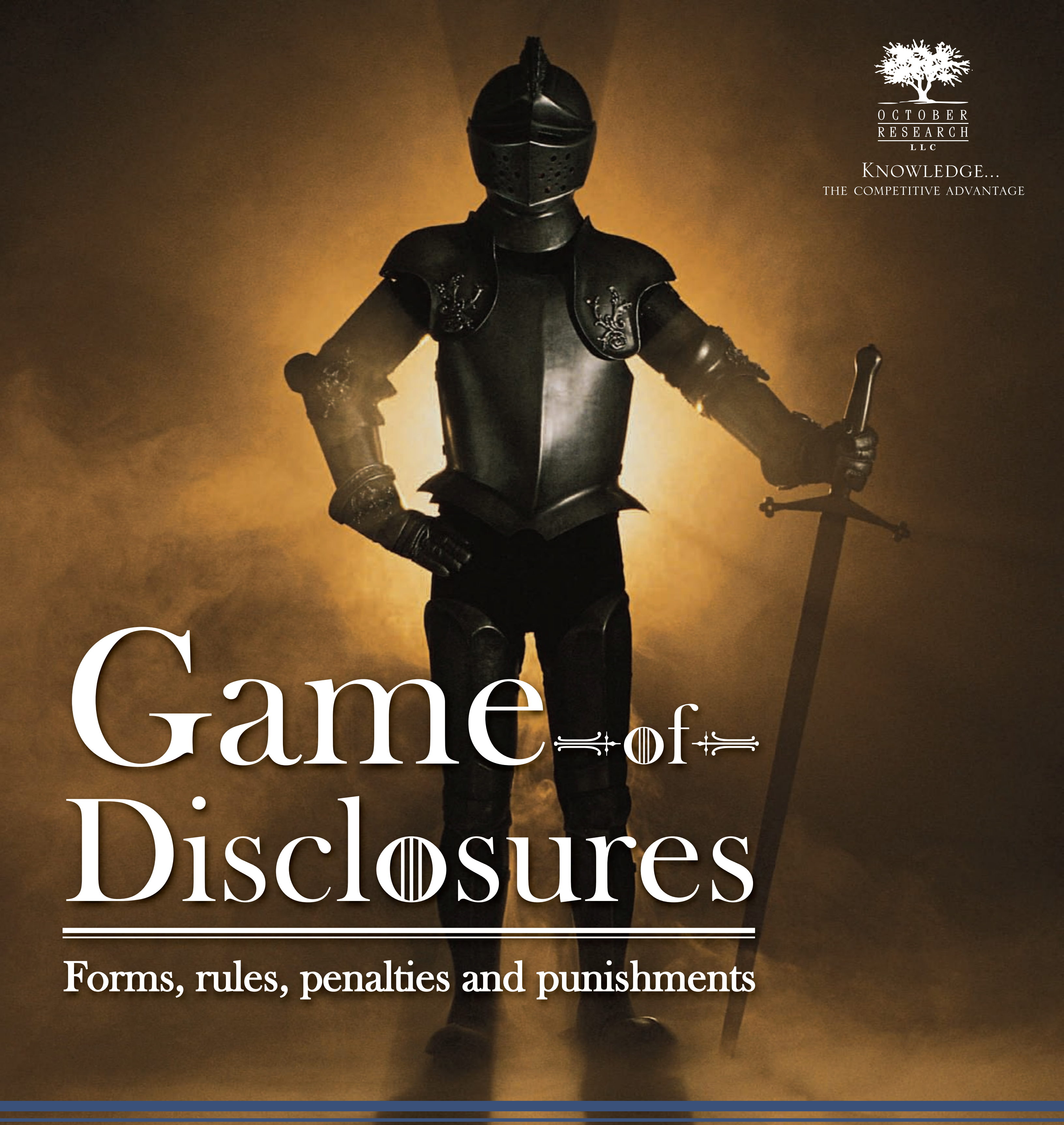

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KNOWLEDGE... THE COMPETITIVE ADVANTAGE

Dear Reader,

The industry waited patiently for nearly a full year from the day the Consumer Financial Protection Bureau (CFPB) opened its doors to find out what changes the agency wanted to make to the RESPA and Truth in Lending Act (TILA) residential mortgage disclosures.

On July 9, 2012, the CFPB released a massive 1,099-page proposed rule. A proposal of that size would be intimidating for anyone. Many small industry businesses do not have the time or the manpower to read such an extensive proposal and submit a comment to bureau, even though this rule could have a significant effect on them.

The good news is that there are others who do have the time and ability to review and analyze this material. *RESPA News* called on experts who were able to sift through the jargon and identify the primary issues that impact mortgage and settlement services industries.

This report is meant to assist those who don't have time to read through the entire rule. We've provided you a history of RESPA and the CFPB, a thorough review of the Loan Estimate and Closing Disclosure forms and a summary of the top issues that should be of concern to you and your business.

Our hope is that with this information in hand, you can feel confident in your ability to submit an informed comment letter to the bureau, letting the agency know which parts of the proposed rule should be changed. This is the time to get your comments in and get changes made before the rule is released. In the words of **Mary Schuster**, director of industry and legislative affairs with RamQuest, "The only thing you can do wrong at this point is to do nothing."

Even after the comment deadline is passed, this report will guide you as to how to prepare for upcoming changes and what to expect from the final rule when it is released.

As always, *RESPA News* is here to keep you up to date on everything that is happening in the world of RESPA. The best thing anyone in the industry can do right now is stay informed. You can do that by logging on to www.RESPANews.com, the number-one independent resource for breaking news, features and analysis on all things pertaining to RESPA.

Until next time,

Angela Rulffes
Editor
arulffes@octoberresearch.com

RESPA NEWS

Table of Contents

RESPA and Regulation X created

The Real Estate Settlement Procedures Act (RESPA) was passed into law in 1974 to keep settlement costs down by targeting illegal unearned fees, split fees, referrals and kickbacks. It also required certain disclosures be provided to consumers to ensure that consumers understand the loan. These disclosures include the special information booklet, the Good Faith Estimate (GFE), HUD-1 Settlement Statement, transfer of servicing information and escrow information.

The law and its accompanying Regulation X have been amended several times since its creation. One of the most significant RESPA reforms was accomplished by the U.S. Department of Housing and Urban Development (HUD) when it published a final RESPA rule in November 2008. That rule included a standardized GFE and modified the HUD-1. The rule also included specified tolerance levels. HUD's regulation went into effect in January 2009. The implementation of the new GFE and HUD-1 went into effect a year later.

It's important to note that the Truth in Lending Act (TILA) is also a consumer disclosure statute, which seeks to inform the borrower of the cost of and use of the credit they obtain. It basically requires the consumer receive information regarding what the loan will cost them when they borrow the funds to purchase a home and what the cost will be in the long run.

The Dodd-Frank Act

In July 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Title X of the act created the Consumer Financial Protection Bureau (CFPB). The act transferred the authority to regulate RESPA from HUD to the CFPB and mandated the integration of RESPA and TILA disclosure forms.

Section 1032(f)

Section 1032 of the Dodd-Frank Act covers disclosures in general. Section 1032(f) mandates the integration of the RESPA and TILA disclosure forms.

Section1032(f) states:

"Not later than one year after the designated transfer date, the bureau shall propose for public comment rules and model disclosures that combine the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974, into a single, integrated disclosure for mortgage loan transactions covered by those laws, unless the bureau determines that any proposal issued by the Board of Governors and the Secretary of Housing and Urban Development carries out the same purpose."

The designated transfer date was July 21, 2011. According to the act, the CFPB had until July 21, 2012 to publish proposed integrated forms.

Section 1098(2)

Section 1098 mandates amendments to RESPA. Section 1098(2) amends Section 4 of RESPA to require that the CFPB "publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this section and section 5, in conjunction with the disclosure requirements of the Truth in Lending Act that, taken together, may apply to a transaction that is subject to both or either provisions of law."

Section 1100A(5)

Lastly, Section 1100A of the Dodd-Frank Act amends TILA. Section 1100A(5) amends TILA section 105(b) to require that the CFPB "publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this title in conjunction with the disclosure requirements of [RESPA] that, taken together, may apply to a transaction that is subject to both or either provisions of law."

The CFPB

Under Title X of the Dodd-Frank Act, the bureau has a variety of specific functions it is required to perform to ensure that consumers have the information necessary to make responsible decisions regarding financial transactions, including:

- Ensure consumers have timely and understandable information to make responsible decisions about financial transactions;
- Protect consumers from unfair, deceptive or abusive acts or practices and from discrimination;
- Reduce unnecessary or overly burdensome regulations;
- Promote fair competition; and
- Advance consumer markets.

Section 1011 of the Dodd-Frank Act mandates the leadership structure of the CFPB. According to that section, the bureau will be headed by a director appointed by the President with the advice and consent of the Senate.

The director will serve a term of five years and may continue to serve after that term has expired until a successor has been named. The President may remove the director for certain reasons such as neglect of duty and malfeasance in office.

The one-person directorship has been a point of controversy for legislators with some arguing that there should be a board of directors.

In July 2011, the CFPB took over RESPA regulatory duties. It did not, however, gain its full power until January 2012 when President **Barack Obama** named **Richard Cordray** as the bureau's director.

Under Section 1054, the CFPB has the power to commence a civil action against anyone who violates a federal consumer financial law. The agency has a three-year statute of limitations to bring a suit after it discovers a potential violation.

Under Section 1055(c), the CFPB has the power to impose a civil money penalty against any person who violates any provision of a federal consumer financial law.

The penalty amounts are divided into three tiers:

Tier 1 – For any violation of a law, rule or order imposed in writing by the CFPB, a civil penalty of $5,000 per day can be imposed;
Tier 2 – For any reckless violation of a law, rule or order imposed in writing by the CFPB, a penalty of $25,000 per day can be imposed; and
Tier 3 – For any violation of a law, rule or order committed knowingly, a penalty of $1 million can be imposed.

Know Before You Owe

The CFPB released its first prototype of the RESPA/TILA integrated mortgage disclosure form in May 2011 before it even officially opened its doors. The bureau went through five rounds of prototypes and consumer testing. During these rounds it met with both consumers and the industry in order to formulate disclosures that would be useful for each side. The agency engaged in consumer testing of the forms while also posting disclosure prototypes on its website www.consumerfinance.gov and using an interactive comment process.

During the CFPB's testing process, it developed prototypes for both the Loan Estimate form (to take the place of the initial Truth in Lending (TIL) disclosure and RESPA's GFE) and the Closing Disclosure form (taking the place of the final TIL and the HUD-1).

In February 2012, the CFPB convened a small business review panel to review the impact certain regulatory changes would have on small businesses.

CFPB proposes new disclosures

On July 9, 2012, the CFPB released the 1,099-page proposed rule containing the integrated mortgage disclosure forms, new requirements as mandated in the Dodd-Frank Act and extensive guidance regarding compliance with those requirements. ■

Proposed Regulations

The new disclosure regulations will appear in Regulation Z

The CFPB proposed to amend TILA's Regulation Z to include the regulations that govern the integrated disclosure forms. In addition, the bureau is proposing substantial changes to Regulation Z's official staff commentary to provide detailed guidance related to the new forms.

K&L Gates attorney **Holly Spencer Bunting** addressed these changes in an October Research webinar titled "Diving into the CFPB Mortgage Disclosures: A step-by-step review of the new forms."

"We understand that the existence of this official staff commentary is an important reason that the bureau is planning to house these regulations in TILA's Regulation Z, because that will allow the bureau to provide more formal guidance regarding the forms rather than relying on frequently asked questions, RESPA roundup documents or other informal announcements to address implementation issues like HUD did."

The GFE and HUD-1 remain

The CFPB's proposed disclosures do not apply to reverse mortgages. Lenders will continue to use the current GFE and HUD-1 in connection with that specific type of mortgage. In furtherance of this, the bureau proposed incorporating the frequently asked questions HUD released regarding the GFE and HUD-1 to the official guidance in the appendixes to the RESPA regulations, as they related to reverse mortgages.

Scope of proposed regulation

The CFPB proposed to apply the new integrated disclosure forms to all closed-end consumer credit secured by real property.

In the Diving into the CFPB mortgage disclosures webinar, Bunting identified what transactions the proposed regulation does not apply to:

- Home equity lines of credit;
- Reverse mortgages;
- Mortgages secured by mobile homes or by dwellings not attached to property; and
- Creditors that make five or fewer loans in one year. ■

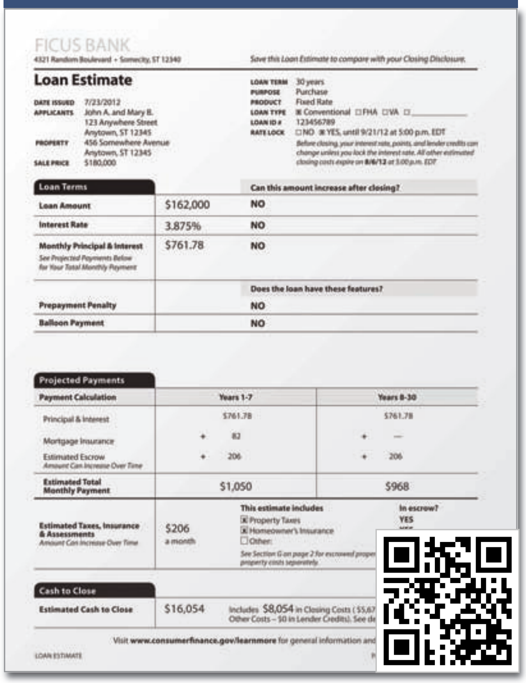
Loan Estimate

In General

The Loan Estimate form is an integration of the GFE and the initial TIL disclosure form into a three-page document.

It is issued by the lender or mortgage broker and must be provided to the consumer within three business days of the creditor receiving an application.

Click here or scan below to view the Loan Estimate PDF



FICUS BANK
4321 Random Boulevard • Somecity, ST 12340

Save this Loan Estimate to compare with your Closing Disclosure.

Loan Estimate

DATE ISSUED 7/23/2012
APPLICANTS John A. and Mary B.
123 Anywhere Street
Anytown, ST 12345
PROPERTY 456 Somewhere Avenue
Anytown, ST 12345
SALE PRICE $180,000

LOAN TERM 30 years
PURPOSE Purchase
PRODUCT Fixed Rate
LOAN TYPE ☒ Conventional ☐ FHA ☐ VA ☐ ______
LOAN ID # 123456789
RATE LOCK ☐ NO ☒ YES, until 9/21/12 at 5:00 p.m. EDT
Before closing, your interest rate, points, and lender credits can change unless you lock the interest rate. All other estimated closing costs expire on ***8/6/12*** *at 5:00 p.m. EDT*

Loan Terms		Can this amount increase after closing?
Loan Amount	$162,000	NO
Interest Rate	3.875%	NO
Monthly Principal & Interest *See Projected Payments Below for Your Total Monthly Payment*	$761.78	NO
		Does the loan have these features?
Prepayment Penalty		NO
Balloon Payment		NO

Projected Payments		
Payment Calculation	Years 1-7	Years 8-30
Principal & Interest	$761.78	$761.78
Mortgage Insurance	+ 82	+ —
Estimated Escrow *Amount Can Increase Over Time*	+ 206	+ 206
Estimated Total Monthly Payment	$1,050	$968

Estimated Taxes, Insurance & Assessments *Amount Can Increase Over Time*	$206 a month	This estimate includes ☒ Property Taxes ☒ Homeowner's Insurance ☐ Other: *See Section G on page 2 for escrowed proper… property costs separately.*	In escrow? YES

Cash to Close		
Estimated Cash to Close	$16,054	Includes $8,054 in Closing Costs ($5,67… Other Costs – $0 in Lender Credits). See de…

Visit **www.consumerfinance.gov/learnmore** for general information and…

LOAN ESTIMATE

Page one

The proposed Loan Estimate form the CFPB released, and that we've provided with this report, is from Ficus Bank. The first page provides the loan terms including loan amount and interest rate. It also provides projected payment information, information about escrow and the total estimated cost.

"You have, right where it says Loan Estimate, a header with what the consumers said was the most important information they wanted to see upfront," said K&L Gates attorney **Phil Schulman** during the Diving in to the CFPB mortgage disclosures webinar. This information includes the loan term, purpose, product, loan type, loan ID number and rate lock.

Looking at the Loan Estimate we have provided for you, you'll notice that the date the form is issued, the buyer(s) name(s) and the property address are all listed on the left-hand said. On the right, you have the loan term, purpose, product, loan type, loan number and whether or not the rate has been locked. So, you'll see that this is a 30-year mortgage, it's a fixed rate mortgage, a conventional loan and the rate lock ends on Sept. 21.

The Loan Terms section tells you that this is a $162,000 loan with an interest rate of 3.875%. The monthly principal and interest is $761.78. At the top of this table, on the right, it states: Can this amount increase after closing?

"The bureau felt that this was critical information, so if you end up answering yes to any of these questions, the bureau expects that you are going to add some detail there," Schulman said.

On this particular form, it states that none of the amounts in the chart can increase after closing. If the answer were yes, there should be further information provided about how and when the amount could increase. If this were an adjustable rate mortgage, rather than fixed, there would likely be increases to these amounts after closing.

The bottom half of this chart indicates whether there is a prepayment penalty or balloon payments.

The next table is projected payments. On this prototype, the payment calculations are broken into two sections, Years 1-7 and Years 8-30. The chart tells the borrower that for the first seven years the principal and interest payment will be $761.78. In addition to that, the borrower will pay $82 in mortgage insurance and $206 in escrow. During the first seven years, the borrower will be paying $1,050 on the loan. That amount then decreases to $968 during years 8-30 because the mortgage insurance is removed.

Next are the estimated taxes, insurance and assessments (things like homeowner association fees and condo fees), which in this case are $206. The form tells us the estimate includes property taxes and homeowner's insurance.

At the bottom of the page is a table that tells the borrower how much cash they need to bring to the closing.

"Kudos to the bureau," Schulman said. "When consumers were polled about the GFE and asked what their number-one complaint was, they said 'We have three pages here of information, and we still don't know how much money we are supposed to bring to the closing table.'"

In this case, the form clearly states that the borrower must bring $16,054 and that amount includes $8,054 in closing costs, which are explained on page two.

Page two

At the top of page two, in section A, the CFPB started with origination charges. This section tells the borrower that the application fee is $300, the underwriting fee is $1,097 and .24% of the loan amount (points) is $405 (note this is listed as both a percentage and as a dollar value). The total origination charges are $1,802. Note that the total amounts are at the top of each section.

Directly under this, in section B, are the services the borrower cannot shop for, which include the appraisal, credit report, flood determination, flood monitoring, tax monitoring and tax statute research fees.

Section C contains services the borrower can shop for like the pest inspection, survey, the title search and settlement agent.

Sections E, F and G also contain fees the borrower cannot really comparison shop for such as taxes and the prepaid and the initial escrow payment at closing.

Section H contains other fees. Notice that the fees in each section are listed in alphabetical order. However, title fees all have the word "title" preceding them. For example, in section H the fee is called "title-owner's title policy."
[See Itemization of fees and charges later in this report for more information.]

Section J contains the total closing costs. These are the costs that were originally identified at the bottom of page one. Page one indicated that the borrower needed $16,054 at closing and $8,054 of that was closing costs. Page two then went through and broke that total amount down so that the borrower knows specifically which funds are going where.

At the bottom right side of the form is the full calculation of the cash needed to close. In this case, the total closing costs are $8,054, the downpayment/funds from the borrower are $18,000. The form subtracts out the buyer's $10,000 deposit, making the estimated cash to close $16,054.

> "Kudos to the bureau. When consumers were polled about the GFE and asked what the number-one complaint was, they said 'We have three pages of information, and we still don't know how much money we are supposed to bring to the closing table.'"
>
> **Phil Schulman**
> **Attorney, K&L Gates**

Page three

The third and final page of the Loan Estimate provides additional information regarding the loan. At the top is the lender's name and the contact information for a loan officer.

Under that information is a comparison chart, which provides information on how much the loan is going to cost during the first five years. After five years the borrower will have paid $56,582 in principal, interest, mortgage insurance and loan costs. The borrower will have paid off $15,773 in principal.

The APR is also shown here and the total interest percentage.

"The Dodd-Frank Act required them to put this special information in called the total interest percentage, and that's the total amount of interest that you pay over the loan term as a percentage of your entire loan amount," Schulman said.

The total interest paid during the life of the loan is shown as a percentage of the loan amount, rather than as a dollar value.

The next category, Other Considerations, contains information on the appraisal, on whether others can assume the loan on its original terms, homeowners

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insurance, late payments, refinance and whether the lender will service the loan or transfer servicing.

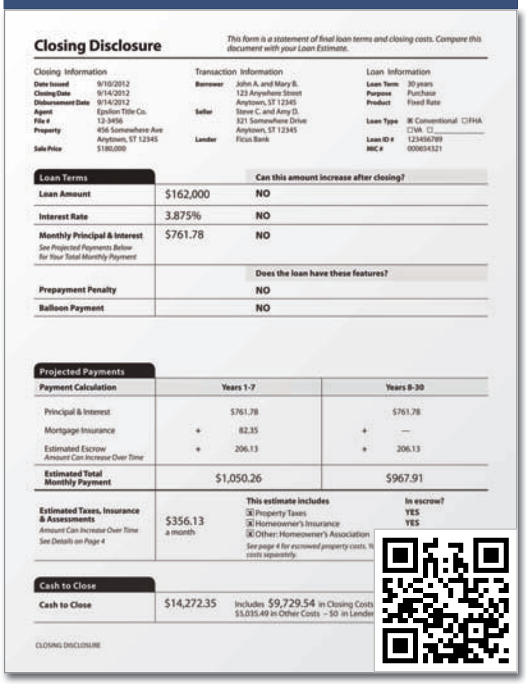
At the bottom of the page is a place for the borrower to sign confirming receipt of the disclosure. The language in that portion states that by signing, the borrower is confirming receipt but is not required to accept the loan.

Closing Disclosure Form

In General

The Closing Disclosure form is an integration of the HUD-1 and the final TIL disclosure into a five-page document.

Click here or scan below to view the Closing Disclosure PDF



Closing Disclosure

This form is a statement of final loan terms and closing costs. Compare this document with your Loan Estimate.

Closing Information		Transaction Information		Loan Information	
Date Issued	9/10/2012	Borrower	John A. and Mary B.	Loan Term	30 years
Closing Date	9/14/2012		123 Anywhere Street	Purpose	Purchase
Disbursement Date	9/14/2012		Anytown, ST 12345	Product	Fixed Rate
Agent	Epsilon Title Co.	Seller	Steve C. and Amy D.		
File #	12-3456		321 Somewhere Drive	Loan Type	☒ Conventional ☐ FHA ☐ VA ☐ ____
Property	456 Somewhere Ave		Anytown, ST 12345		
	Anytown, ST 12345	Lender	Ficus Bank	Loan ID #	123456789
Sale Price	$180,000			MIC #	000654321

Loan Terms		Can this amount increase after closing?
Loan Amount	$162,000	NO
Interest Rate	3.875%	NO
Monthly Principal & Interest *See Projected Payments Below for Your Total Monthly Payment*	$761.78	NO
		Does the loan have these features?
Prepayment Penalty		NO
Balloon Payment		NO

Projected Payments Payment Calculation	Years 1-7	Years 8-30
Principal & Interest	$761.78	$761.78
Mortgage Insurance	+ 82.35	+ —
Estimated Escrow *Amount Can Increase Over Time*	+ 206.13	+ 206.13
Estimated Total Monthly Payment	$1,050.26	$967.91

Estimated Taxes, Insurance & Assessments *Amount Can Increase Over Time* *See Details on Page 4*	$356.13 a month	This estimate includes ☒ Property Taxes ☒ Homeowner's Insurance ☒ Other: Homeowner's Association *See page 4 for escrowed property costs.* ... *costs separately.*	In escrow? YES YES

Cash to Close		
Cash to Close	$14,272.35	Includes $9,729.54 in Closing Costs ... $5,035.49 in Other Costs – $0 in Lender ...

CLOSING DISCLOSURE

The disclosure must be provided to the borrower three business days before the closing.

Page one

Page one of the Closing Disclosure looks similar to page one of the Loan Estimate. The CFPB indicated it purposefully made the forms look similar to make the information easily accessible to the consumer.

The top section contains the details of the transaction. This is again a 30-year fixed rate conventional loan. In the loan terms table, the loan amount is $162,000 with a 3.875% interest rate. The monthly principal and interest is $761.78 and none of these amounts will increase after closing. There is no prepayment penalty and no balloon payment.

The projected payments table sets out years 1-7 and years 8-30, just as the information was provided in the Loan Estimate. The estimated taxes, insurance and assessments increased on this form to $356.13 a month. The estimate includes property taxes, homeowner insurance and homeowner association fees. The property taxes and homeowner's insurance are included in escrow, but the homeowner's association fees are not. The table explains that the borrower can find details regarding these costs on page four.

Finally, at the bottom of the page, it again shows what cash the borrower needs to bring to the closing table. In this case, it's $14,272.35, which includes $9,729.54 in closing costs. The form also states that the details regarding these costs are illustrated on page two.

Page two

Page two also contains information that is similar to the second page of the Loan Estimate. The borrower's fees are broken down to match the information on the Loan Estimate, but this page also includes all of the other costs that are being paid in the transaction. The amounts paid by the seller and others are provided.

The fees within the categories, such as the Origination charges and title insurance fees are itemized, which is a change from the current HUD-1. The proposed rules also require that the itemization of charges appear in alphabetical order.

Looking at the lettered sections, they go in the same order as those in the Loan Estimate: A) origination charges; B) Services borrower did not shop for; C) Services you can shop for, etc…

The fees are again itemized in alphabetical order and the total amounts are at the top of the sections.

Notice that Section H contains more fees than those originally listed on the Loan Estimate.

"These are costs incurred in the transaction that are not necessarily costs of the loan," Bunting said. "This is where the real estate commission is listed as well as the owner's title insurance. So, even though the remainder of the title charges are listed under subsection C, which are required fees in connection with the loan transaction, because the lender is not requiring the borrower to purchase owner's title insurance it's listed at the bottom under other costs."

Section J at the bottom provides the borrower with the $9,729.54 that was first mentioned on page one. Note that the columns on this page are broken out into amounts paid at closing and amounts paid before closing. So in section J, the total closing costs are $9,729.54. However, directly beneath that you'll see that the borrower paid $29.80 before closing. So, the closing subtotal is $9,699.74 ($9,729.54 with the $29.80 subtracted out).

Page three

The top of page three provides the borrower with the breakdown of the calculation of cash needed to close. The table shows the estimate of costs as compared to the final costs and plainly tells the borrower if the amount changed with a short explanation of why.

The lower part of the page is a summary of the borrower's and seller's transactions. If you take a look at the first page of the current HUD-1, you'll see that this section is similar to that. One important difference is that the series numbers are gone. It is instead organized in lettered sections. Section K contains the amount due from the borrower at closing and section M contains the amount due to the seller at closing.

Page four

The fourth page contains a variety of loan disclosures such as whether others can assume the loan amount, what happens if a payment is late, whether the lender will accept partial payments and escrow account information.

Page five

The top left portion of page five contains the traditional TIL disclosures including the finance charge and APR. The total interest percentage required by the Dodd-Frank Act is also provided in this section.

"Again, that's a new disclosure that's required by the Dodd-Frank Act, and because it's a high percentage that may not make a lot of sense to the consumer, the bureau has specifically requested comments as to whether this disclosure should be included as part of the Closing Disclosure," Bunting said.

Near the bottom of the page is the contact information for the lender, along with the real estate broker and settlement agent so that the borrower can easily contact the companies involved in this loan transaction.

At the bottom of the page is a place for the borrower to sign the document. The borrower signs and dates the disclosure as a confirmation that the form was received, but the language states that signing the document does not mean the borrower accepts the loan. ■

Narrowed definition of application

It's important to note that the proposed rule amends the current definition of application under RESPA. The rule requires that lenders provide the borrower with a Loan Estimate within three days of completing an application. Thus, it is important for the lender to understand what an application is.

The current Regulation X sets forth seven elements that make up an application. The seventh element is a catch-all that allows lenders to collect "any other information deemed necessary by the loan originator."

The bureau's proposed definition eliminates that seventh element.

The CFPB's definition for application contains the following six pieces of information that the lender can collect: 1) the consumer's name; 2) income; 3) social security number; 4) property address; 5) an estimate of the value of the property or sales price on a purchase transaction; and 6) the mortgage loan amount sought.

Once those six pieces of information are collected, the creditor then is required to provide the Loan Estimate.

"It was the bureau's view that a lot of lenders were delaying having to give out the GFE by coming up with some strange request for information in order to postpone giving the form," Schulman said. "So they said 'If we have our way, we are changing that.' What they've done is narrow the definition to eliminate the catchall provision."

According to Schulman, the bureau is looking for uniformity. It wants the borrower to receive the Loan Estimate sooner in the process rather than later, and it does not want a situation where the consumer can get a Loan Estimate from one lender but not another. So, it is proposing more uniformity in the system with less flexibility. This doesn't mean that the lender can't collect additional information. The lender can collect other information either before or after the consumer receives the Loan Estimate. What is crucial here is that when the lender receives the six elements that make up the application, it must then provide the consumer with the Loan Estimate.

Also note that the definition of "business day" has been modified. Under the CFPB's proposal, "business day" is any calendar day except Sunday or a legal public holiday. Thus, Saturday would be considered a business day.

Tolerances

Current tolerances

Under Section 1024.7(e) of the current Regulation X, the tolerances are broken up into three groups or buckets — zero percent, 10 percent and charges that can change by any amount. Currently, the lender's own costs go in the zero tolerance bucket. This includes the processing, underwriting and origination fees, along with transfer taxes. If a charge falls into the zero bucket, it means that the fee cannot increase from the amount that was estimated to the consumer, and if it does, the lender owes the consumer the difference between the estimated price and the higher price.

The 10 percent bucket is for services that the borrower can't shop for like the appraisal, credit report and flood determination fees. These are the fees listed in Section B on page two of the Loan Estimate.

Lastly, there is the "no tolerance specified" bucket for those charges that can change by any amount. This would include escrow amounts and homeowner association fees.

Proposed tolerances

The CFPB's proposal expands the tolerance buckets, which would be called "variations."

The rule says that a good faith estimate should be "based on the best information reasonably available to the person providing the estimate. In many cases, a creditor should be able to estimate costs with considerable precision based on its familiarity with its own underwriting process and its knowledge of the real estate settlement process."

The proposal tightens and expands the current tolerances. The zero tolerance bucket would be expanded to include: 1) the lender's or mortgage broker's charges for its own services; 2) charges for services provided by an affiliate of the lender or mortgage broker; and 3) charges for services for which the lender or mortgage broker does not permit the consumer to shop (this would include affiliated and unaffiliated settlement service providers). If the amount charged for those services exceeds the amount stated on the Loan Estimate, the lender must make a refund to the consumer.

The bureau explained in its proposal that it included affiliate services in the zero tolerance bucket because it believes it's reasonable to "expect creditors to use the significant amount of historical settlement cost data available to them, by virtue of the repeat business from affiliate relationships, to develop highly accurate estimates of costs."

In general, the bureau says that charges for other services should not increase by more than 10 percent. This would include charges paid to unaffiliated settlement service provides and services the consumer can select from the creditor's settlement services provider list.

Then there are fees in which the lender does not have to worry about a tolerance, such as prepaid interest, property insurance premiums and escrow amounts.

> "I think there's a good likelihood that the bureau will allow a splitting of this function, because from their perspective, they don't really care if the agent gives it out or the lender gives it out as long as the lender is on the hook."
>
> **Phil Schulman**
> **Attorney, K&L Gates**

However, even when a tolerance level is not set, the lender must still be cautious. The lender cannot purposely provide a low estimate because that action could be viewed as acting in bad faith. As quoted above, the lender is required to use the best information reasonably available. If the lender knows what the charges will be and estimates them lower on purpose, then that lender could be subject to unfair and deceptive trade practice violations.

Who provides the Closing Disclosure?

In its proposal, the CFPB left open the question of whether the lender should prepare the Closing Disclosure or whether the responsibility should be shared between the lender and the settlement agent. The bureau has indicated that it plans to make the lender liable for the accuracy of the information on the form.

So the alternatives are:

1) The creditor provides the Closing Disclosure; or
2) The settlement agent provides the Closing Disclosure but the creditor has the liability.

RESPA currently requires the settlement agent to prepare the HUD-1 settlement statement. The CFPB's proposal does not have this requirement in place. So the question becomes, who would be responsible for the presenting the disclosure to the consumers and who disperses the loan proceeds?

"The settlement agent really should be the one to aggregate the information for the form, prepare the disclosure form and provide it to the consumer in concert with the lender like we do today," said **Mary Schuster**, director of industry and legislative affairs at RamQuest, during a webinar titled "Driving Change Through the CFPB's Foundation for Reform." "I think to cut the settlement agent out of that role either advertently or inadvertently would be a disservice to consumers."

If the settlement agent provides the disclosure, "we know that a lender is going to say, 'If I let you give out the Closing Disclosure and there's a screw up on it and I have to pay the borrower, guess what, you are going to have to pay me,'" said Schulman. "If the settlement agent does give out the form, they have to meet all of the regulatory requirements that are found in section 1026.19(f). And I think there's a good likelihood that the bureau will allow a splitting of this function, because from their perspective, they don't really care if the agent gives it out or the lender gives it out as long as the lender is on the hook.

"The reason I think it's going to end up being a split of some sort is because about 60 or 70 percent of the Closing Disclosure is the TIL information about all of the loan fees and that's information a title agent would not have at their disposal," Schulman continued. "With respect to all the information about taxes and recording fees and title fees and so forth, those are things that are within the knowledge of the title agent. So there is a good likelihood that this responsibility ultimately will be split."

Timing of disclosures

The Loan Estimate

The lender must provide the Loan Estimate within three business days after receiving the application and seven business days prior to closing. The consumer could waive the seven-day waiting period if they have a bona fide emergency.

Remember that under the proposed rule, "business day" would now include Saturdays.

The proposed rule also contains a provision similar to the current changed circumstances concept. If there is a qualified changed circumstance, the Loan Estimate could be re-disclosed. That re-disclosure would have to be made within three business days of the change.

The current HUD-1 process

Currently, the lender prepares the TILA final disclosure and delivers it to the consumer three business days before closing. The settlement agent's job is to prepare the HUD-1 Settlement Statement and deliver that form to the consumer at or before closing. This process will likely change once the CFPB releases its new integrated mortgage disclosure form regulation.

"What the CFPB is proposing to do now, is to change the way in which this is handled, and the reason for that is the need to reconcile the fact that they are integrating [two different statutes] in this final five-page document," said **Ruth Dillingham**, special counsel, First American Title Insurance Co., during an American Land Title Association (ALTA) webinar. "The CFPB has determined that they will pick the longer timeframe, the one from TILA, which allows for three days before closing for disclosure on both the credit-related costs and the settlement costs."

The proposed three-day rule

The proposal requires that the consumer receive the Closing Disclosure three days prior to closing. Section 1026.19(f) of the proposed rule specifically states: "The creditor shall ensure that the consumer receives the disclosures required under paragraph (f)(1)(i) of this section no later than three business days before consummation."

The reason behind this is that the CFPB wants to allow the consumer to have more time to review the costs and ask questions so that they are aware of their obligations by the time they go to the closing. The bureau also said the extra time should allow consumers to find and correct errors and negotiate cost increases.

In addition, if changes are made to the disclosure, with some exceptions, another three-day waiting period must be tacked on.

Similar to the Loan Estimate, the three-day waiting period can be waived in cases of bona fide personal financial emergencies.

Receipt of the disclosure

An important point to recognize is that the statute requires the three-day countdown to begin when the consumer "receives" the disclosure, not when it was delivered or mailed. During the ALTA Webinar, **Shari Schneider**, national compliance and ethics counsel, Title Resource Group, explained that the Closing Disclosure can be delivered in one of three ways:

1) hand delivery;
2) mail; or
3) email.

When you hand deliver the disclosure, you know that the consumer received the form on the same day you delivered it. The same is not true for mail or email. Proposed comment 19(f)(1)(iii) defines "delivery." It states that when a disclosure is mailed, there is a presumption that the consumer received it three business days after it is mailed.

"This is a presumption which may be rebutted by providing evidence that the consumer received the disclosures earlier than three business days," the comment says. "For example, if the creditor sends the disclosures via overnight mail on Monday, and the consumer signs for receipt of the overnight delivery on Tuesday, the creditor could demonstrate that the disclosures were received on Tuesday, thereby rebutting the presumption that the disclosures were received on Thursday, three business days after they were sent."

It's important to note that the three business days necessary for the presumption of delivery cannot be included in the three business days required for receipt before consummation. Meaning that if the form is mailed to the consumer there is a presumption that the consumer received it three business days later. After receipt, an additional three business days must pass before the closing (or consummation) can take place.

The CFPB treats email the same as mail. The rule states that if the creditor emails the disclosure to a consumer on Monday, the consumer is presumed to have received the disclosure on Thursday. There is again a rebuttable presumption if the creditor can provide evidence that the consumer received the email earlier.

Exceptions to the three-day rule

According to Dillingham and Schneider, there are five categories of changes that do not require a new three-day waiting period:

- Seller-buyer negotiation;
- Minor cost increases;
- Post-closing change to government fees;
- Correction of non-numerical clerical errors; and
- Tolerance refunds.

These exceptions are covered under Section 19(f)(2) of the CFPB's proposed comments.

> "The Dodd Frank Act required them to put this special information in called the total interest percentage, and that's the total amount of interest that you pay over the loan term as a percentage of your entire loan amount."
>
> **Phil Schulman**
> **Attorney, K&L Gates**

Seller-buyer negotiation

This first exemption does not go into effect until the buyer has received the disclosures. That is when the clock starts running. If, after they have received the disclosures, the buyer and seller agree to change the transaction in a way that affects the cost, this will not trigger a new three-day waiting period.

"Assume consummation is scheduled for Thursday, the consumer received the disclosures required under Section 1026.19(f)(1)(i) on Monday, and a walk-through inspection occurs on Wednesday morning," the CFPB wrote in comment 19(f)(2)(i). "During the walk-through the consumer discovers damage to the dishwasher. The seller agrees to credit the consumer $500 towards a new dishwasher. The creditor complies with the requirements of Section 1026.19(f) if the creditor provides a revised disclosure at or before consummation on Thursday."

Minor cost increases

Section 19(f)(2)(ii) states that the creditor does not need to wait an additional three business days if the amount in the revised disclosure does not exceed the amount originally disclosed to the consumer by $100. The example the CFPB used was if a disclosure is provided to the consumer that reflects an amount of $18,700, and that amount includes the homeowner's insurance premium of $800. The premium, however, is actually $850. Because an increase of $50 does not exceed the $100 exception, the creditor can provide a revised disclosure to the consumer at or before the closing.

"This does not, however, apply to items on which there is a zero tolerance," said Schneider. "So under the new rule, that would be both the lender fees and the affiliated fees. You can't apply this exemption to that.

"This is really an area that we as an industry need to be really careful in," she continued. "The bureau has a lot of commentary cautioning against inflating fees in the Loan Estimate so that we don't exceed that threshold. We need to be really careful because that is not the bureau's intention. They believe there are competitive forces out there that will mitigate that from happening but that is not the intention of this, the intention is true miscalculation errors or true minor changes at closing."

Post-closing change to government fees

If the disclosure becomes inaccurate because of changes in government fees after the closing, the creditor must deliver a revised disclosure within three business days. For example, if the closing takes place on Monday (with calculated recording fees) and the next day when recording the security instrument it is discovered that the recording fees have changed, the creditor is required to send a new disclosure within three days, but is not required to do another closing.

The CFPB provides additional examples under comment 19(f)(2)(iii) where the recording takes place weeks after the closing. One example states that the consumer must receive the revised disclosure within 30 days of closing. If the instrument is recorded on day 28 and the fees have been changed, placing the new disclosure in the mail would not be a viable option since it presumably takes three days for the consumer to receive the disclosure.

Correction of non-numerical clerical errors

Comment 19(f)(2)(iv) explains that the creditor is required to send the consumer a new disclosure if the original disclosure contains a non-numeric clerical error. This would be a typographical error that does not affect the dollar amount. The revised disclosure must be delivered as soon as practicable. It cannot be delivered later than 30 days after closing.

Tolerance refunds

"If there is a tolerance violation, then the refund can be handled as it is now — at or within 30 days after closing a new disclosure has to be created," Dillingham said.

"If the creditor advises the settlement agent that they plan to [address the tolerance violation] after the closing, you can go ahead and close as scheduled and as soon as practicable, but no more than 30 days after closing, the lender has to get the corrected disclosure statement showing the credit to the consumer," she continued. "So presuming that in today's work flow, there is a violation that gets flagged the morning of the closing, the lender overfunds the loan for the purpose of giving $200 back to their borrower to bring back under the tolerance issue. Again, that would not trigger the additional three days."

Finance charge calculation

One change the bureau suggested in the proposed regulation is a new finance charge calculation. The proposal calls for a more inclusive annual percentage rate (APR).

The new rule amends section 1026.4 by redefining how the APR is calculated by getting rid of the current "some fees in some fees out" approach and including all of the up-front costs of the loan. The CFPB indicated that its proposed test is simpler and more inclusive than the one currently set forth in TILA section 106(a).

Under the proposed test, "a fee or charge is included in the finance charge if it is (1) payable directly or indirectly by the consumer to whom credit is extended, and (2) imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit."

Finance charge would, however, exclude fees or charges paid in comparable cash transactions. The proposed rule also contains some narrow exclusions from the finance charge.

The fees that would be included are:
- Title searches;
- Document preparation;
- Appraisals;
- Credit reports; and
- Notaries.

"TILA defines the finance charge as the sum of the charges that are payable directly or indirectly by the person to whom the credit is extended and imposed directly or indirectly by the creditor as an incident to the extension of credit," Bunting said. "That excludes certain charges that are defined in the TILA statute. Regulation Z also contains certain exceptions to the finance charge calculation that go beyond the exceptions that are identified in the statute. It's those exceptions in the regulation that the bureau is targeting with their amendments to the finance charge calculation. Essentially they would remove those regulatory exceptions and create a more inclusive finance charge calculation."

Excluded from the proposed calculation would be:
- Fees paid in comparable cash transactions (purchase money only);
- Late fees and similar charges;
- Seller's points;
- Escrow amounts; and
- Property and casualty insurance premiums.

Many in the industry are opposed to this new definition. A group of 16 industry associations including ALTA, American Bankers Association and National Association of Mortgage Brokers wrote a comment letter sharing their concerns about the CFPB's "all-in APR" proposal and its potential impact.

"We question the wisdom and practicality of injecting new requirements for the so called 'all-in' [APR] into the rulemaking," the associations stated. "On balance, we strongly believe that aspect should be dropped.

"As the CFPB and other agencies have documented and industry can attest, the current APR is of little value to consumers. It neither enhances a borrower's understanding of the obligation they are undertaking, nor serves as an accurate shopping tool," the associations continued. "The bureau's own research indicates that consumers confuse the APR with the note rate; this confusion has nothing to do with what is in or out of the APR calculation. Simply adding additional fees to an unhelpful formulation that consumers do not use or understand will add significant costs and complications to the rulemaking effort, with no measurable benefit to the borrower."

> "The fact that they put it under TILA and not under RESPA should not be taken to mean that all of the penalty provisions of TILA would apply to RESPA."
>
> **Phil Schulman**
> **Attorney, K&L Gates**

The associations noted that the APR is embedded in several mortgage finance rules as a trigger for additional compliance requirements, yet it is unclear how the reconfigured APR will impact or relate to these other rules.

One issue is that the more inclusive finance charge calculation will likely result in higher finance charges overall. Higher finance charges could trigger HOEPA, which means that more closed-end loans may be protected under HOEPA. There is a similar issue with state high cost loan laws. The higher interest rate could trigger protection under those laws as well.

"The takeaway with regard to the finance charge calculation is, with more fees being added to that calculation, it is going to result in higher points and fees calculations and higher APR calculations that have a pretty significant impact on the kinds of loans that mortgage lenders will be able to make," Bunting said.

The comment period for the finance charge section of the proposed rule originally ended on Sept. 7. The bureau, however, extended the comment period to Nov. 6 because of industry concerns.

Penalties and liability

Currently there are no penalties under RESPA for GFE or HUD-1 violations. Under TILA, there are penalties for disclosure violations. TILA provides for $4,000 in damages as well as recovery for actual damages and attorney's fees.

However, the CFPB is proposing to put disclosure rules under TILA. So, does this mean that the TILA penalties will now apply to RESPA? Schulman says no.

"The fact that they put it under TILA and not under RESPA should not be taken to mean that all of the penalty provisions of TILA would apply to RESPA," Schulman said. "Just the opposite. The bureau does not have authority, only Congress does, to prescribe penalties under these two statutes and so the penalties under TILA remain and the lack of penalty under RESPA remain and even though both integrated forms are found within the TILA regulations, the penalty sections remain the same."

As previously noted, the bureau said it is putting these regulations under TILA because it contains a commentary section that RESPA does not have. This would help the bureau avoid having to release the RESPA FAQ type documents that HUD released periodically.

It is important to remember that certain RESPA violations can leave an individual or company open to liability for unfair and deceptive trade practices.

Itemization of fees and charges

HUD bundled the title and closing costs together on the HUD-1, because their philosophy was that consumers are more interested in what the total cost is going to be.

The bureau unbundles the charges so that they will be listed separately.

It's important to recognize that the way information is input into the forms is going to change under the proposed rule.

The HUD-1 utilizes various series to organize information. For example, the 700 series is where you would input real estate broker fees and the 1100 series is reserved for title charges.

The CFPB's proposed rule puts an end to that. In the Closing Disclosure, the bureau removed the series numbers and inserted lettered sections. This is a significant change as far as identifying where specific information goes.

Page two of the Closing Disclosure begins with Section A — Origination Charges, and the lettered sections end with Section N on page three — Due from Seller at Closing.

When itemizing these fees, the CFPB wants them to be listed in alphabetical order. This is a change from the way fees are listed on the HUD-1. It will probably be more difficult to input fees into a template when they must be alphabetized. Currently you may be using a template that inputs fees based on the specific line number. With line numbers gone and fees required to be in alphabetical order, this will no longer be possible. What this means is that every form you complete could list fees in different places, depending on what fees the borrower is paying and where that fee fits into the alphabetical order.

Although it's in alphabetical order, the CFPB wants costs associated with title insurance to be preceded by the word "title," so those costs will be grouped together. You'd write: title- commitment fee, title-title search, or title-lender's title policy.

There could also be an issue with this type of ordering if different lenders use different terminology.

Increased time for closings

The Closing Disclosure form is substantially different from the HUD-1. It will take time for agents to get comfortable with the form. It is also a longer form and it will take agents additional time to get through it with the consumer. That means that closings are going to take longer to complete. Longer closings likely means that agents will complete fewer closings in a day.

Small business concerns

"The proposed regulations really have the potential to substantially impact small businesses," Bunting said. "They are going to have to update technology, train employees, retool their systems and while larger institutions are going to have to do the same thing, the cost for implementation is going to be harder for those smaller companies to swallow."

One problem small businesses may run into with the Closing Disclosure will likely be the cost of the technology changes in order to drop the series numbers and incorporate the new lettered categories. Settlement agents who have their technology tied to the various series numbers are going to need to make significant changes.

"In order to implement the various pages, disclosures and graphics that the bureau is requiring as part of these forms, it's going to require an overhaul in technology," Bunting said.

Another cost will be employee training. The Closing Disclosure is not simply a re-write of the HUD-1, it's an incorporation of the HUD-1 and the final TIL disclosure along with other requirements mandated under the Dodd-Frank Act. Preparing your company for the use of the new disclosures is going to mean additional training and possibly some extra legal or compliance support to ensure the forms are being used correctly.

In addition to all of this is the cost small businesses spent just three years ago, in 2009, when they were required by HUD to overhaul their technology because of new forms.

"The cost of implementation continues to go up as you talk about each one of these items," Bunting said. "Small businesses should not be shy about pointing out the substantial costs they are going to incur in their public comments to the bureau on these particular proposed disclosure forms."

It's a good idea to review the new disclosures and identify the problems you foresee for your small business. Then send a comment letter to the CFPB explaining problems specific to you.

Unauthorized practice of law?

According to Schuster, some in the industry are concerned that filling out or presenting the information included on the top right of page five of the Closing Disclosure, in the "Other Disclosures" section, could be the unauthorized practice of law, especially the sections regarding liability after foreclosure and tax deductions.

For example, the tax deductions section states: "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."

Some in the industry worry that reviewing this information with the borrower could be the same as providing legal tax advice.

Signature at the end of the Disclosure

At the end of Closing Disclosure, there is a place for the borrower to sign, and it states that signing the document is simply an acknowledgment of receipt and does not require the borrower to accept the loan. Some in the industry are concerned that this language will confuse the consumer. This type of language could make sense if the borrower signs the disclosure three days before closing because at that point, the borrower is not accepting the loan. But what if the borrower doesn't sign the form until the closing? At the closing, the borrower would actually be consummating the transaction, so does that language make sense? ■

Final Effective Date

Under the Dodd-Frank Act, there is no actual deadline for the release of the final integrated RESPA/TILA disclosure form rule. In addition, there is no deadline for its implementation.

In the proposed rule, the CFPB requested comment regarding when the final rule should be effective. According to the bureau, it wants to make the rule effective as soon as possible to benefit consumers, but it understands that the rule will require many in the industry to make extensive revisions to their software and to train their staff. Because of this, the CFPB asked the industry to comment on how much time it needs to make these changes.

ALTA says that the industry will need a substantial amount of time to prepare for the new forms.

"We stressed very strongly to them that we'll need a significant amount of implementation time especially given the large number of changes to software programs that will be needed," said **Steve Gottheim**, legislative and regulatory counsel at ALTA. "We have asked for at the very least one year after they finalize this rule and hopefully even longer. Here's what we do know in terms of the timeline. The bureau has put this proposal out for public comment, that public comment period will close Nov. 6 of this year. After that, the bureau will be required by law to read every single comment, consider every single comment, then go back to their rule and make any necessary changes and then publish it as a final rule. That's going to be a fairly time consuming process, especially given the large number of comments and technical comments that we expect to receive."

Schuster indicated that the industry had 14 months in 2010 when HUD introduced new forms. She said that the industry needs at least that long this time and probably more given how widespread the regulatory changes are. According to Schuster, software providers are saying they need 18 months to implement the changes.

Schulman said he doesn't expect the CFPB to release the final rule before May or June 2013. Then the bureau will have to decide upon an effective date. Schulman doesn't expect to see the rule become effective until 2014 at the earliest so that the industry has time to prepare. ■

Deadlines for Comments

Under the proposed rule there are two comment periods: 1) Sept. 7, 2012, for a temporary exemption for the Affected Title XIV Disclosures in Section 1026.1(c); and 2) Nov. 6, 2012, for the remainder of the proposed rule.

If you have a concern about the proposed rule, send a comment to the CFPB. It's always a good idea to let them know what issues you have found with the rule and where you think changes can be made.

"The only thing you can do wrong at this point is to do nothing," says Schuster. "This is absolutely the time to be engaged. It is absolutely the time to stay informed. Once the comment period closes on Nov. 6, the CFPB will take all the comments that have been submitted, they will sift through them, they will make their changes or not, they will gather the support for those changes or not and at some point we will see the final rule published. After that time, you will not be able to shape much of what is left of this. We will be left to simply implement whatever is in the final rule, so if you have feelings about any of this, send in those comments."

> "The only thing you can do wrong at this point is to do nothing. This is absolutely the time to be engaged. It is absolutely the time to stay informed... if you have feelings about any of this, send in those comments."
>
> **Mary Schuster**
> **Dir. of Industry and Legialstive Affairs, RamQuest**

Schuster suggested that instead of trying to write one long comment letter covering every issue you think is important, it is better to cover each topic one at a time in separate letters. One way to do this is by breaking it up into one topic a week. Because comments can be submitted online at www.regulations.gov, this could be as easy as uploading one email-type letter per week.

What kinds of topics should you cover? That is entirely up to you and what parts of the regulation you think are important.

If you do decide to send a response, comments letters should identify Docket No. CFPB-2012-0028 or RIN 3170-AA19.

You can get your comments in electronically by going to www.regulations.gov searching for CFPB-2012-0028 and then clicking the blue box that says "Comment Now!"

In addition, comments may be submitted by mail or courier sent to:

Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552.

Further Instructions: All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, D.C., area and at the bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to http://www.regulations.gov. In addition, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, D.C., 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.■