

SHOULD WE AMEND OUR PURCHASE AGREEMENT FORMS TO ACCOMMODATE TRID DELAYS?

In recent months, a number of local associations and Realtor® firms have asked whether they should amend their purchase agreement forms to address anticipated closing delays caused by TRID compliance. Michigan Realtors® has not revised its purchase agreement form and this article will explain why that is.

Realtors® may recall that under TRID, a buyer/borrower must receive a Closing Disclosure form no less than three (3) business days prior to closing. A Closing Disclosure is considered “received” three (3) business days after it is sent. Thus, in the ordinary course, typically six (6) business days will be required for compliance with the time requirements for the Closing Disclosure form. (However, if the lender has evidence that the borrower actually received the Closing Disclosure form earlier, the lender may rely on that evidence and consider it to be received on that date.) If the Closing Disclosure form is later revised, then the timing requirements can be triggered again. (Only certain revisions retrigger the 3-day waiting period however: (1) changes to the loan’s APR; (2) changes to the loan product; and (3) the addition of a prepayment penalty.)

We have previously advised that as a result of TRID, Realtors® will need to change the way they handle closings. There can be no more scrambling for information/documents at the last minute. Rather, the goal should be to have all the details finalized at least ten (10) days prior to the closing date. Moreover, when designating a closing date at the time the purchase agreement is prepared, Realtors® may wish to add 10-15 days to their current estimated transaction time.

A number of Realtors® have suggested that Realtors® should go one step further and amend their purchase agreement forms to provide for automatic extensions to accommodate any delays caused by TRID compliance. We do not recommend such a change. While it certainly could be beneficial for buyers/borrowers to have this kind of flexibility, such a provision could cause significant problems for sellers. Keep in mind that while the goal of such a provision is presumably to address the situation where there is a correction of a computational error in the Closing Disclosure, the suggested language is typically much broader than that and would cover, for example, the situation where the interest rate changes and the borrower decides to start over with a different lender. It could also cover the situation where the buyer does not provide all necessary information to the lender/title company, so the closing documents are not prepared enough in advance. It also typically would allow repeated delays for various reasons, perhaps causing the sellers to breach the purchase contract on the home they are buying, or at least interfere with the sellers' relocation plans.

It has always been the case that actions or inactions of a buyer's lender can cause the buyer to miss a closing deadline by a few days. In the past, as a general rule, in these situations buyers have been fairly comfortable delaying the closing for a couple of days. First, because historically, Michigan courts have not strictly enforced closing deadlines. Second, because as a practical matter, sellers will typically live with a few day delay rather than terminate an existing purchase contract and start over with a new buyer. The fact that the process has changed under TRID does not really change this analysis. Certainly there is some risk that a seller will try to use a delay of a few days to try and get out of the transaction, but it is our opinion that this risk is relatively small compared to the chaos that would be created by using purchase agreement forms that permit a buyer/borrower to delay the closing indefinitely.

For those local associations and firms who do choose to amend their purchase agreement forms, our advice is to make sure that the language is narrowly drafted. We strongly advise against a provision, for example, that automatically extends the closing deadline “as necessary to comply with requirements related to TRID.” Any clause should limit the extension either in terms of available time, for example, 7 days, and/or causation, for example, “delays due to a retriggering of the notice requirement caused by revisions to the Closing Disclosure form.”

For example: In the event the closing is delayed due to a retriggering of the TRID notice requirement caused by revisions to the Closing Disclosure form, there shall be a one-time 7-day extension to the closing deadline.

After we have all had a chance to work under the TRID requirements for awhile, it may become apparent that there are changes to our purchase agreement forms that would be useful. For now, however, we think the best advice is to make sure that the stated deadline in your purchase agreement gives the buyer enough time to get prepared for closing and that closing details are “finalized” ten (10) days before that deadline.