



TRID RULE UPDATES AND THE “BLACK HOLE” CONUNDRUM

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On August 11, 2017, the Consumer Financial Protection Bureau (“Bureau”) issued a Final Rule (2017 TILA-RESPA Rule or 2017 Rule, hereinafter “Rule”), amending and clarifying certain mortgage disclosure provisions implemented in Regulation Z.¹

The Rule modifies the Federal mortgage disclosure requirements under the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA) that are implemented in Regulation Z. It memorializes the Bureau’s informal guidance on various issues and makes additional clarifications and technical amendments.

Furthermore, the Rule also creates tolerances for the total of payments, adjusts a partial exemption mainly affecting housing finance agencies and nonprofits, extends coverage of the TILA-RESPA Integrated Disclosures (“TRID Disclosures”) requirements to all cooperative units, and provides guidance on sharing the TRID Disclosures with various parties involved in the mortgage origination process

The following outline closely follows the Executive Summary provided by the Bureau, which was issued on July 7, 2017.² The Rule is effective 60 days after its publication in the Federal Register. Compliance with the Rule is optional, not mandatory, on the effective date of October 10, 2017.

It is worth noting that the Rule includes this optional compliance period, which begins on the Rule’s effective date. Beginning on the Rule’s effective date and for transactions for which a creditor or

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mortgage broker receives an application prior to October 1, 2018, a person can comply with the Rule but is not required to do so. Generally, during this optional compliance period, a person may comply with the changes set forth in the Rule all at one time or phase in the changes over time (even within the course of a transaction).

October 1, 2018 is the mandatory compliance effective date of the Rule for transactions for which a creditor or mortgage broker receives an application on or after October 1, 2018. That said, the Escrow Closing Notice and Partial Payment Disclosure requirements apply starting October 1, 2018, without regard to when the creditor or mortgage broker receives the application.

➤ CAUTION

Exercise caution during an optional implementation of the Rule. Notwithstanding this flexibility, a financial institution cannot phase in the Rule in a way that would violate provisions of Regulation Z that are not being changed. Additionally, if a creditor or mortgage broker receives an application prior to October 1, 2018, optional compliance continues to apply to that transaction after October 1, 2018 (except as noted regarding the Escrow Closing Notice and Partial Payment Disclosure). For example, during the optional compliance period, a creditor cannot provide a Good Faith Estimate followed by a Closing Disclosure for a transaction secured by a cooperative unit that is not considered to be real property under applicable state law.³

Concurrently with the issuance of the Rule, the Bureau issued a Notice of Proposed Rule-Making (NPRM) regarding when a creditor may use a Closing Disclosure, instead of a Loan Estimate, to determine if an estimated closing cost was disclosed in good faith and within tolerance.⁴ Affectionately known as the “black hole” – referring to situations in which a lender may not be able to use a Closing Disclosure to reset fee tolerances – the Rule does not make changes or clarifications related to this issue.

So, although the Rule addresses and clarifies certain topics, it is notable that the Rule does not actually deal with the so-called “black hole” issue. Even if the nomenclature is controversial, the fact is a situation can happen where a Closing Disclosure may (or may not) be used to determine whether certain estimated charges were disclosed in “good faith.” To put a finer point on it, lenders want clarity on this issue, but instead the Bureau simultaneously published the separate proposed rule, the NPRM, which addresses “when a creditor may use a Closing Disclosure, instead of a Loan Estimate, to determine if an estimated closing cost was disclosed in good faith and within tolerance.” So, this concern is still unresolved. Comments on the NPRM are due 60 days after the NPRM it was published in the Federal Register.⁵

The Rule consists of 560 pages.⁶ The NPRM is 41 pages. Condensing the updates into a few high-level points is, to put it modestly, an inspired endeavor. Nevertheless, in the following outline, I hope to provide a general, section by section, synopsis of the Rule’s salient requirements and features. Please pay

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attention to my observations, marked as a “Note” to certain items, so as to tease out the regulatory nuances involved.

PARTIAL PAYMENT DISCLOSURES AND ESCROW CLOSING NOTICES

Regulation Z requires a creditor or servicer to provide a consumer with an escrow closing notice before an escrow account subject to 12 CFR 1026.20(e) is canceled.⁷

It also requires certain persons who become the owner of an existing closed-end consumer mortgage loan (other than a reverse mortgage) to notify the consumer of the partial payment policy applicable to the mortgage loan.⁸

These obligations generally arise after consummation, and these notices are sometimes referred to as post-consummation notices.

The Rule addresses the applicability of these post-consummation notice requirements.

Specifically, it provides that after October 1, 2018, the applicability of these requirements will not be dependent on when the application for the mortgage loan was received. Until the Rule’s mandatory compliance date on October 1, 2018, a creditor or servicer can either provide the escrow closing notice for covered escrow accounts established in connection with a mortgage loan for which an application was received on or after October 3, 2015 or provide the notice in connection with all covered escrow accounts without regard to when the mortgage loan application was received.

Similarly, a covered financial institution has the option to provide the partial payment disclosure for closed-end consumer mortgage loans for which an application was received on or after October 3, 2015 or to provide the disclosure for all such loans without regard to when the application was received. But, starting October 1, 2018, the escrow closing notice and partial payment disclosure requirements apply without regard to when the application for the covered loan was received.

LOANS SECURED BY COOPERATIVES

Currently, Regulation Z requires a creditor to provide the TRID Disclosures for a loan secured by a cooperative unit if cooperative units are classified as real property under applicable state law.

NOTE: A creditor is not required to provide the TRID Disclosures for such loans if cooperative units are classified as personal property under applicable state law.

The Rule creates a uniform mandate regarding such loans and requires creditors to provide TRID

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Disclosures for a closed-end consumer loan (other than a reverse mortgage) secured by a cooperative unit regardless of whether state law classifies cooperative units as real property.

LOANS TO CERTAIN TRUSTS

The Rule revises the commentary to clarify that, for purposes of Regulation Z's definition of "consumer," credit extended to certain trusts established for tax or estate planning purposes is credit extended to a natural person. The preamble to the Rule discusses providing the Disclosures in these situations.

PARTIAL EXEMPTION FOR CERTAIN HOUSING ASSISTANCE LOANS

Regulation Z provides an exemption from the TRID disclosure requirements for low-cost, non-interest bearing, subordinate lien housing assistance loans that satisfy six criteria. Similarly, Regulation X provides an exemption from certain RESPA disclosure requirements for loans that satisfy the six criteria set forth in Regulation Z.

The Rule clarifies and changes two of the six criteria.

The Rule revises the costs that may be payable by the consumer without loss of eligibility for the partial exemption.

Specifically, it provides that:

1. Transfer taxes, in addition to recording, application, and housing counseling fees, may be payable by the consumer at consummation without losing eligibility for the partial exemption; and
2. Recording fees and transfer taxes are excluded from the 1-percent cap on total costs payable by the consumer at consummation.

The Rule also revises the requirements regarding the disclosures that must be provided to meet a criterion for the partial exemption. Particularly, it allows the creditor to provide the TRID Disclosures as an alternative to providing a disclosure of the cost of credit under 12 CFR 1026.18. Disclosures must comply with all Regulation Z requirements pertaining to those disclosures.

NOTE: Assuming the other criteria for the partial exemption are satisfied, a creditor may provide either a compliant disclosure of the cost of credit under 12 CFR 1026.18 or a compliant Loan Estimate and Closing Disclosure, and does not need to provide the special information booklet, Good Faith Estimate, or HUD-1 settlement statement.

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CONSTRUCTION LOANS

The Rule amends and clarifies several disclosure provisions related to construction loans.

Among other things, the Rule does the following with respect to construction loans:

1. Provides that when disclosing a construction-permanent loan as two separate transactions, a creditor must provide a Loan Estimate for a particular phase within 3 business days of receiving an application for that phase (i.e., the creditor must provide the Loan Estimate for the construction phase within 3 business days of receiving the application for the construction phase and the Loan Estimate for the permanent phase within 3 business days of receiving the application for the permanent phase).

NOTE: If a creditor receives a single application for both phases but discloses them separately, it provides a Loan Estimate for the construction phase and a Loan Estimate for permanent phase within 3 business days of receipt of such application.

2. Provides that, if a creditor discloses a construction-permanent loan as two separate transactions, the creditor must allocate to the construction phase amounts for finance charges and points and fees that would not be imposed but for the construction financing, and that other amounts for finance charges and points and fees must be allocated to the permanent phase.⁹

NOTE: Fees and charges that are not finance charges or points and fees may be allocated between the construction phase and permanent phase in any manner that the creditor chooses.

3. Provides that construction inspection and handling charges collected before or at consummation are disclosed in the Loan Costs table and that such costs collected after consummation are disclosed in a separate addendum.

NOTE: The Rule includes additional information regarding disclosure of these charges and the applicability of the good faith standard depending on when the charges are collected.

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4. Provides that, in transactions without a seller, the appraised value or estimated value disclosed on the Loan Estimate must be based on the best information reasonably available and may, at the creditor's option, include the estimated value of the anticipated improvements to the property.

NOTE: The value disclosed on the Closing Disclosure in transactions without a seller, must include the value of the property used to determine the approval of the loan, including the value of improvements to be made on the property if the improvements' value was used to approve the loan.

5. Provides that, if a construction-permanent loan is disclosed as a single transaction, the Loan Term is the combined term of both phases (i.e., the construction phase of 12 months and permanent phase of 30 years is disclosed as 31 years).

NOTE: If a construction- permanent loan is disclosed as two transactions, the Loan Term for the permanent phase begins on the date that interest for the permanent phase's periodic payments begins to accrue.

6. Provides how to complete the Product disclosure as well as disclosure of interest-only features and balloon payments for construction-only loans and construction-permanent loans.
7. Provides that, if the loan contract indicates the creditor may modify the interest rate when the construction phase converts to the permanent phase and such modifications may increase the payment, the creditor provides the adjustable rate mortgage (ARM) disclosures¹⁰

NOTE: if the loan is secured by the consumer's principal residence, but is not required to provide the initial ARM disclosures,¹¹ for the permanent phase of a construction-permanent loan.

8. Addresses certain interest rate disclosures for construction-only and construction-permanent loans, including in situations where certain interest rates are unknown.
9. Addresses disclosure of the answer to "Can this amount increase after closing?" for

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construction loans and construction-permanent loans where the amounts and timing of advances are unknown.¹²

10. Addresses disclosure of the Projected Payments table, including ranges of payments, for construction-only loans and construction-permanent loans.
11. Addresses disclosure of mortgage insurance and escrow payments in the Projected Payments table when only the permanent phase of a construction-permanent loan requires escrow and the loan is disclosed as a single transaction.
12. Provides that construction costs (i.e., the costs of the improvements) are factored into the Funds for Borrower calculation on the Loan Estimate or, if applicable, disclosed in the optional alternative Calculating Cash to Close table.

NOTE: On the Closing Disclosure, construction costs are disclosed in the Summaries of Transactions table and factored into the Funds for Borrower calculation or, if applicable, disclosed in the alternative Calculating Cash to Close table.

NOTE: The Rule also addresses situations where a creditor places a portion of the proceeds in a reserve or other account at consummation

SIMULTANEOUS SUBORDINATE LIEN LOANS

The Rule permits creditors to disclose simultaneous subordinate lien loans used to finance home purchases on alternative disclosures if the entirety of the seller's transaction is disclosed on the Closing Disclosure for the first-lien mortgage loan.¹³

NOTE: Example: the creditor may leave the seller information, including the itemization of amounts due to seller, blank or may use the optional alternative tables.

Additionally, in a purchase transaction that involves simultaneous subordinate financing, a settlement agent may provide the seller with only the seller's Closing Disclosure for the first-lien transaction, if the first lien Closing Disclosure discloses the entirety of the seller's transaction. Alternatively, the settlement agent may provide the seller with the seller's Closing Disclosures for both the first-lien and simultaneous subordinate financing transactions.

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NOTE: Although the TRID Disclosures for a purchase money subordinate lien loan may omit seller information or use the alternative tables, the Purpose of such loan is disclosed as “Purchase” as long as the loan is secured by the purchased property.

The Rule explicitly provides that the proceeds from a simultaneous subordinate lien loan must be included in the first lien mortgage loan’s Loan Estimate and Closing Disclosure. It also clarifies how the proceeds are disclosed in the TRID Disclosures for the first-lien loan as well as how the proceeds may be disclosed in the TRID Disclosures for the subordinate lien mortgage loan itself.

TOLERANCES FOR TOTAL OF PAYMENTS DISCLOSURE

The Rule includes tolerances for the total of payments disclosure, including tolerances that apply for purposes of rescission. The tolerances for the total of payments disclosure mirror the tolerances applicable to the finance charge.

NOTE: Example: The Rule generally provides that the total of payments disclosure is considered accurate if it is overstated, or if it is understated by no more than \$100.

GOOD FAITH AND REVISED DISCLOSURES

The Rule amends and clarifies the application of the good faith standard and related tolerances for certain TRID Disclosures.¹⁴ It also amends and clarifies when revised Loan Estimates or Closing Disclosures are permitted or required.

Among other things, it provides that:

1. If a creditor fails to disclose a specific settlement service on the written list of providers or fails to provide the list, the 10 percent aggregate standard for determining good faith continues to apply to a required third-party, non-affiliate settlement service charge that otherwise complies with 12 CFR 1026.19(e)(3)(ii).

NOTE: “Good faith” for such charges is determined under the “zero tolerance” standard if the creditor fails to permit the consumer to shop. Whether the creditor permits the consumer to shop is determined based on all the relevant facts and circumstances.

NOTE: The preamble to the Rule also notes that a creditor is not prohibited from

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issuing a revised written list of service providers for informational purposes.

2. The best information available standard applies to bona fide charges for third-party services if a consumer is permitted to shop for the service, as set forth in the Rule, and selects a provider not listed on the written list of settlement service providers provided to the consumer.

NOTE: This standard applies even if the charge is paid to the creditor's affiliate.

3. A creditor can provide a revised Loan Estimate for informational purposes or, if applicable, to reset tolerances.¹⁵ In either situation, the Loan Estimate must be based on the best information reasonably available to the creditor.
4. A creditor may not provide a revised Loan Estimate after it issues a Closing Disclosure even if the interest rate is locked on or after the date the Closing Disclosure is provided to the consumer.

NOTE: If the rate is locked or if the rate changes after a Closing Disclosure is provided to the consumer, the creditor must provide a corrected Closing Disclosure at or before consummation to reflect the changes.

NOTE: If the change triggers a new 3-day review, the creditor must provide the corrected Closing Disclosure at least 3 business days before consummation.

5. Voluntarily extending the expiration date of a Loan Estimate, either orally or in writing, allows the consumer a longer period to indicate an intent to proceed.

NOTE: If the consumer indicates an intent to proceed within the extended period, the creditor must use the charges disclosed in the Loan Estimate when determining good faith and tolerances, unless Regulation Z otherwise allows the creditor to reset tolerances.

6. If a revised Loan Estimate is issued after the consumer indicates an intent to proceed, the expiration date and time for the disclosed costs are left blank on the revised Loan Estimate.

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7. A post-consummation corrected Closing Disclosure is not required if the only changes that would be required to be disclosed in the corrected disclosure are changes to per-diem interest and any disclosures affected by the change in per-diem interest.
8. The creditor has options for disclosing a refund for a tolerance violation. The Rule also provides details for proper disclosure of principal reductions.

DECIMAL PLACES AND ROUNDING

The Rule amends and clarifies the disclosure requirements related to decimal places and rounding. For example, on the Loan Estimate, per-diem interest amounts disclosed in Prepaids and the monthly amounts disclosed in the Initial Escrow Payment at Closing are not rounded to the nearest dollar.

NOTE: Percentage amounts required to be disclosed in the Loan Terms table, in the Adjustable Interest Rate table, in the Adjustable Payments table, for the Total Interest Percentage, and for Points in Origination Charges are disclosed by rounding the exact amount to three decimal places. Any zeroes to the right of the decimal point are not included in the disclosure (i.e., 1%, not 1.000%).

CALCULATING CASH TO CLOSE

The Rule amends and clarifies various calculations used to complete the Calculating Cash to Close table.

Among other things, it:

1. Provides that the loan amount used to calculate the Closing Costs Financed is the face amount of the note.
2. Provides that, in certain purchase transactions, the amount disclosed as the Down Payment/Funds from Borrower is the difference between the sales price and the sum of the loan amount and amounts for loans that the consumer is assuming or subject to which the consumer is taking title to the Property.

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NOTE: The amounts for loans that the consumer is assuming or subject to which the consumer is taking title are amounts that will be disclosed on the Closing Disclosure in the Paid Already by or on Behalf of Borrower at Closing portion of the summary of the borrower's transaction.

3. Provides that, in other purchase transactions, such as cash-back purchase transactions, simultaneous subordinate financing purchase transactions, and construction transactions, the amounts disclosed as the Down Payment/Funds from Borrower and Funds for Borrower are determined by subtracting the sum of the loan amount and amounts for loans that the consumer is assuming or subject to which the consumer is taking title to the Property from the total amount of all existing debt being satisfied in the transaction.
4. Provides details regarding when the TRID Disclosures should include an amount for Down Payment/Funds from Borrower or Funds for Borrower.
5. Addresses the disclosure of Adjustments and Other Credits in the TRID Disclosures.
6. Provides that, on the Loan Estimate, specific seller credits may be disclosed as a lump sum in the Calculating Cash to Close table, or at the creditor's option, may be disclosed by reducing the amount of the specific charge in the Loan Costs or Other Costs table.
7. Provides that a creditor uses the most recent Loan Estimate provided to the consumer when completing the Loan Estimate column of the Calculating Cash to Close table on the Closing Disclosure.
8. Addresses calculation of the Closing Costs Financed on the Closing Disclosure, including for simultaneous subordinate lien loans, construction loans, and construction-permanent loans.
9. Provides options for disclosing the statement that the consumer should see details regarding seller credits if there is a difference between the amount of seller credits disclosed on the Loan Estimate and those disclosed on the Closing Disclosure and the difference is not due to rounding.
10. Provides details regarding which amounts are included in the Adjustments and Other

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Credits section to prevent amounts from being counted twice in the Calculating Cash to Close table.

OTHER DISCLOSURES IN LOAN ESTIMATES AND WRITTEN LISTS OF PROVIDERS

The Rule amends and clarifies several requirements related to the Loan Estimate or written list of settlement service providers.

Among other things, it provides that:

1. A creditor must identify the settlement services it requires the consumer to obtain but for which the creditor permits a consumer to shop. The creditor must provide sufficient information to allow the consumer to contact providers for the settlement services it requires but for which it permits a consumer to shop.

NOTE: The identified providers must correspond to the settlement services for which the consumer may shop.

2. Although a creditor is not required to use the model form H-27 (in appendix H of Regulation Z) for the written list of service providers, the proper use of the model form (including any permitted changes) provides a safe harbor.
3. If there is no seller and the creditor has performed its own estimate of the property value by the time the disclosure is provided to the consumer, the creditor must disclose its own estimate rather than disclose an estimate provided by the consumer.
4. Payoffs of existing liens and unsecured debts are included in the Payoffs and Payments amount or factored into the Funds for Borrower or Adjustments and Other Credits amount in the Calculating Cash to Close table.
5. The Loan Amount disclosed in the Loan Estimate is the face amount of the note.
6. If multiple changes to periodic principal and interest payments may occur in a single year, the creditor combines the changes and discloses them as a single range of payments.
7. If accurate, a creditor can indicate that a portion of taxes, insurance and assessments will

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be paid with escrow funds.

8. Consistent with the terms of the legal obligation between the creditor and consumer, both specific and general lender credits are included in the disclosure labeled "Lender Credits" on the Loan Estimate.
9. The Total Interest Percentage ("TIP") includes prepaid interest that the consumer will pay but does not include prepaid interest that someone other than the consumer will pay.

NOTE: Prepaid interest that is disclosed as a negative number must be included as a negative value when calculating the TIP.

OTHER DISCLOSURES IN CLOSING DISCLOSURES

The Rule amends and clarifies certain disclosure requirements relating to the Closing Disclosure.

Among other things, it does the following:

1. Provides details regarding the disbursement date to be used in the Closing Disclosure.
2. Provides that only the names and addresses of the persons to whom credit is offered or extended are disclosed at the top of the first page of the Closing Disclosure with the label "Borrower."
3. Addresses the itemization requirement for disclosure of taxes and other government fees.
4. Provides that the creditor should disclose "\$0.00" (not "\$0") for prepaid interest if, based on the best information available, the creditor does not believe it will collect prepaid interest.
5. Provides that a creditor may use the 12-month period beginning with the initial payment (instead of consummation) for certain escrow account disclosures.¹⁶
6. Provides that a creditor may include ongoing payments for mortgage insurance in certain escrow account disclosures.¹⁷

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7. Provides that a creditor may use an addendum if additional lines are needed to complete the escrow account disclosures.¹⁸

SHARING DISCLOSURES WITH VARIOUS PARTIES DURING THE ORIGINATION PROCESS

The Rule clarifies that a creditor may provide separate disclosure forms to a consumer and seller if state law prohibits sharing information in the disclosure form as well as in any other situation where the creditor chooses to provide separate disclosures.

The Rule also clarifies the three methods that a creditor may use to make modifications to the Closing Disclosure, in order to separate consumer and seller information.

A creditor may:

1. Leave certain disclosures blank on the form provided to the consumer or seller (as applicable);
2. Omit a table or label, as applicable, for the form provided to the consumer or seller (as applicable); or
3. Assist the settlement agent in providing (or provide when acting as a settlement agent) a modified version of the Closing Disclosure form to the seller.

NOTE: Form H-25(I) illustrates a modified version of the form that can be provided to the seller.

TECHNICAL CORRECTIONS AND CLARIFICATIONS

In addition to the changes discussed above, the Rule makes technical corrections and minor changes and clarifications to wording throughout several provisions of Regulation Z.

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¹ *Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z)*, Bureau of Consumer Financial Protection, 12 CFR Part 1026, Federal Register, Vol. 82, No. 154, August 11, 2017, Rules and Regulations

² *Executive Summary of the 2017 TILA- RESPA Rule*, Consumer Financial Protection Bureau, July 7, 2017

³ The creditor would violate § 1026.38(i), which requires that information that was disclosed on the Loan Estimate be included in the Closing Disclosure.

⁴ *Proposed Rule with Request for Public Comment, Amendments to Federal Mortgage Disclosure Requirements under the Truth in Lending Act (Regulation Z)*, 12 CFR Part 1026, Bureau of Consumer Financial Protection, August 11, 2017

⁵ *Idem*

⁶ The Bureau will also update the *TILA-RESPA Integrated Disclosure Rule Small Entity Compliance Guide* and the *Guide to the Loan Estimate and Closing Disclosure Forms*.

⁷ Note, generally 12 CFR 1026.20(e) requires an escrow closing notice for an escrow account established in connection with a closed-end consumer mortgage loan secured by a first lien on real property or a dwelling (other than a reverse mortgage), unless the escrow account was established solely in connection with a consumer's default or delinquency on the underlying loan or the underlying loan is terminated, such as by repayment.

⁸ See 12 CFR 1026.39(d). Persons required to provide mortgage transfer notices when the ownership of a mortgage loan is being transferred must include in the notice information related to the partial payment policy that will apply to the mortgage loan.

⁹ See 12 CFR 1026.4 for a description of the finance charges and 12 CFR 1026.32(b)(1) for a description of points and fees.

¹⁰ Under 12 CFR 1026.20(c)

¹¹ Under 12 CFR 1026.20(d)

¹² Appendix D is used to calculate the schedule of payments.

¹³ The Rule renames the alternative disclosures for transactions without a seller as alternative disclosures for transactions without a seller and simultaneous subordinate financing. These disclosures are also referred to as "alternative disclosures or tables."

¹⁴ Under 12 CFR 1026.19(e)(3)

¹⁵ *Op. cit.* 1, the Executive Summary states: "A creditor may, for example, reset tolerances if there is a changed circumstance under 12 CFR 1026.19(e)(3)(iv)(A) or (B), or if the consumer requests certain changes under 12 CFR 1026.19(e)(3)(iv)(C). The 2017 TILA-RESPA Rule also clarifies when estimated charges expire for purposes of good faith and determining if charges are within tolerance."

¹⁶ Under 12 CFR 1026.38(l)(7)

¹⁷ *Idem*

¹⁸ *Op. cit.* 12

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