2016 TRID AND RESPA Legal Update
(rev. 9/16)

A. TRID LEGAL UPDATE:

1. TILA-RESPA Integrated Disclosure Rule (TRID)

a. Creation of the TRID – on Nov. 20, 2013 the CFPB issued the 1,888 page document that specifically addresses the sections of the Dodd-Frank Act that are designed to combine certain disclosures that consumers receive in connection with applying for and closing on a mortgage loan under the TILA and RESPA. To that end, the CFPB amended Regulation X (Real Estate Settlement Procedures Act) and Regulation Z (Truth in Lending Act) to establish new disclosure requirements and forms in Regulation Z for most closed-end consumer credit transactions secured by real property.

b. Effective Date: TRID applies to mortgage applications taken after October 3, 2015.

c. Application of TRID: - TRID applies to a majority of closed-end mortgages except: reverse mortgages, HELOCs, mobile home loans, commercial loans, creditors making five or fewer loans per year and certain no-interest, subordinate special purpose loans.

d. TRID – Two New Forms:

   i. The Loan Estimate: The first new form (the Loan Estimate) is designed to provide disclosures that will be helpful to consumers in understanding the key features, costs, and risks of the mortgage for which they are applying. This form will be provided to consumers within three business days after they submit a loan application.

   ii. The Closing Disclosure: The second form (the Closing Disclosure) is designed to provide disclosures that will be helpful to consumers in understanding all of the costs of the transaction. This form will be provided to consumers three business days before they close on the loan.

e. TRID Compliance and Enforcement – The lender is ultimately responsible for TRID compliance. The CFPB has the authority to enforce all consumer financial laws including RESPA and TILA. Penalties for non-compliance with TRID include: $5,000 per day violation, $25,000 per day violation for reckless violations, and $1,000,000 per day violation for knowing violations.

2. The Loan Estimate (LE)

a. Timing: The lender must give the form to the borrower no later than three business days after the borrower applies for a mortgage loan. An "application" takes place when the borrower provides the following information to the lender: borrower's name, income, social security number to obtain a credit report, the property address, an estimate of the value of the property, and the mortgage loan amount sought.

b. Limitation on Fees – creditor generally cannot charge borrowers any fees until after the borrower has been given the LE and the borrower has communicated an intent to proceed with the transaction.
c. Review of LE (include LE slide)
d. Required Information v. Preferred Information for LE:

LE Required Information	LE Preferred Information
Name	Name
Income	Income
SSN	SSN
Property Address	Property Address
Mortgage Loan Amount	Mortgage Loan Amount
	Current Contact Information of Borrower
	Purchase Agreement
	Commissions
	Concessions
	Broker Fees
	Invoices (estimates)
	Bank Statements (past 2 months)
	W-2's (past 2 years)
	Tax Returns (past 2 years w/extensions)
	Homeowner's Insurance Information
	Real Estate Agent Contact Information
	Property Taxes
	Transfer Taxes
	Title Premiums and Fees

e. "Change of Circumstance" - Changes to the LE - The Lender will continue to have the opportunity to protect itself from tolerance violations if there are changes in circumstances after the initial LE. However, there are only 6 instances that will allow the Lender to revise the LE and in addition, the Lender may only change those fees on the LE that the change effects – it does not give the Creditor license to fix errors on an earlier LE. These six instances include:
    i. Inaccurate information from borrower;
    ii. Extraordinary event;
    iii. Discovery of new information specific to the borrower or the transaction;
    iv. Revision requested by borrower;
    v. On day of locking rate; or
    vi. After the 10-day expiration of the LE.

3. **The Closing Disclosure (CD)** exception that allows creditors to charge fees to obtain consumers' credit reports.
    a. Purpose: - The CD form replaces the current HUD-1 and the TIL.
    b. Control: - The accuracy and timeliness of the CD is a lender responsibility and they are solely liable for compliance. For that reason, lenders are preparing, sending, revising and re-disclosing the CD in-house. This will require all parties

to the transaction to get the numbers to the lender 7 to 10 days in advance of the consummation date.

c. Timing:
    i. The lender must give the CD in final form to the borrower at least 3 business days in advance of consummation.
    ii. A "business day" means all days except Sundays and the 10 federal holidays (New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day).
    iii. "Consummation" means the time that a consumer becomes contractually obligated on a credit transaction.
d. "Delivery" of the CD - 3 Days Actually Means 6 Days -
    i. Immediate Delivery: Hand Delivery or Email with receipt confirmed by borrower after approval to use email method of delivery (deliver on Monday, close on Thursday)
    ii. One Day to Receive – overnight delivery with borrower-confirmed receipt
    iii. Three Days to Receive: US Mail or regular email
e. Delivery Examples (See Slide)
f. Redisclosure – the CD must be re-disclosed if any of the following three events occur:
    i. APR increases more than 1/8%*;
    ii. Change in loan product; or
    iii. Prepayment penalty added

* APR on your mortgage is the interest rate on your loan plus all of the costs such as points and origination fees. The most common settlement costs that affect APR include:

- Loan origination fees
- Loan discount "points"
- Mortgage broker fee
- Tax and Flood certification fees
- Mortgage insurance premiums
- Mortgage lock or commitment fee
- Application fee
- Closing fee
- Loan Document preparation fee
- Per diem interest

g. Review of CD – (insert CD slides)
h. Seller Closing Disclosure – the CD is required only for Buyers. Most title companies will create a separate Seller's CD to be signed at consummation.
    i. Benefits of two separate statements:
        1. Title company controls preparation and delivery to seller's statement
        2. Title company can make changes at the table for seller-only adjustments (with lender approval)
        3. Allows proper disclosure of title premium on seller's side
        4. Protects personal information of buyer and seller

4. **Closing Statements**
    a. Review the final closing statements prepared by the title company.
5. **Transaction Timeline (include timeline slides)**
6. **Top 10 TRID Take-Away's**
    a. "45" is the new "30" days
    b. Increased communications between all parties
    c. Buyer engagement must increase
    d. Rapid notification of issues
    e. Rapid response to requests
    f. Review title and the Buyer and Seller CD's early
    g. Don't plan on last minute changes
    h. Keep track of dates
    i. Extend the PA if necessary
    j. Build in contingencies for redisclosure

B. RESPA UPDATE:

- **RESPA Overview**
  - Section 8(a) prohibits "any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).
    - This provision does not prohibit "the payment to any person of a bona fide salary or compensation or other payment…for services actually performed." 12 U.S.C. § 2607(c) (2). Under 12 U.S.C. § 2607 (d) (2), any person who violates the provision "shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation."
- **CFPB Enforcement Summary (2012-March, 2016)**
  - 80 Actions consummated (27 were mortgage, real estate and title related)
  - 208,820,500 consumer helped
  - $211,025,849 Fines to others
    $6,471,535,663 restitution to consumer
    $377,166,076 CFPB Fine
    $7,059,727,588 TOTAL
- **CFPB Actions and Guidance on Marketing Service Agreements**
  - *Concerning comments in consent orders*
    - CFPB – "Entering a contract is a 'thing of value' even if the fees paid under that contract are fair market value for the goods or services provided."
    - CFPB – "Entering a contract with the agreement or understanding that in exchange the [real estate brokers] will refer settlement services violates Section 8(a)."
  - *J.P. Morgan Chase Bank, N.A.*
    Wells Fargo Bank, N.A.
    - January 22, 2015
    - Started with law suit:
      - Plaintiffs: CFPB & State of Maryland, Consumer Protection Division
      - Defendants: Wells Fargo, J.P. Morgan Chase, Todd and Elaine Cohen, Genuine Title LLC (a defunct title company)
  - *J.P. Morgan/Wells*
    - 2009-2013 Genuine Title Provided the following Marketing Services:
      - Marketing leads from third-party
      - Marketing Materials that were:
        - Printed
        - Folded
        - Stuffed
        - Mailed
      - Paid for postage
  - *The "E" in email = evidence*
    - Genuine Title email to the printer of the Marketing Materials:

- "I need you to provide me with some invoices that we will ultimately not use."
- "Can we also have 'Invoices' for certain loan officers Printed, Stuffed, Folded & Posted for 500 each? They would be individual 'Fake' invoices for the job you did for them last week."

- *CFPB Consent Order*
  - Wells Fargo:
    - Money Judgement to CFPB/CPD = +/- $11 Million
    - Fine to CFPB = $21 Million
    - Fine to MD CPD = $3 Million
  - Todd Cohen, a Wells Fargo LO and his wife, Elaine Oliphant Cohen agreed to pay a $30,000 penalty
  - J.P. Morgan Chase:
    - Money Judgement to CFPB/CPD = $300,753
    - Fine to CFPB = $500,000
    - Fine to Md CPD = $100,000
- *MSA Death Knell?*
  - July 30, 2015:
    - Wells Fargo & Prospect Mortgage
    - Cancelling All MSA and Desk Rental Agreements citing "Regulatory Uncertainty" surrounding these and similar arrangements.
  - CFPB Comments:
    - Important step
    - MSAs can carry significant legal risk for companies and undermine transparency for consumers.
    - Warning: Take note of today's action.
    - Consider carefully whether their own business practices comply with the law.

- **CFPB Compliance Bulletin – RESPA Compliance and Marketing Service Agreements (October 2015)**
  - Any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction.
  - In recent months, various mortgage industry participants have publicly announced their determination that the risks and complexity of designing and monitoring MSAs for RESPA compliance outweigh the benefits of entering the agreements. Accordingly, certain lenders have dissolved existing agreements and decided that they will no longer enter into MSAs. The Bureau encourages all mortgage industry participants to consider carefully RESPA's requirements and restrictions and the adverse consequences that can follow from non-compliance.

- As described above, the Bureau has found that many MSAs necessarily involve substantial legal and regulatory risk for the parties to the agreement, risks that are greater than less capable of being controlled by careful monitoring than mortgage industry participants may have recognized in the past. MSAs appear to create opportunities for parties to pay or accept illegal compensation for making referrals of settlement service business. The Bureau also found that efforts made to adequately monitor activities that in turn are performed by an wide range of individuals pursuant to MSAs are inherently difficult. Especially in view of the strong financial incentives and pressures that exist in the mortgage and settlement service markets, the risk of behaviors that may violate RESPA are likely to remain significant. That can be true even where the terms of the MSA have been carefully drafted to be technically complaint with the provisions of RESPA.
- In sum, the Bureau's experience in this area gives rise to grave concerns about the use of MSAs in ways that evade the requirements of RESPA. In consequence, the Bureau reiterates that a more carful consideration of legal compliance risk arising from MSAs would be in order for mortgage industry participants generally. This review is especially warranted insofar as whistleblower complaints about MSAs that violate REAPA have been increasing. The Bureau intends to continue actively scrutinizing the use of such agreements and related arrangements in the course of its enforcement and supervision work. Any industry participant that suspects unlawful activity by other or that wishes to self-report its own conduct that may have violated RESPA is encouraged to contact the CFPB. Self-reporting and cooperation, consistent with the Responsible Business Conduct bulletin, CFPB Bulletin 2013-06, will be taken into account in resolving such matters.

- **CFPB Consent Order – Paul Taylor Homes Limited (May 2013)**
  - Builder ordered to pay $118,194 as a return on distributions and referral fees obtained by referring borrowers to a mortgage company. The builder was also ordered to pay to the CFPB any tax benefit that may be obtained through the payment.
- **CFPB Files Suit Against Borders & Borders for Allegedly Paying Kickbacks (October 2013)**
  - *Consumer Finance Protection Bureau v. Borders & Borders, PLC*
    - A Kentucky-based law firm accused by the Consumer Financial Protection Bureau (CFPB) of paying kickbacks for real estate settlement referrals filed a lawsuit denying any wrongdoing.
    - On February 12, 2015 the U.S. District Court denied Borders motion to discuss the CFPB's complaint.
- **Sixth Circuit Rules HUD's 10-Point Sham AfBA Test Unconstitutional (Nov. 2013)**
  - *Carter v. Wells-Bowen*
    - In *Carter v. Welles-Bowen*, Ohio homeowners alleged they received title insurance services from sham affiliated businesses that provided few substantive services during the transaction, in violation of Real Estate Settlement Procedures Act (RESPA).

        - The homeowners' argument relied on the U.S. Department of Housing and Urban Development's 10-factor sham affiliated business test. HUD issued the policy statement in 1996 to help determine the legitimacy of a controlled business arrangement through a set of 10 criteria.
        - In June 2010, a judge for the U.S. District Court for the Northern District of Ohio ruled HUD's 10-point test was unconstitutionally vague and provided insufficient guidance.
        - The opinion issued by the Sixth Circuit Court of Appeals upheld the district court's ruling, essentially affirming that the 10-point test is unconstitutional and because Welles-Bowen did everything required under RESPA, "they thus qualify for the affiliated business arrangement exemption," the court wrote.

- **CFPB Consent Order – Fidelity Mortgage Corporation (January 2014)**
    - Fidelity was ordered to repay $27K in mortgage originations and a $54K civil penalty for violating Sec. 8 of RESPA by paying above-market rent for an office space within a bank from the months of March-November, 2012. The per-day office lease agreement included an exclusivity clause requiring the bank to promote the services of Fidelity Mortgage.

- **Baehr v. The Creig Northrop Team, P.C. (January 2014)**
    - Class action lawsuit certified in U.S. District Court alleging that the Northrop group received more than $500,000 in kickbacks in violation of RESPA from Lakeview Title Co. Inc. over a period of years.
    - The suit claimed the Northrop engaged in two illegal schemes- "a sham employment agreement and a sham marketing agreement to generate unearned fees and kickbacks."
- **CFPB Consent Order –Realty South (May 2014)**
    - RealtySouth, has agreed to pay a $500,000 civil penalty to settle allegations that it "strongly encouraged" and in some cases required agents to use its affiliated title insurance and closing services provider, without adequately disclosing to consumers that they had a right to shop around for those and other settlement services.
    - The consent order alleges that from March 2011 until May 2012, RealtySouth used a preprinted purchase contract that "explicitly directed" that title and closing services would be provided by its affiliated business, TitleSouth.
    - "Disclosures give consumers the power to make informed financial decisions, and buying a house is among the biggest financial decisions most people ever make," said CFPB Director Richard Cordray in a statement. He said the CFPB "will continue to take action against companies that attempt to modify disclosures and keep consumers in the dark."
- **CFPB Consent Order –Stonebridge Title Services, Inc. (June 2014)**
    - Stonebridge Title Services was required to pay a fine of $30,000 for paying referral commissions of up to 40% of the title insurance premium to

independent salespeople for the referral of the title insurance work to Stonebridge.
    - The consent order alleges that the commission payment amounts for the title insurance orders were determined solely on the value of the title insurance premium multiplied by a previously agreed-to commission percentage.
- **CFPB Consent Order –Amerisave Mortgage (August 2014)**
    - Amerisave Mortgage and Novo Appraisal were ordered to pay $14.8 million in refunds to harmed consumers and pay a $4.5 million penalty. Their owner, Patrick Markert, as an individual, agreed to pay an additional $1.5 million penalty for engaging in a deceptive bait-and-switch mortgage-lending scheme that harmed tens of thousands of consumers.
    - The Bureau found that Amerisave lured consumers by advertising misleading interest rates, locked them in with costly up-front fees, failed to honor its advertised rates, and then illegally overcharged them for affiliated "third-party" services (credit report fees increased by 350%, inflated appraisal fees and "appraisal validation" fees. .
- **CFPB Consent Order –Lighthouse Title (September 2014)**
    - A title insurance agency has agreed to pay $200,000 to settle allegations that it violated the Real Estate Settlement Procedures Act (RESPA) by entering into marketing services agreements with companies, including real estate brokers, with the understanding that those companies would refer mortgage closings and title insurance business.
    - Broad CFPB statement: "Entering a contract is a 'thing of value' within the meaning of Section 8, even if the fees paid under the contract are fair market value for the goods or services provided."
- **CFPB Consent Orders –Wells Fargo and JPMorgan Chase (September 2014)**
    - (see summary above)
- **CFPB Consent Orders –PHH Mortgage (June 2015)**
    - The original penalty of $6.4 million on PHH by Administrative Law Judge was overruled by CFPB Director Cordray and the fine was expanded to $109 million.
    - It was found that PHH was participating in a "mortgage insurance kickback scheme". This scheme entailed lenders referring borrowers to certain mortgage insurers and in exchange for these referrals, agreed to purchase reinsurance from a PHH subsidiary at inflated rates.
- **Timothy Strader Sr. versus Realogy, PHH, NRT, et al. (Nov. 25, 2015) (RESPA consumer class action surrounding their AFBA's).**
    - The suit states PHH and Realogy created PHH Home Loans, a sham venture engineered to facilitate and disguise the payment of unlawful referral fees and kickbacks in exchange for the referral of title insurance and other settlement services to Realogy's subsidiary, Title Resource Group (TRG).