

Client Alert

December 2015

Know Before You Owe: TILA RESPA Integrated Disclosure Rule (TRID) and Secondary Market Considerations

On October 3, 2015, the residential mortgage lending landscape — from origination to the secondary market — changed dramatically when the Consumer Financial Protection Bureau's (CFPB) Know Before You Owe TILA RESPA Integrated Disclosure Rule (TRID) took effect for closed-end residential mortgage loans. Our August 25, 2015, [client alert](#) addressed TRID-Related Changes to the Section 404 Notice applicable to servicers.

This client alert will discuss potential assignee liability as well as enforcement concerns under TRID. As discussed more fully below, the implications of potential liability and TRID enforcement for the creditor and the investor-assignee have far-reaching effects. Investors should work with their due diligence providers to make sure that they are adequately covered to prevent potential assignee liability. If not, investors may be setting themselves up for financial and reputational risks.

TRID consolidated the four existing disclosures required to be provided to consumers under the Truth-in-Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) — the initial and final Truth-in-Lending Disclosure Statement(s) (TIL), the Good Faith Estimate (GFE) and the HUD-1 Settlement Statement (HUD-1) — into the Loan Estimate and the Closing Disclosure (collectively referred to as the "Integrated Disclosures").

Assignee Liability Under TRID

Assignee liability is a possibility under TRID, which could subject investors in mortgages to that liability. However, the application of such assignee liability under TRID needs more certainty. For assignee liability to exist, there must be a statutory private right of action. Prior to TRID, TILA provided for a private right of action for its consumer credit disclosure provisions. Remedies under TILA's private right of action included actual damages, statutory damages up to \$4,000 per violation, class action damages, attorney's fees and court costs and administrative enforcement. RESPA, however, contained no private right of action for violations of its disclosure provisions. Violations of RESPA provisions were instead subject to enforcement action by federal and state governmental authorities, with possible civil money penalties and claims arising under state law, such as state deceptive acts and practices statutes. Notably, enforcement actions under RESPA are brought against the originator and not the assignee.

TRID is a combination of TILA and RESPA. We know that there is a private right of action and potential assignee liability for investors under TILA. We also know that there is no private right of action and assignee liability for investors under RESPA. What we do not know, however, is how the combination of TILA and RESPA may or may not allow for a private right of action and potential assignee liability for investors under TRID.

The CFPB has indicated that a determination of whether TILA liability applies depends on the specific authorization (TILA or RESPA) relied on for each provision of TRID. But will courts agree? We must wait for more certainty on whether a violation of any of the TRID requirements, including using incorrect forms or not correctly completing the forms, would allow for a private right of action and subsequent assignee liability against an investor. In some cases, there is a lack of certainty to determine whether TILA or

RESPA has authorized the provision. We may not know whether a private right of action exists under certain provisions of TRID and therefore whether assignee liability exists under those same provisions until the courts have opined. There is also the possibility that TILA liability may be erroneously applied to a provision of TRID that was authorized by RESPA, thereby allowing for lawsuits against assignees when they should not otherwise proceed.

TRID Enforcement

On October 7, 2015, the US House of Representatives passed H.R. 3192, the Homebuyers Assistance Act, which would delay TRID enforcement until February 1, 2016. H.R. 3192 precludes lawsuits from being filed against any person for a violation of TRID requirements occurring before February 1, 2016, as long as the person made a good faith effort to comply with the requirements.

If H.R. 3192 passes the US Senate, creditors and assignees of TRID mortgage loans need not worry about liability for good faith compliance for the initial four months of TRID. This will alleviate the short-term fears about the CFPB's enforcement of the new rules but the long-term issues will remain.

FHFA and FHA Perspectives

On October 6, 2015, at the direction of the Federal Housing Finance Agency, Fannie Mae and Freddie Mac issued guidance regarding TRID compliance.¹ In recognition of the continued implementation of TRID technical disclosure, timing and tolerance requirements, Fannie Mae and Freddie Mac will not conduct routine post-purchase loan file reviews for technical compliance with TRID during the transitional period (which date is likely from October 3, 2015 through January 31, 2016). However, Fannie Mae and Freddie Mac will review whether the correct forms were used in connection with the origination of the mortgage loans. After the transitional period, Fannie Mae and Freddie Mac will announce that such period is over and that reviews for technical compliance will begin.

Fannie Mae and Freddie Mac expect lenders and sellers/servicers to make good faith efforts to comply with TRID. The failure to use the Loan Estimate and/or the Closing Disclosure will be deemed a violation of the good faith efforts standards and will render the mortgage loan subject to all contractual remedies, including repurchase. However, Fannie Mae and Freddie Mac stated in their respective guidance that they intend to exercise such remedies for noncompliance with TRID in only two limited circumstances: (1) the Loan Estimate and/or Closing Disclosure form has not been used or (2) a particular practice would impair enforcement of the note or mortgage or would result in assignee liability to Fannie Mae or Freddie Mac, and a court of law, regulator or other authoritative body has determined that such practices violate TRID.

The Federal Housing Administration's (FHA) Office of Single Family Housing (SFH) also recently announced that due to TRID implementation challenges, it will not include technical TRID compliance as an element of its routine quality control reviews until April 16, 2016.² SFH expects lenders to make good faith efforts to comply with TRID, which, at a minimum, requires the use of the TRID required forms. Consistent with current practices, SFH will evaluate whether the correct forms were used in connection with the origination of FHA mortgages.

¹ Fannie Mae Lender Letter LL-2015-06 and Freddie Mac Industry Letter re: Information Related to Know Before You Owe TILA-RESPA Integrated Disclosures.

² HUD Industry Letter: Information to Mortgagees on FHA's position on the implementation of the Consumer Financial Protection Bureau's Know Before You Owe TILA-RESPA Integrated Disclosure (TRID) rule.

Rating Agency Perspectives

In May, Moody's Investors Service (Moody's) issued a report addressing the increased RMBS risk of losses under TRID. According to the report, the initial operational challenges for creditors to implement and comply with TRID, along with the potential for increased costs in the event of non-compliance, raise the risk of losses for RMBS trusts. Moody's concluded that the extent of RMBS trusts' liability for errors of creditors will be in large part based on the interpretation by courts in the future.³

Moody's also advised that it believes that securitizations are unlikely to contain loans that violate TRID as long as standard third-party due diligence procedures are in place prior to closing. Such procedures should catch any potential TRID violations before the effected loans are placed in the secondary market.⁴

Takeaways

Currently, industry participants should consider the following:

- Confirm that the Loan Estimate and Closing Disclosure were used to originate the mortgage loan.
- Confirm that the Loan Estimate and Closing Disclosure were each completed fully and accurately.
- Monitor the length of the transitional period before the CFPB begins enforcing TRID.
- Monitor the good faith compliance interpretations by the CFPB, Fannie Mae, Freddie Mac and FHA.

TRID is an evolving area of law, but the potential for liability under TRID is an origination, servicing and assignee issue. We will be monitoring developments under TRID, and if you have any questions regarding TRID, please feel free to contact us.

Contacts

Steven H. Becker
sbecker@hunton.com

Amy McDaniel Williams
awilliams@hunton.com

Robert J. Hahn
rhahn@hunton.com

Melanie R. Finkelstein
mfinkelstein@hunton.com

³ Announcement Moody's: New mortgage disclosure rule will increase risk for US RMBS (May 19, 2015): http://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBS_1005142.

⁴ Moody's Report: https://www.moodys.com/research/Moodys-New-mortgage-disclosure-rule-will-increase-risk-for-US--PR_325752.