

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[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 financial services and has

CFPB Clarifies Liability Standard for TRID

January 28, 2016 | by

Since TRID was introduced, a debate has raged on as to whether the Truth in Lending Act's (TILA) liability rules or RESPA's would govern TRID violations. The debate has key ramifications: under TILA, there is a private right of action. Under RESPA, there is not. In a letter to the Mortgage Bankers Association, the CFPB has provided some answers to the debate while attempting to provide some assurances to the mortgage industry. The results are a mixed bag.

The letter comes in response to concerns raised by the Mortgage Bankers Association as to secondary market rejection of mortgages which may contain technical TRID violations. As to the secondary market, the CFPB assured that the Federal Housing Finance Agency, government sponsored entities, and the Federal Housing Administration will not conduct routine post purchase loan file reviews for technical compliance and do not intend to exercise contractual remedies, including repurchase, for noncompliance with TRID's disclosure rules where the lender is making good faith efforts to comply. The CFPB also reiterated that initial examinations by regulators for compliance with TRID will focus on "whether companies have made good faith efforts come into compliance with the rule." Examinations would be "corrective and diagnostic, rather than punitive."

More importantly, the letter provided some helpful clarification of the CFPB's interpretation of TRID liability and suggests that TILA's provisions will control:

Cure Provisions:

- TRID provides for curing of certain errors post-closing by issuing a correct Closing Disclosure. The letter reminds that "consistent with existing Truth in Lending Act (TILA) principles, liability for statutory and class action damages would be assessed with reference to the final closing disclosure issued, not to the loan estimate, meaning that a corrected closing disclosure could, in many cases, forestall any such private liability"; and
- TILA provides a safe harbor to lenders for correction of errors, and that provision applies to TRID. Under 15 U.S.C. 1640(b), lenders may cure violations provided the creditor notifies the borrower of the error and makes appropriate adjustments to the account before the creditor receives notice of the violation from the borrower.

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.

Assignee Liability:

- For non high-cost mortgages, there is no general TILA liability unless the violation is apparent on the face of the disclosure documents and the assignment is voluntary.

Limitations on Liability:

- "TILA limits statutory damages for mortgage disclosures, in both individual and class actions for failure to provide a closed-set of disclosures";
- "Formatting errors and the like are unlikely to give rise to private liability unless the formatting interferes with the clear and conspicuous disclosure of one of the TILA disclosures listed as giving rise to statutory and class actions damages in 15 U.S.C. 1640(a); and
- "The listed disclosures in 15 U.S.C. 1640(a) that give rise to statutory and class action damages do not include either the RESPA disclosures or the new Dodd-Frank Act disclosures, including the Total Cash to Close and Total Interest Percentage."

Bona Fide Errors:

- TILA's provisions for unintentional, bona fide errors applies to TRID.

While there has been significant debate as to whether RESPA or TILA would control the liability functions of TRID, Cordray's letter suggests that the answer is TILA. While that is not entirely good news for the mortgage industry (as RESPA contains no private right action), the CFPB has at least provided some indication of their intentions and with a path in front of it, the mortgage industry can now better assess and manage risk.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541