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Real Estate Settlement Procedures Act, Mortgage Servicing Rules, and TRID

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Over the years, the compliance responsibilities of residential mortgage lenders and servicers, real estate agents and title companies have vastly expanded as Congress worked to integrate two disparate federal laws into a comprehensive and consistent standard.

Today, the Real Estate Settlement Procedures Act of 1974 (RESPA)[1] is a broad-ranging consumer protection statute that affects nearly every party involved in consumer purpose residential mortgage transactions—real estate agents, title companies, lenders, and servicers.

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RESPA became effective on June 20, 1975, and has been amended several times since then. In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[2] sought to reconcile the very different requirements of RESPA and the federal Truth in Lending Act (TILA). Congress did so by, first, shifting authority for interpreting and promulgating regulations under RESPA from the Secretary of the U.S. Department of Housing and Urban Development (HUD) to the newly created Consumer Financial Protection Bureau (CFPB). This change became effective July 21, 2011.[3] Among other things, the CFPB thereafter: (1) republished HUD's Regulation X, which implements RESPA, as its own regulation in 12 C.F.R. Part 1024;[4] (2) implemented new mortgage servicing requirements under RESPA, known as the Mortgage Servicing Rules, which became effective on January 10, 2014;[5] and (3) published final rules and forms that combine certain disclosures required under TILA[6] and RESPA, in connection with applying for and closing on certain mortgage loans, encouraging the CFPB to integrate TILA and RESPA disclosures into a single, consistent format. The rules, known as the TILA/RESPA Integrated Disclosures, or TRID, became effective October 3, 2015,[7] and have been amended in the interim.

Prior editions of this book included a separate chapter on mortgage servicing. Because those requirements—at least on the federal level—have now been consolidated in the Mortgage Servicing Rules, we cover those rules exclusively in this chapter to avoid duplication. This chapter also covers TRID because although (like the Mortgage Servicing Rules) the requirements are rooted in both RESPA and TILA, we believe practitioners will benefit from the presentation of each of these sets of rules in a single comprehensive chapter.

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Overview of the Law

Q 3.1 Why was RESPA originally enacted?

RESPA was enacted, in part, to address and correct certain practices that had historically resulted in unnecessarily high settlement charges in real estate financing transactions. Closely related to this goal was the purpose of providing consumers with greater and timelier information on the nature and costs of the real estate settlement process. Provided with such information, presumably consumers could

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compare the costs of competing settlement service providers, and the resulting competition would reduce consumers' transaction costs. Subsequent to its initial enactment, RESPA was expanded to require disclosures and impose substantive requirements in connection with tax and insurance escrow accounts and loan servicing. Thus, from its inception, RESPA has included requirements relating to more than simply the "settlement" of real estate loans. RESPA is also an "anti-kickback" statute that is designed to prohibit various entities involved in the settlement process from referring business to one another in exchange for kickbacks.[8]

Q 3.2 Does the CFPB have oversight over RESPA?

Under the Dodd-Frank Act, the CFPB was granted the authority to prescribe rules and regulations, to make interpretations, and to grant reasonable exemptions for classes of transactions, as may be necessary to achieve RESPA's purposes. The following constitute rules, regulations, or interpretations of the CFPB:

- Regulation X, including any appendices or supplements thereto; and
- any document published by the CFPB in the *Federal Register* that states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA.[9]

The CFPB also has supervisory and enforcement authority for RESPA and Regulation X (see QQ 3.72–3.74).

Q 3.3 Does RESPA preempt state laws?

As a general matter, state laws that are inconsistent with RESPA or Regulation X are preempted to the extent of the inconsistency. However, state laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA. Upon request, the CFPB may determine whether particular state laws are inconsistent with RESPA or Regulation X.[10]

With respect to affiliated business arrangements, RESPA and Regulation X specify that state law provisions that impose more stringent limitations on affiliated business arrangements than RESPA are

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not inconsistent, so long as they give more protection to consumers and/or competition.[11]

With respect to transfers of servicing, state laws requiring notice to the borrower at the time of application or transfer are preempted, and there may be no additional borrower disclosure requirements. Thus, a lender that makes a mortgage loan or a servicer will be considered to have complied with such state laws by complying with 12 C.F.R. § 1024.33's disclosure requirements (see Q 3.37). However, provisions of state law that require disclosures beyond those that 12 C.F.R. § 1024.33 requires (for example, additional notices to insurance companies or taxing authorities) are not preempted; such additional information may be added to a notice provided under 12 C.F.R. § 1024.33, if permitted under applicable state law.[12]

Q 3.4 Does RESPA cover all real estate mortgage transactions?

No. RESPA applies only to transactions involving "federally related mortgage loans," which include most loans secured by a lien on residential property, including home equity lines of credit (HELOCs).[13] RESPA defines "federally related mortgage loan" in two parts.

First, the loan must be secured by a lien (regardless of lien priority) on residential real property located within a state,[14] upon which either (1) a one-to-four family structure is located or will be constructed using loan proceeds (including individual condominium or cooperative units); or (2) a manufactured home is located or will be constructed using loan proceeds.

Second, the loan must be one of any of the following:

(1) made, in whole or in part, by a lender whose deposits are insured by any agency of the federal government or are regulated by an agency of the federal government;

(2) made, in whole or in part, or insured, guaranteed, supplemented, or assisted in any way by any other officer or agency of the federal government, or under or in connection with a housing or urban development program administered by the Secretary of HUD, or a housing or related program administered by any other officer or agency of the federal government;

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(3) intended to be sold by the originating lender to the Federal National Mortgage Association (Fannie Mae), the Government National Mortgage Association (Ginnie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) or its successors, or a financial institution from which it is to be purchased by Freddie Mac or its successors;

(4) made, in whole or in part, by any creditor who makes or invests in residential real estate loans aggregating more than $1 million per year;

(5) originated by a dealer or a mortgage broker (if the obligation is to be assigned to any maker of mortgage loans described in items (1)–(4) above); or

(6) the subject of a home equity conversion mortgage (HECM) or reverse mortgage issued by a maker of mortgage loans described in items (1)–(4) above.

"Federally related mortgage loans" also include installment sales contracts, land contracts, or contracts for deed on otherwise qualifying residential property if the contract is funded, in whole or in part, by proceeds of a loan made by a maker of mortgage loans described in items (1)–(4) above.[15]

Q 3.5 What loans are not subject to RESPA?

As noted above, only transactions involving "federally related mortgage loans" are subject to RESPA. Cash sales and sales in which the individual home seller takes back a mortgage are not covered by RESPA because a federally related mortgage loan is not involved.[16]

In addition, several types of transactions are specifically exempted from RESPA's coverage, including:

- loans primarily for business, commercial, or agricultural purposes (including, for example, rental property transactions);
- temporary financing, such as construction loans;[17]
- "bridge" or "swing" loans in which a lender takes a security interest in otherwise covered one-to-four-family residential property;

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- loans secured by vacant or unimproved property where no loan proceeds will be used within two years of loan settlement to construct or place on the property a one-to-four family residential structure;
- assumptions without lender approval;
- loan conversions that do not involve a new note (even if the lender charges for the conversion); and
- bona fide transfers of loan obligations in the secondary market (although RESPA's mortgage servicing requirements under 12 C.F.R. §§ 1024.30–1024.41 still apply).[18]

Loans subject to the integrated disclosure requirements (see Q 3.7) or included in certain housing assistance loan programs for low-and moderate-income persons are exempt from RESPA's settlement cost booklet, Good Faith Estimate, settlement statement, and application servicing disclosure statement requirements.[19] This exemption is available for:

(1) consumer credit transactions secured by real property or a cooperative unit that are subject to the initial disclosure, final disclosure, and special information booklet requirements that became effective under TILA's implementing regulation, Regulation Z, on October 3, 2015; and

(2) subordinate lien transactions—for down payment, closing costs, or other similar home buyer assistance, property rehabilitation assistance, energy efficiency assistance, or foreclosure avoidance or prevention—where the credit contract satisfies certain requirements and the creditor complies with all other applicable Regulation Z requirements for the transaction.[20]

Disclosures

Generally

Q 3.6 What disclosures are required?

Because the overarching goal of RESPA is to provide consumers with accurate and timely information, RESPA requires various disclosures to be made to a consumer involved in a transaction subject to

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RESPA. There are three basic types of disclosures that are grouped according to when they are required to be delivered:

(1) initial disclosures;
(2) disclosures to be made in connection with settlement; and
(3) post-closing disclosures.

Such disclosures may be provided in electronic form, if in compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. §§ 7001 *et seq.*[21]

TILA/RESPA Integrated Disclosures

Q 3.7 What disclosure changes became effective on October 3, 2015 as TRID?

In accordance with the Dodd-Frank Act, the CFPB has integrated the separate mortgage loan disclosures required by RESPA and TILA in connection with a mortgage application into two core forms that are provided prior to closing, known as the TILA/RESPA Integrated Disclosures, or TRID. Prior to 2015, the analogous documents were the Good-Faith Estimate (GFE) and HUD-1 settlement statement, which are still required for loans not subject to the TRID Rule (see QQ 3.8–3.15). The TRID disclosures are:

- The Loan Estimate (provided at the time of application), which assists consumers in understanding the key features, costs, and risks of the loan for which they are applying, and must be provided to consumers no later than the third business day after they submit a loan application and no later than seven business days before consummation of the transaction.[22]

- The Closing Disclosure (provided prior to closing), which assists consumers in understanding all the costs of the transaction, and must be provided to consumers at least three business days before consummation of a loan.[23]

Q 3.7.1 Does TRID apply to all mortgage loans?

No. These integrated disclosure requirements apply to most closed-end consumer mortgages, but they do not apply to HELOCs,

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reverse mortgages, mortgages secured by mobile homes or dwellings not attached to land (other than cooperative units), or where the lender makes five or fewer mortgages per year.[24]

Q 3.7.2 What triggers the requirement to provide a Loan Estimate?

For a loan subject to the TRID Rule, a creditor is responsible for delivering a Loan Estimate no later than the third business day after receipt of the consumer's "application," which consists of the submission of six pieces of information: (1) the consumer's name; (2) the consumer's income; (3) the consumer's social security number (to obtain a credit report); (4) the property address; (5) an estimate of the value of the property; and (6) the mortgage loan amount sought.[25] Submission of these six pieces of information triggers the requirement even in the absence of verifying documents,[26] and even if the information is provided solely for purposes of obtaining a pre-qualification or pre-approval letter.[27] Note that, effective October 3, 2015, a seventh item—any other information deemed necessary by the loan originator—was removed from the Regulation X definition of "application."[28] An application may be either in writing or electronically submitted, including a written record of an oral application.

PRACTICE TIP: Determining when an application is received is critical for purposes of complying with the initial disclosure requirements, particularly for loan originators that prequalify prospective home buyers. Originators who wish to provide prequalification for their customers must be aware that if they do not wish to provide a Loan Estimate, they must ensure that at least one of the six pieces of information—e.g., the property address—is not submitted by the consumer. If, however, a prequalified consumer subsequently submits the property address (i.e., the sixth of the six pieces of information that constitute an application under the TRID Rule), the Loan Estimate requirement would then be triggered.

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Q 3.7.3 What information must be provided in a Loan Estimate?

Regulation Z provides highly specific requirements for the information to be included in the Loan Estimate, as well as requirements for how the information is formatted.[29] For example, the Loan Estimate must include a host of general information about the loan such as, among other things, the loan purpose, the property address, the identity of the applicant and the creditor, and the like, as well as separate tables specifying, among other things, the loan terms, estimated closing costs, and expected payments. The CFPB provides annotated and blank model forms for the Loan Estimate in both English and Spanish.[30]

Q 3.7.4 May any fees be imposed prior to providing a Loan Estimate?

Generally, no. For a loan subject to the TRID Rule, the creditor may not impose any fee on the consumer until the Loan Estimate has been provided and the consumer has thereafter indicated an intent to proceed with the transaction.[31] However, the one fee expressly permitted is that the creditor may impose a bona fide and reasonable fee for obtaining the consumer's credit report before the Loan Estimate is provided.[32]

Q 3.7.5 Is a creditor bound by the estimated closing costs disclosed in the Loan Estimate?

Generally, yes. The Loan Estimate must include only "good faith estimates." An estimated closing cost is deemed in good faith if the charge paid by or imposed on the consumer does not exceed the amount originally disclosed on the Loan Estimate.[33]

There are a number of exceptions to this general rule, however. Limited increases are permitted for a charge for a third-party service or a recording fee if (1) the aggregate amount of charges for third-party services and recording fees paid by or imposed on the consumer does not exceed the aggregate amount of such charges on the Loan Estimate; (2) the charge for the third-party service is not paid to the creditor or an affiliate of the creditor; and (3) the creditor permits the consumer

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to shop for the third-party service.[34] Regulation Z also permits variations for certain specified charges if the original estimate is consistent with the best information reasonably available to the creditor at the time it was disclosed.[35] Revised estimates will also be deemed in good faith if the revision is due to various specified changed circumstances, such as a change in the consumer's creditworthiness, the size of the transaction, or revisions specifically requested by the consumer.[36]

Q 3.7.6 What information must be provided in a Closing Disclosure?

Not surprisingly, Regulation Z requires that the Closing Disclosure provide much of the same information as is required in the Loan Estimate, as well as specific information (such as the closing date and actual closing costs) which may not have been ascertained when the Loan Estimate was prepared.[37] The CFPB also provides model forms for the Closing Disclosure in annotated and blank format in both English and Spanish.[38]

Q 3.7.7 When must an amended Closing Disclosure be provided?

As noted above, the creditor must ensure that a consumer receives a Closing Disclosure no later than three business days before consummation. If the disclosed terms change after the creditor has provided the initial Closing Disclosure to the consumer, the creditor must provide a corrected Closing Disclosure to the consumer. However, the corrected Closing Disclosure may be provided any time at or before consummation unless (1) the change results in the APR becoming inaccurate;[39] (2) the loan product information (i.e., "adjustable rate," "step rate," or "fixed rate") required to be disclosed under the TRID Rule has become inaccurate; or (3) a prepayment penalty has been added to the loan.[40] Any of these three changes requires that the corrected Closing Disclosure must be received by the consumer no later than three business days before consummation.

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