if, following a decline or withdrawal within the 3-day period, the consumer later amends the application because of the creditor's unwillingness to approve it on the terms originally requested, the creditor did not violate the regulation by failing to provide a Loan Estimate based on the original terms, but the amended application must be a new application that requires a Loan Estimate.

In other words, procedurally, if the creditor determines within the 3-business-day period that the application will not be approved on the terms requested by the consumer, or if the consumer withdraws the application within that period, the creditor does not have to provide a Loan Estimate. If the creditor does not provide the Loan Estimate, it will not have complied with the Loan Estimate requirements if it later consummates the transaction on the terms originally applied for by the consumer. If the consumer then amends the application and the creditor determines the amended application may proceed, the amended application is a new application that requires a Loan Estimate within the 3-business-day period.

COLLECTION OF FEES AND CONSUMER DOCUMENTS

With the exception of a creditor or other person imposing a *bona fide* and reasonable fee for obtaining the consumer's credit report, TRID prohibits a creditor or other person from imposing a fee on a consumer before the consumer has:

- Received the Loan Estimate,[31] and
- Indicated an intent to proceed with the transaction.[32]

The consumer may indicate intent to proceed in any manner the consumer chooses, unless the creditor requires a particular manner of communication, provided that the creditor does not assume silence indicates intent. The creditor must document the communication of intent to satisfy TILA's record retention requirements.[33] A consumer's signature or initials on a Loan Estimate do not constitute an intent to proceed. A creditor may not allow the Loan Estimate to be signed by the consumer to document intent to proceed – the optional signature on the Loan Estimate is only to document receipt of the Loan Estimate.

Oral communication in person immediately upon delivery of the Loan Estimate sufficiently indicates intent; also valid would be an oral communication over the phone, written communication by email, or signing a pre-printed form, if the action occurs after receipt of the Loan Estimate.[34] But silence is not acceptable.

One highly charged question usually is posed whenever I outline the requirements concerning the collection of fees prior to the consumer receiving the Loan Estimate. The fact is no manner of constructive receipt of fees is permitted prior to the Loan Estimates receipt by the consumer, other than the *bona fide* and reasonable fee for obtaining the consumer's credit report. A creditor or third party imposes a fee if the person requires a consumer to provide a method of payment, *even if payment is not made at that time*. For example, if a creditor or other person requires the consumer to provide a $500 check to pay for a "processing fee" before the consumer receives a Loan Estimate, the creditor does not comply with the TRID rule, even if the creditor or other person stated that the check would not be cashed until after a Loan Estimate was received by the consumer and waited to cash the check until after the consumer indicated an intent to proceed. Similarly, a creditor may not require the consumer to provide a credit card number before the consumer receives the Loan Estimate and indicates an intent to proceed, even if the creditor promises not to charge the card until after that time – although the creditor may accept a credit card number for purposes of imposing a reasonable and *bona fide* credit report fee, and may maintain the number on file so long as no other fee is imposed until the Loan Estimate is received, the consumer has indicated an intent to proceed, and the creditor has received a separate authorization to process the additional fee charge.[35]

With respect to consumer documentation, a creditor or other person may not require a consumer to submit documents verifying information related to the consumer's application before providing a Loan Estimate.[36] The creditor or other person may collect from the consumer any information it requires prior to providing a Loan Estimate or at the same time as it collects the six items of information that constitute an "application," but the creditor or other person may not require the consumer to submit documentation to verify that information until a Loan Estimate has been provided.

Consider these two examples. The creditor may ask for the sale price and property address, but may not require the consumer to provide a purchase and sale agreement to support the information the consumer orally provides until after a Loan Estimate has been given. A mortgage broker may ask for the names, account numbers, and balances of the consumer's checking and savings accounts, but may not require the consumer to provide bank statements or similar documentation until the Loan Estimate has been provided.[37]

Both this fee imposition prohibition and the prohibition against requiring verification documentation take effect August 1, 2015 and are not tied to the receipt of a loan application.

GOOD FAITH AND TOLERANCE RULES

TRID continues and expands the general RESPA rule that the charges actually paid by or imposed on the consumer for certain settlement services and transfer taxes when the loan is closed may not exceed the amounts included on the early disclosures, with several exceptions.[38]

Like RESPA, TILA (as amended by the TRID rule), establishes tolerance categories limiting the permissible variations between the estimated amounts and the actual amounts: the 10% category, the unlimited variation category, and the zero percent category.

An amount disclosed on the Loan Estimate is considered in good faith and in compliance with TRID if the actual charge does not exceed the estimated amount by the amount permitted by the applicable tolerance rule.[39]

<u>10% Category</u>

An estimate of a charge for a third-party service or a recording fee is in good faith if:

(1) the aggregate amount of actual charges for third-party services and recording fees does not exceed the aggregate amount of those charges disclosed on the Loan Estimate by more than 10 percent;
(2) the charge for the third-party service is not paid to the creditor or an affiliate of the creditor;[40] and

(3) the creditor permits the consumer to shop for the third-party service. Only these items fit into the 10% category:
    a. fees paid to an unaffiliated third party if the creditor
        i. permitted the consumer to select a settlement service provider not on the written list of service providers and
        ii. disclosed on that list that the consumer may select the provider; and
    b. recording fees.[41]

Assume that the Loan Estimate includes a $300 estimated fee for a settlement agent, the settlement fee is included in the 10% category, and the sum of all 10% category charges, including the settlement agent fee, equals $1,000. If the actual settlement agent fee exceeds 10% (i.e., exceeds $330), then the creditor does not violate the tolerance rule if the sum of all 10% category charges does not exceed 10% (i.e., $1,100). The focus of the 10% tolerance rule on aggregate amounts also provides flexibility in disclosing individual fees. For example, if the creditor does not include an estimated charge for a notary fee, but a $10 notary fee is charged to the consumer and the notary fee qualifies as a 10% category fee, then the creditor does not violate the tolerance rule if the sum of all 10% category amounts does not exceed $1,100, even though the creditor did not disclose the notary fee on the Loan Estimate.[42]

<u>Unlimited Variation Category</u>
An estimate of the following charges is in good faith if it is consistent with the best information reasonably available to the creditor at the time it is disclosed, regardless of the amount of variation between it and the amount actually charged:
(1) prepaid interest;
(2) property insurance premiums;
(3) amounts placed into an escrow, impound, reserve, or similar account;
(4) charges paid to third-party service providers for which the consumer is permitted to shop and which the creditor did not identify on the written list of service providers; and
(5) charges paid to third-party service providers not required by the creditor, including affiliates of the creditor.

Under TRID, a fee is not considered "paid to" a person if the person does not retain the fee. A fee is also not considered "paid to" a person if the person retains the fee as reimbursement for an amount it has already paid to another party.[43]

Differences between the amount of these charges disclosed in the Loan Estimate and actual charges do not constitute a lack of good faith so long as the original estimated charge, or lack of an estimated charge for a particular service, was based on the best information reasonably available to the creditor when the Loan Estimate was provided. A charge is considered to be in good faith if the creditor charges the consumer less than the amount disclosed on the Loan Estimate.

Zero Percent Category

All other charges are in good faith only if the actual charge does not exceed the estimated amount. These include, but are not limited to, fees paid to the creditor, fees paid to the mortgage broker, fees paid to an affiliate of the creditor or mortgage broker, fees paid to an unaffiliated party if the creditor did not permit the consumer to shop for a third-party settlement service provider, and transfer taxes.[44]

CHANGES AND REVISED LOAN ESTIMATES: SIX SITUATIONS

A creditor may provide a revised Loan Estimate at any time. The provision addressing revised Loan Estimates[45] does not prohibit a creditor from providing updated disclosures. Rather, it provides an exception to the general rule that an actual charge must be compared to the amount in the original Loan Estimate.

There are six specific situations where providing a revised Loan Estimate allows the creditor to compare the actual amounts charged to the updated figures that have increased since the original Loan Estimate and that justify the revised Loan Estimate. If the creditor issued a revised Loan Estimate for a reason other than the six situations, then the creditor must compare the actual amounts charged to the earlier disclosures, not those on the revised Loan Estimate. I provide a brief outline of these six situations.[46]

If the creditor wants to use a revised Loan Estimate, the creditor must provide the revised Loan Estimate within three business days after receiving information sufficient to establish that one of the six situations applies.[47]

The six situations are these:

1) Changed Circumstance Affecting Settlement Charges

A changed circumstance causes the estimated charges to increase or, in the case of a 10% category charge causes the aggregate amount of those charges to increase by more than 10 percent.

A "changed circumstance" means:

- An extraordinary event beyond the control of any interested party (i.e., a war or natural disaster that damages the property or otherwise results in additional closing costs) or other unexpected event specific to the consumer or the transaction (i.e., the title insurer goes out of business during underwriting).
- Information specific to the consumer or transaction that the creditor relied upon when providing the Loan Estimate and that was inaccurate or changed after the disclosures were provided (i.e., a consumer misrepresented income and the creditor relied on the misrepresentation when providing the Loan Estimate, or a co-applicant becomes unemployed during underwriting and the creditor relied on the combined income when providing the Loan Estimate).
- New information specific to the consumer or transaction that the creditor did not rely on when providing the Loan Estimate (i.e., the creditor relied on the value of the property in providing the Loan Estimate, but during underwriting a neighbor of the seller, learning of the impending sale, files a claim contesting the boundary of the property).[48]

2) Changed Circumstance Affecting Eligibility

The consumer is ineligible for an estimated charge previously disclosed because a changed circumstance affected the consumer's creditworthiness or the value of the security for the loan.[49]

3) Revisions Requested by the Consumer

The consumer requests revisions to the credit terms or the settlement that cause an estimated charge to increase.[50]

4) Interest Rate-Dependent Charges

The points or lender credits change because the interest rate was not locked when the Loan Estimate was provided. On the date the interest rate is locked the creditor must provide a revised version of the Loan Estimate to the consumer with the revised interest rate, points as are required to be disclosed in Section A under Origination Charges on the Closing Disclosure, lender credits, and other interest-rate dependent charges and terms.[51]

An inquiry we have received relating to this category involves the complexity of rate lock timing. So let's assume that a creditor executes a rate lock agreement with the consumer and then provides a Loan Estimate. The actual points and lender credits are compared to the estimated points and lender credits disclosed in the Loan Estimate to determine if those charges have increased. If the consumer enters into a rate lock agreement after a Loan Estimate has been provided, then the creditor must provide, on the date of the rate lock agreement, a revised Loan Estimate reflecting the revised interest rate, points, lender credits and any other interest rate-dependent charges and terms. Assuming that the revised Loan Estimate is appropriate, the actual points and lender credits are compared to those disclosed on the revised Loan Estimate to determine if the fees have increased.[52]

5) Expiration
The consumer indicates an intent to proceed with the transaction more than 10 business days after the Loan Estimate is timely provided. TRID requires no justification for the revised Loan Estimate other than the lapse of 10 business days (using the definition of business day that applies for Loan Estimate timing rules – days on which the creditor's offices are open to the public for carrying on substantially all of its business functions).[53]

6) Delayed Settlement Date on a Construction Loan
In transactions involving new construction, when the creditor reasonably expects settlement to occur more than 60 days after the Loan Estimate is timely provided, the creditor must provide a revised Loan Estimate if the original Loan Estimate clearly and conspicuously states that at any time prior to 60 days before consummation the creditor may issue a revised Loan Estimate. If no such statement is provided, the creditor may not issue revised disclosures unless one of the other five situations outlined above applies. If a use and occupancy permit has been issued for the home before the issuance of the Loan Estimate, then the home is not considered to be under construction and the transaction would not fit within this provision.[54] By new construction loan, I mean a loan for the purchase of a home not yet constructed or the purchase of a new home where construction is currently underway; I do not mean a loan for financing home improvements or remodeling, or adding to an existing structure, or for which a use and occupancy permit has been issued before provision of a Loan Estimate.

The timing of a revised Loan Estimate relating to providing it prior to consummation has been the source of much consternation. There are several scenarios, but the following are the primary concerns:

(1) The creditor may not provide a revised Loan Estimate on or after the date on which a Closing Disclosure is provided.
(2) The consumer must receive the revised Loan Estimate not later than four business days before consummation.
(3) If the revised Loan Estimate is not provided to the consumer in person, the consumer is considered to have received it three business days after the creditor delivers or places it in the mail.
(4) If fewer than four business days remain between the time the revised Loan Estimate

must be provided and consummation, the creditor complies with the Loan Estimate timing requirement by reflecting the revised disclosures in the Closing Disclosure.

A change of circumstance may happen within four days of consummation. What then?

The remedy takes into consideration that the creditor will not be able to provide and rely on a revised Loan Estimate. Instead, the creditor may provide a Closing Disclosure reflecting any revised charges resulting from one or more of the six specific situations and rely on those figures, rather than the amounts disclosed on the Loan Estimate, for purposes of determining good faith and the applicable tolerance.[55]

Procedurally, if the changed circumstance or other triggering event occurs between the fourth and third business days from consummation, the creditor may reflect the revised charges on the Closing Disclosure provided to the consumer three business days before consummation; and if the event occurs after the first Closing Disclosure has been provided to the consumer (i.e., within the 3-business-day waiting period before consummation), the creditor may compare charges on the revised Closing Disclosure with the amounts actually charged for purposes of determining good faith and tolerances.

Rounding Rules for Loan Estimates

On many occasions, the TRID rule requires rounding, but its general rule is to require numbers and percentages to be disclosed as exact numbers. This does not mean that a number like 3.14159265 should not be rounded. A creditor may safely assume that a dollar amount would be rounded to the nearest cent. Obviously, a borrower cannot pay $3.14159265; the actual payment will be $3.14. A percentage amount would be rounded to 3. 141% or 3.14%. TRID generally offers an option for percentages to either two or three decimal places.[56]

The rounding rule is influenced by the CFPB's view that, due to its consumer testing results, "a large number of exact dollar amounts and percentages had the potential to cause information overload and reduce the overall effectiveness of the disclosure." The CFPB believes "that rounded disclosures allow consumers to digest the information on the Loan Estimate faster and more easily than disclosure of non-rounded numbers. Moreover, given that many of the numbers on the Loan Estimate are simply estimates and will likely change on the Closing Disclosure, disclosing exact values is unnecessary and may contribute to information overload without any real benefit to consumers."[57]

WRITTEN LIST OF SETTLEMENT SERVICE PROVIDERS

Like RESPA, TILA requires a creditor to provide a written list of settlement service providers if the creditor allows the consumer to shop for providers.[58] [59]

A creditor permits a consumer to shop for a settlement service if it permits the consumer to select the provider of the service, subject to reasonable requirements. For instance, a creditor may require that a settlement agent chosen by the consumer must be appropriately licensed in the relevant jurisdiction.[60] In contrast, a creditor does not permit a consumer to shop if the creditor requires the consumer to choose a provider from a list provided by the creditor. Thus, the written list requirement does not apply if the creditor does not permit the consumer to shop for any of the settlement services.

In any event, the written list must:

- Identify at least one available provider of each settlement service for which the consumer is permitted to shop. An entity that the creditor lists for a particular service must be available to provide the service. The settlement service providers identified on the written list must correspond to the settlement services for which the consumer may shop, as disclosed in the Loan Costs table on page 2 of the Loan Estimate.
- State that the consumer may choose a different provider for that service. Model form H-27 in Appendix H of Regulation Z offers a model statement.
- Be provided separately from the Loan Estimate but according to the same timing requirements.

How should affiliates be treated, with respect to the written list of settlement service providers? A creditor may include affiliates on the list.[61] But the listing of an affiliated provider, under a heading that clearly states that a consumer can shop for different providers (even if the affiliate is the only provider listed), does not make that provider a "required provider" under RESPA, although the listing constitutes a "referral" under RESPA[62] and the creditor must give an affiliated business arrangement (AfBA) disclosure as required by RESPA's Regulation X.

A creditor is allowed to state on the written list the service providers for which the consumer is not permitted to shop,[63] provided that the creditor clearly and conspicuously distinguishes those services from the services from which the consumer is permitted to shop.

In providing this broad overview of the Loan Estimate, it is my hope that this analysis encourages management to meet to discuss the ways and means available to effectuate its proper and timely implementation.

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[1] Foxx, Jonathan, *RESPA/TILA Integration – Part I: Overview and Loan Estimate*, pp 28-54, National Mortgage Professional, October 2014
[2] Foxx, Jonathan, *RESPA/TILA Integration – Part II: Closing Disclosure and Action Plan*, pp 26-50, National Mortgage Professional, December 2014
[3] www.teamtrid.com
[4] www.tridhotline.com
[5] Regulation Z § 1026.19(e)(2)(B)(ii)
[6] Regulation Z § 1026.19(e)(2)(ii)
[7] As defined by RESPA, Regulation X § 1024.2(b)
[8] 78 FR 79729, 79993, December 31, 2013
[9] Construction-only loans with terms of less than 2 years that do not finance the transfer of title to the borrower, loans secured by vacant land on which a home will not be constructed or placed using the loan proceeds within 2 years after settlement of the loan, and loans with a consumer purpose secured by non-residential real property. TILA § 105(b) explicitly provides that nothing in TILA may be construed to require a creditor to use any model form or clause prescribed by the CFPB under that section (viz., § 105(a) being the authority relied upon by the CFPB for these non-RESPA loans).
[10] Regulation Z, Official Staff Commentary, Comment 37(o)(3)-1
[11] TILA § 128(a)(19), added by Dodd-Frank Act § 1419
[12] TILA § 128(a)(17), added by Dodd-Frank Act § 1419
[13] TILA § 129C(g)(3), added by Dodd-Frank Act § 1414(c)
[14] TILA § 106(c) and Regulation Z § 1026.4(d)(2)(i), required to exclude homeowner's insurance premiums from the finance charge.
[15] Regulation Z, Official Staff Commentary, Comment 37-1
[16] Regulation Z § 1026.37 includes special rules for certain disclosures. See also § 1026.37(i), (j)
[17] Applies also the Closing Disclosure with respect to allowing a separate cover letter.
[18] Regulation Z Official Staff Commentary, Comment 37(o)(1)-1; see also § 1026.37
[19] Regulation Z §§ 1026.19(e)(1)(iii)(A) and 1026.2(a)(6)
[20] Regulation Z Comment 19(e)(1)(ii)-1. In a future article, I will provide an analysis of the creditor and mortgage

broker relationship relating to TRID requirements, responsibilities, and regulatory implementation.

[21] Regulation Z § 1026.19(e)(1)(iv)

[22] Regulation Z § 1026.37(o)(3)(iii), and Official Staff Commentary, Comment 19(e)(1)(iv)

[23] Regulation Z § 1026.19(e)(1)(i)(C)

[24] Regulation Z §§ 1026.19(e)(1)(iii)(B) and 1026.2(a)(6). "Consummation" means the time the consumer becomes contractually obligated on the credit transaction. See also Regulation Z § 1026.2(a)(13).

[25] Regulation Z § 1026.19(e)(1)

[26] Regulation X § 1024.7

[27] Regulation Z § 1026.25(c)

[28] This may be an area vetted through litigation. The applicable Comment states that "the creditor is responsible and may not issue a revised disclosure correcting the error." Yet TILA § 130(b) generally offers the creditor the opportunity to escape civil, enforcement or criminal liability for TILA disclosure errors by issuing corrections within 60 days after discovery, provided that an appropriate notification accompanies the notification. Although issuance of a revised disclosure may not erase liability for actual settlement charges that fall outside the tolerances for determination of good faith, it might allow the creditor to escape liability for the damages specified by TILA § 130. The area of dispute may be a claim that Regulation Z should not be permitted to contradict this statutory provision.

[29] Regulation Z, Official Staff Commentary, Comment 19(e)(1)(ii)-1 and-2

[30] Regulation Z also follows this convention, that is, the term "creditor" used in the Regulation Z generally refers to the creditor or the mortgage broker, as applicable.

[31] Regulation X § 1024.7(a)(4) and (b)(4) and TILA Regulation Z § 1026.19(a)(1)

[32] Regulation X § 1024.7(a)(4) and (b)(4)

[33] Regulation Z § 1026.25

[34] Regulation Z, Comment 19(e)(2)(i)(A)-2

[35] Regulation Z Official Staff Commentary, Comment 19(e)(2)(i)(A)-5

[36] This requirement parallels the requirement in Regulation X § 1024.7(a)(5)

[37] Regulation Z § 1026.19(e)(2)(iii) and Official Staff Commentary, Comment 19(e)(2)(iii)-1

[38] A charge "paid by or imposed on the consumer" refers to the final amount for the charge paid by or imposed on the consumer at consummation or settlement, whichever is later.

[39] Regulation X § 1024.7(e)-(f)

[40] An "affiliate" is "any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956." See 12 U.S.C. 1841 et seq.

[41] Regulation Z § 1026.19(e)(3)(ii) and Official Staff Commentary, Comment 19(e)(3)(ii)-1

[42] Regulation Z Official Staff Commentary Comment 19(e)(3)(ii)-2

[43] Regulation Z, Official Staff Commentary, Comment 19(e)(3)(i)-3

[44] In general, transfer taxes are state and local government fees on mortgages and home sales based on the loan amount or sales price, while recording fees are state and local government fees for recording the loan and title documents. See Regulation Z, Official Staff Commentary, Comments 37(g)(1)-1 and -3

[45] Regulation Z § 1026.19(e)(3)(iv)

[46] The comparison must be between the actual charges and either the charges on the original Loan Estimate or the charges on the most recent Loan Estimate revised to reflect one or more of the six situations.

[47] Regulation Z § 1026.19(e)(iv)(D) overrides this 3-business-day rule if the reason for the revised Loan Estimate is the locking of the interest rate. See Official Staff Commentary, Comment 19(e)(5)(i)-2

[48] Regulation Z § 1026.19(e)(3)(iv)(A) and Official Staff Commentary, Comment 19(e)(3)(iv)(A)-2

[49] Regulation Z § 1026.19(e)(3)(iv)(B) and Official Staff Commentary, Comment 19(e)(3)(iv)(B)-1. See also Item

section 8.5 in the CFPB's *TILA-RESPA Integrated Disclosure Rule Compliance Guide*, available at http://files.consumerfinance.gov/f/201403_cfpb_tila-respa-integrated-disclosure-rule_compliance-guide.pdf

[50] Regulation Z § 1026.19(e)(3)(iv)(C) and Official Staff Commentary Comment 19(e)(3)(iv)(C)-1

[51] This requirement of disclosure on the day the interest rate is locked applies notwithstanding the 3-business-day rule set forth in Regulation Z § 1026.19(e)(4)(i). See TILA Regulation Z § 1026.19(e)(3)(iv)(D) and Official Staff Commentary, Comment 19(e)(4)(i)-2.

[52] Regulation Z § 1026.19(e)(3)(iv)(D) and Official Staff Commentary, Comment 19(e)(3)(iv)(D)-1

[53] Regulation Z § 1026.19(e)(3)(iv)(E) and Official Staff Commentary, Comments 19(e)(1)(iii)-1 and 19(e)(3)(iv)(E)-1

[54] Regulation Z § 1026.19(e)(3)(iv)(F) and Official Staff Commentary, Comment 19(e)(3)(iv)(F)-1

[55] Regulation Z, Official Staff Commentary, Comment 19(e)(4)(ii)-1

[56] Regulation Z Official Staff Commentary, Comment 37(o)(4)-1 and -2

[57] 78 FR 79730, 79995, December 31, 2013

[58] It seems to me that the CFPB used a certain finesse by including the requirement in the main text of the regulation. In an unusual way of imposing a significant regulatory requirement, HUD included this requirement in Appendix C to RESPA Regulation X, which contains instructions for completing the Good Faith Estimate.

[59] Regulation Z § 1026.19(e)(1)(vi)

[60] Regulation Z Comment 19(e)(1)(vi)-1

[61] Regulation Z Comment 19(e)(1)(vi)-7

[62] Regulation X 1024.14(f)

[63] Regulation Z Comment 19(e)(1)(vi)-6