What We Know

ARTICLES & INSIGHTS

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Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer

Thoughts on TRID and Potential Regulatory Traps for Lenders

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The Truth in Lending RESPA Integrated Disclosure Rule (TRID) took effect October 3, 2015, and placed the mortgage industry in unchartered waters. Our office has spent countless hours reviewing the rule, the commentary, the CFPB Guidelines, and listening to lenders' concerns about the Rule. Here are our initial observations.

Initial Examinations: All of the relevant regulators have provided assurances to their supervised entities that examiners will "evaluate an institution's compliance management system and overall efforts to come into compliance, recognizing the scope and scale of changes necessary for each supervised institution to achieve effective compliance." So what does this mean? It means that examiners will likely be focused on the implementation of policies and procedures and due diligence testing of software in initial examinations. The good news is that most lenders began implementing policies and procedures regarding TRID well ahead of October 3rd; however, reports from the CFPB and lenders themselves indicate that the software roll out from vendors may not have been as smooth. Several lenders have indicated that software is still being updated making it difficult for them to do their due diligence in testing the software. The CFPB has indicated some awareness of the issue, acknowledging that the implementation process "was not as smooth as we would have hoped" and placing the blame largely at the feet of the software vendors. Our message for lenders, however, remains the same: make sure you are adequately testing the software and remember, TRID places liability for noncompliance squarely on the lender.

Private Rights of Action/Class Actions: Simply put, TRID provides more risk for litigation exposure to lenders. Under TRID, lenders are solely responsible for compliance with the rule. While RESPA did not provide a private right of action; the TRID Rule relies on the Truth in Lending Act for all disclosure, timing and content requirements. Truth in Lending does provide a private right of action and thus, it is a foregone conclusion that we will see more litigation under TRID. Additionally, class actions are likely to become more prevalent.

Loan Estimates: The timing requirements for Loan Estimates (3 business days from application) places immense pressure on underwriters to perform their analysis of credit financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

worthiness in a very tight time frame. The ramifications of this are that lenders are going to make loan decisions without adequate time to fully vet credit worthiness. Additionally, we see the following pitfalls for Loan Estimates:

- **Product Description:** When it takes 50+ pages for the CFPB to explain how to fill out a three-page form, the form does not meet its goal of simplification. Case in point: TRID requires that products be described in terms of any payment feature that may change the periodic payment and the duration of the relevant payment feature. For example, the Commentary to the Rule suggests that an adjustable rate where the introductory rate is five years and then adjusts every three years– "5/3 Adjustable Rate." It is unlikely that the average consumer is going to understand the import of that product description.
- **Projected Payment Changes:** TRID requires that projected payment changes be disclosed. TRID expressly requires that lenders include within those changes the automatic termination of Mortgage Insurance. The CFPB has indicated that it is concerned that lenders are not appropriately terminating Mortgage Insurance. This disclosure on the Loan Estimate is, therefore, likely to receive a lot of attention in Initial Examinations.
- **Overestimating Costs:** Inevitably, there will be an inclination to overestimate costs to not run afoul of the Good Faith Estimate Test and tolerance thresholds. Lenders need to be careful in doing so as a practice of doing so is likely to be scrutinized by examiners for fair lending violations and unfair and deceptive violations.

Closing Disclosures and Consummation:

- Lenders and their settlement agents need to be cognizant of their obligations to prevent the impermissible disclosure of Nonpublic Personal Information to third parties.
- Lenders and their settlement agents need to fully contemplate that Closing Disclosures are likely to need to be revised and have a clear idea as to when an additional three-day waiting period is required and when it is not.
- Additionally, we anticipate that initial examinations will scrutinize the timeliness of refunds to consumers for overpayment of costs as a result of inaccurate Closing Disclosures and whether revised charges were impermissibly charged to the consumer rather than being absorbed by the lender (as determined by the Good Faith Test and permissible tolerances).

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