Special Report

FutureFocus on the TRID Rule

Impact on Small and Midsize Businesses

Real Estate, Mortgage Lending, and Title (Settlement) Services

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Education Matters

THE NINE MOST TERRIFYING WORDS...

It seems only appropriate, in the days leading up to the October 3, 2015 effective date of the TILA-RESPA Integrated Disclosure ["TRID"] Rule to harken back to an August 1986 news conference at the Illinois State Fair in which President Ronald Reagan opened his speech by saying to American farmers:

> *"I think you all know that I've always felt the nine most terrifying words in the English language are: **I'm from the Government, and I'm here to help**. A great many of the current problems on the farm were caused by government-imposed embargoes and inflation, not to mention government's long history of conflicting and haphazard policies."*

In contrast, the following quote by CFPB Director Richard Cordray, posted on the Bureau's website, contains nine equally terrifying words for mortgage lenders and other settlement services professionals currently drowning under a Tsunami of new rules and regulations:

> *"If the whole point of our regulations is to **protect consumers and promote fair, transparent, and competitive markets**, then we should care about how well the rules are understood and implemented, how operational issues can be more easily addressed, and the amount of effort required. And we have shown that we do care deeply about these things."*

Consumer protection and fair, transparent, and competitive markets are certainly lofty goals toward which government as well as business and industry should strive. However, we must question the wisdom in flooding the industry with a mountain of new rules and regulations when the failures of the past, leading up to the current regulatory regime, can be largely attributed to the failure of the federal government to adequately enforce the consumer protection and fair market laws already in place.

We don't need more laws, rules, and regulations delivered in a top-down, one-size-fits-all approach which are destined to: derail fair and competitive markets; destroy any hope for a level playing field among small, midsize, and large providers of financial products and services; and dump consumers on the doorstep of monopolistic *megacorp* banks, insurance companies, and real estate brokerages which provide everything *except* fairness, transparency, competitive markets, and consumer protection.

Prior to the 2010 Dodd-Frank Act, the biggest regulatory changes/challenges occurred in 2008 when the industry was hit with the *Tsunami Trifecta* including the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 [SAFE Act]; the Mortgage Disclosure Improvement Act [MDIA]; and the November 2008 RESPA Final Rule. The Tsunami Trifecta followed a decade of unparalleled financial fraud caused, in large part, by failed government policies exacerbated by the abject greed of those working in or near the financial services industry. Unchecked mortgage fraud and securities fraud triggered the collapse of the housing bubble and the freezing of the mortgage market, leading to worst U.S. financial crisis since the Great Depression and spurring unparalleled levels of foreclosure fraud, foreclosure-rescue fraud, and short sale fraud -- all of the above contributing to and culminating in the 2007-2009 Great Recession. In the words of Henry Paulson, former Goldman Sachs CEO who became Treasury Secretary in 2006:

> *"From the beginning of time, we've had financial crises. People always blame the banks and for good reason. **When you look for the root causes, they're almost always failed government policies**.*

In 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ["Dodd-Frank Act"] established the Consumer Financial Protection Bureau [CFPB] for the purpose of promoting *fairness and transparency* for mortgages, credit cards, and other consumer financial products and services. The Bureau, in turn, flooded the mortgage lending industry with yet another federal "Tsunami" of mortgage-related rules including Ability to Repay/Qualified Mortgage; HOEPA; Loan Originator Compensation; Servicing; and the TILA-RESPA Integrated Disclosure Rule ["TRID"]. Quoting, again, Henry Paulson, with his own nine most terrifying words for consumers:

> *There is a very real danger that **financial regulation will become a wolf in sheep's clothing**."*

INDUSTRY IMPACT

As to the question of whether increased federal rules and regulations will force independent small and midsize businesses *out of business,* the answer is, *they already have.* Unless remedial action is taken, the current regulatory climate will continue to squeeze the life and livelihood out of independent small and midsize service providers in the mortgage lending, title (settlement), and real estate industries.

Mortgage Loan Originators

Following the Great Recession and arrival of the SAFE Act, tens of thousands of independent mortgage loan originators either exited the mortgage industry entirely or morphed into employees of banks, credit unions, and other federally-regulated depository institutions. As MLO employees, they are federally registered but, otherwise exempt from SAFE Act requirements involving education, testing, and state licensing. It is notable that the SAFE Act does not impose standards of care or practices that loan originators must follow when originating residential mortgage loans.

Title (Settlement) Agents

Currently, in the wake of CFPB Bulletin 2012-03 regarding creditor oversight of third party service providers, in conjunction with the TRID Rule, hundreds of small and midsize independent title agencies have already gone out of business, with thousands more expected to follow within the next 1-3 years. The Bulletin, more than the TRID Rule, is the culprit, as creditors attempt to skirt around the edges of the Bureau's due diligence expectations by requiring that title agents/agencies be self-certified or third-party-certified in industry "best practices" proffered by the industry's national association.

Should creditors [lenders] undergo federal regulatory examination and be found non-compliant due to failure to exercise appropriate due diligence over service providers, the quickest and simplest way to cure such non-compliance is to jettison third party service providers – in this case, independent small and midsize title (settlement) agents/agencies – and take the settlement process in-house. The CFPB, in workshops leading up to publication of the 2012 Proposed TRID Rule, stated that some lenders might decide to take the settlement process in-house, via *"lender-owned, lender-affiliated, or lender-preferred-partner providers."* The TRID Final Rule, referencing settlement agents providing creditors a copy of the agent-prepared Seller's Closing Disclosure, includes the caveat, *"unless the creditor IS the settlement agent."*

The most likely *"preferred-partner providers"* for national lenders are national title insurers with significant direct-operation and vendor-management footprints. Today, the top two title insurer "families" control approximately 60% of all title insurance business in the United States, with the top four "families" controlling in excess of 82%.

Finally, factor *technology* into the equation...

> The CFPB's eClosing Pilot Program completed July 2015 demonstrates the Bureau's fervent commitment to a future of electronic mortgage closings; and
>
> Title Insurers, harnessing the power of technology as a delivery system for title insurance coverage, require fewer and fewer title agents to market products and provide title and settlement related services;

... and the writing on the wall becomes even more clear. The future of independent small and midsize title (settlement) agents are numbered, per agency "exit strategies" currently promoted by the industry's national association.

Real Estate Agents

Looking forward, according to the recent NAR-commissioned *Danger Report*, *"the real estate industry is saddled with a large number of part-time, untrained, unethical, and/or incompetent agents. This knowledge gap threatens the credibility of the industry."* The Report also cites that the role, function, and perceived value of agents will continue to deteriorate as agents fail to properly assess and respond to changing consumer demands and expectations; further noting that the disproportionate power that independent contractors have enjoyed over the past three decades will go out of vogue as capital or economies of scale change the rules and the *"Wall Street reign"* begins. In addition, the Report states that an IRS ruling reclassifying the legal status of real estate agents from independent contractors to employees will further explain the current-to-future mass exodus of independent real estate agents from the industry.

As for real estate brokerages, the Report finds that brokerages face their own challenges, such as compliance with aggressively enforced federal regulatory policies. Among the most prominent, according to the Report, are the anti-kickback and referral-fee rules governing brokers' financial arrangements with title companies, lenders and others, and increased CFPB enforcement re same. The Report states that *"although most brokerage companies are either ignorant of the fact or believe they are in compliance, most are likely in violation already."* The estimated time period for mass exodus of part-time real estate agents and small independent real estate brokerages is believed to be no more than 3-5 years

Once the majority of independent small and mid-size settlement services providers are driven out of business, consumers will be exposed and consumer protection laid bare to the full range of unethical and unlawful actions of monopolistic "megacorp" banks,

insurance companies, and real estate brokerages which are collectively too big to fail and too big to jail. As long as the revolving door between Wall Street and Washington continues to turn unimpeded – its turnstile well-oiled by industry lobbyists – independent small and midsize businesses, along with consumers, will continue to be damaged by what some call the "unintended consequences" of failed policies flowing forth from politics as usual.

ARE YOU "TRID" READY?

At this point, you may wonder why it *matters* whether or not you are *"TRID Ready"* especially if you own or work for an independent small or midsize lender, title (settlement) agency, or real estate company. It matters because – in spite of all the harsh truths shared above which arguably paint a very bleak picture for "independent" providers – at heart I am an optimist. Not only am I an optimist, I am also a staunch believer in regulatory compliance, having spent the better part of the last 40 years teaching regulatory compliance courses and preaching the importance of consumer protection. For true consumer protection to prevail, we must create and preserve fair and free markets where small, midsize, and large businesses compete on a level playing field. To accomplish that, we must rise far above the *letter of the law* and embrace the *spirit of the law.*

In short, *we must do the right thing in the highest and best interests of all concerned, simply because it is the right thing to do.* That requires not only being *"TRID Ready"* but going above and beyond the TRID Rule which, if implemented solely and strictly as written, will make mortgage loan transactions *less transparent* and *more confusing* – the antithesis of what the TRID Rule is supposed to do – and will end up *harming consumers* rather than protecting them.

According to CFPB Director Cordray, the Bureau has *"shown how deeply it cares about how well rules are understood and implemented, how operational issues can be more easily addressed, and the amount of effort required."* Yet, according to a *RESPA News* article published a week prior to the October 3, 2015 TRID Rule effective date, *"Thousands of lenders and financial institutions – and the agents, realtors, vendors and partners that work with them – will start October with no idea how their regulator will enforce the new TILA-RESPA Integrated Disclosure (TRID) rules."* While the article focuses on which federal agency has supervisory powers over the various financial institutions – *the CFPB supervises about 100 financial institutions that collectively control over 3/4 of the overall market, while the OCC and FDIC supervise the remaining 8,000 or so which collectively control less than 1/4 of the market* – it begs the larger question, which is whether financial institutions [large and small] and their industry partners [title (settlement) agents and real estate agents, among others] are truly *"TRID Ready."*

THE DEVIL IS IN THE DETAILS...

If the only requirement for *"TRID Readiness"* was knowing how to complete Loan Estimate and Closing Disclosure forms most industry professionals could probably pass the readiness test. However, the 3-page Loan Estimate and 5-Page Consumer [Borrower] Closing Disclosure comprise only 8 of the 1,888 page TRID Final Rule – indicating that the Devil may, indeed, be in the *details.* With more than 4,500 title (settlement) agents, attorneys, loan originators, and real estate agents completing The Koogler Group's full-day TRID Program – which includes a 330-page *Integrative TILA-RESPA Study Manual* and post-course TRID support – it is clear that many industry myths and misconceptions threaten to derail implementation for many providers.

The balance of this article addresses implementation issues impacting lenders, title (settlement) agents, and realtors in an attempt to improve communication and kick-start conversations that will enable us to rise above the limiting language of the TRID Rule and provide truly *meaningful* consumer protection.

LENDER LOGISTICS UNDER THE TRID RULE

For those unfamiliar with TRID Rule, let's dispel the myth that the *TILA-RESPA Integrated Disclosure Final Rule* consolidates the federal Truth in Lending Act and the Real Estate Settlement Procedures Act into a *single* federal Act. *It does not.* While the TRID Rule merges aspects of TILA and RESPA for the purpose of supporting blended disclosure forms, TILA continues to govern actions of creditors, just as RESPA governs the actions of all settlement services providers on RESPA-related transactions.

Of the two federal Acts, TRID pulls from TILA far more than it pulls from RESPA. The TILA-heavy nature of the TRID Rule is the culprit causing so much confusion for non-creditor settlement services providers, including title (settlement) agents and realtors. Most title (settlement) agents and realtors grew up with RESPA which, of the two federal Acts, is far more user-friendly. It is not surprising that those unfamiliar with the intricacies of TILA are scratching their heads wondering why the TRID Rule seems so much more confusing and difficult to implement than the 2008 RESPA Final Rule.

Under TILA, there are two disclosure forms: the Initial TIL and Final TIL. Under RESPA, which was last modified in 2008, there are also two disclosure forms: the GFE and HUD-1 settlement statement.

> *Note: Certain loan types will continue to be regulated by TILA and/or RESPA, and will therefore not transition to the TRID Rule. These include Home Equity Lines of Credit [HELOCs]; Reverse Mortgages [HECMs]; Chattel-Dwelling Loans; and Non-Creditor Loans [those making fewer than 5 mortgage loans during the preceding year].*

Lenders, under TILA as modified by MDIA in 2008, are responsible and liable for the content, timing, and delivery of Initial and Final TILs – thus, most *Lender Logistics* involved in meeting compliance obligations were, in the past, *invisible* to title (settlement) agents and realtors who were primarily focused on RESPA.

In turn, under RESPA, lenders are responsible for preparing and delivering the GFE, while title (settlement) agents are responsible for preparing and delivering the HUD-1 settlement statement at or before closing. Where borrowers request one-day advance inspection, title (settlement) agents must provide borrowers a HUD-1 completed based on best information reasonably available.

Under the prior regime, title (settlement) agents often scrambled, in the hours leading up to closing, to obtain final figures from lenders as well as other service providers. Historically, most lenders did not provide final figures until the day prior to closing or, in some cases, the day of closing. It was therefore, not unusual to revise the HUD-1 at the closing table.

Where HUD-1 settlement statements were prepared on the fly in the final moments leading up to closing, realtors often did not receive a copy of the final HUD-1 until or after closing. This is the manner in which the overall settlement services industry operated since the inception of RESPA in 1974. Understandably, the longer one has been working in the real estate, mortgage lending, or title (settlement) industries, the more entrenched one becomes in the *"way things have always been done"* and are resistant to change – especially when change flows from information with which one is partially or wholly unfamiliar.

Moving forward, as TILA steals the spotlight from RESPA under the new TRID Rule, lender liability overshadows all else. This explains why most [*but not all*] Creditors [Lenders] are choosing to prepare and deliver the 5-page Closing Disclosure to the Consumer [Borrower], with most also choosing to prepare and deliver any revised Closing Disclosures to the Consumer [Borrower] when changes are TILA-significant [e.g., change in APR or loan product, or addition of prepayment penalty] and trigger an additional 3-day waiting period before consummation.

Beyond the obvious *language barrier* that arises when those who speak fluent RESPA are required to speak TILA under the TRID Rule – e.g., Creditor [*Lender*]; Consumer [*Borrower*]; [Service Provider [*Title (Settlement) Agent*]; and Consummation [*Closing*] – the myriad *timing mechanisms* flowing from TILA, while familiar to Creditors [Lenders], are for the most part, new territory for other Settlement Services Providers.

Where, in the past, lenders believed that "day prior" or "day of" closing was ample time to provide title (settlement) agents with final figures their tune has changed significantly under the TRID Rule. To the extent lenders choose to prepare the Initial 5-page Closing Disclosure and deliver it to the Consumer [Borrower] who must receive it 3 days prior to consummation, most require that title (settlement) agents – who will at least in the short term continue to function as the "hunters and gatherers" of closing cost information – deliver final title and settlement (closing) costs 10-14 days in advance of consummation. This, in turn, will force title (settlement) agents to push others [including real estate agents/brokers, COA/HOAs, payoff lenders, and hazard/flood insurers] for final figures far earlier in the transaction than normal.

THE PLIGHT OF TITLE (SETTLEMENT) AGENTS

On purchase/sale/finance transactions, title (settlement) agents are responsible for closing in compliance with three main transaction-governing documents: (1) real estate contract; (2) loan closing instructions; and (3) title commitment. This responsibility will continue under the TRID Rule, unless and until lenders decide to take the settlement process in-house via lender-owned, lender-affiliated, or lender-preferred-partner providers. In the past, this was not particularly difficult. Under RESPA, title (settlement) agents were responsible for preparing and delivering the HUD-1 settlement statement to buyer/borrowers and sellers at time of closing. Under the TRID Rule, things have gotten a lot more complicated and there are as many "moving parts" as there are mortgage lenders.

Under the TRID Rule, each lender must individually determine the *"Who-What-When-Where-How"* of preparing and delivering Initial Loan Estimates, Revised Loan Estimates, Initial Closing Disclosures, Pre-Consummation Revised Closing Disclosures [TILA changes], Pre-Consummation Revised Closing Disclosures [RESPA changes] and Post-Consummation Closing Disclosures for Consumers [Borrowers] as well as Initial Closing Disclosures, Pre-Consummation Revised Closing Disclosures, and Post-Consummation Revised Closing Disclosures for Sellers. In case you didn't keep count, that's a minimum of nine junction points.

As lenders individually choose how to implement the TRID Rule, each lender will change its internal procedures *once* and inform title (settlement) agents of such *procedural changes*. In the past, most lenders comported themselves much like all other lenders. However, back then, there weren't as many decisions to make that would, in turn, impact other settlement services providers. *That has now changed.* Moving forward, as each *individual* lender changes its internal procedures *once* – title (settlement) agents must adapt to *all* changes on a lender-by-lender basis. To the extent such changes differ, in whole or in part, from lender to lender this makes change at the level of title (settlement) agents, a logistical nightmare! To fully understand the challenge, consider that most title (settlement) agents handle transactions for at least 10-20 different lenders, with larger agents dealing with 50 or more lenders. *Lenders change procedures once.* Title (settlement) agents, on the other hand, must change procedures on a lender-by-lender basis, which creates challenges of mega-proportions.

In addition to the "Who-What-When-Where-How" changes discussed hereinabove, consider the following:

COLLABORATION-COMMUNICATION-COMPLIANCE SOFTWARE

From a collaboration, communication, and compliance standpoint, RealEC® Technologies – a division of Black Knight Financial Services, a Fidelity National Financial (NYSE-FNF) company – developed Closing Insight™, a suite of Internet-based technology solutions that enables mortgage lenders and their respective service providers and vendors to meet new disclosure requirements by streamlining what is viewed by most as a complex and unfamiliar work flow.

However, not all lenders utilize Closing Insight technology. As with everything else, title (closing) agents must heed lender-by-lender directives including which software technology to use when communicating with lenders and transmitting sensitive loan documentation. *Failure to use the technology solutions required by a specific lender or otherwise placing sensitive consumer information at risk will be viewed as a failure to comply with lender requirements*. Such failure, under CFPB Bulletin 2012-03 – a *"TRID-adjacent"* Bureau directive to creditors regarding due diligent oversight of third party services providers – may quickly escalate to termination of the title (settlement) agent as a service provider.

THE ABC'S OF DISCLOSURE: LINE ITEM TERMINOLOGY

Among myriad other requirements set forth in the TRID Rule, is the *"Devil in the Details"* requirement to use same/similar [consistent] line item terminology on Loan Estimates and Closing Disclosures. *Once again, if all lenders used standardized terms and terminology, this would not be a problem. However, since they don't, title (settlement) agents must follow the lead of lenders on a lender-by-lender basis.*

For example, one lender might refer to *"pest inspection"* while another prefers *"termite inspection"* and a third uses *"wood destroying organism report."* Whatever terminology a lender uses on the Loan Estimate is the same terminology that should be used on the Closing Disclosure. Where the lender prepares the 5-page Consumer [Borrower] Closing Disclosure, the title (settlement) agent, when preparing the separate 2-page Seller Closing Disclosure, should use the same terminology to ensure consistency.

> *Note: While larger lenders have chosen to prepare and deliver the 5-page Consumer Closing Disclosure and have title (settlement) agents prepare the 2-page Seller Closing Disclosure, smaller lenders might choose to outsource preparation of the 5-page CD to title (settlement) agents. Regardless of who prepares which form, there remains the possibility that some lenders may require the 5-page CD to be "fully populated" with Buyer/Borrower and Seller figures, rather than having title (settlement) agents prepare a separate 2-page Seller CD. Regardless of such decision, title (settlement) agents have recognized the need – independent of the TRID Rule Closing Disclosure(s) – for there to be a third form "settlement statement" for purposes of correcting "misinformation" appearing on the TRID Rule CD(s) and to support proper escrow administration.*

The ABC's of Disclosures reminds us that, as items are added to the "Loan Costs" and "Other Costs" Tables appearing on Page 2 of Loan Estimate and Closing Disclosure forms, such added items must be properly *alphabetized.* This includes alphabetizing title charge sub-items appearing as "Title - [Item Name]". Even here, one must be careful to follow the lead of each lender. One lender might use the term "Title - Abstract" while another may prefer "Title - Search" just as one lender might us the term "Title - Closing" while another prefers "Title - Settlement". *Not only must title (settlement) agents use the same line item terminology set by each lender, agents must also remember to properly alphabetize added line items.* If that is not enough to drive one crazy, consider also that certain line items might *shift* between Loan Costs Table Sections B [*"non-shoppable"* items] and C [*"shoppable"* items] on Loan Estimates and Closing Disclosures. *This is enough of a challenge for individual lenders who must establish and implement TRID Rule procedures once. For title (settlement) agents dealing with multiple/myriad lenders, it is a lender-logistics nightmare!*

Not to leave real estate brokers and agents out of the loop, the TRID Rule provides plenty of "fun" for everyone. For example, where a broker charges a fee in addition to the real estate commission – *e.g., a "transaction", "broker", or "administrative" fee* – in the past, such fees were often lumped together with the commission and shown as a single fee. Under the TRID Rule, such charge will appear on a line item separate from the gross commission, making it a target for those who believe such fees violate RESPA.

> *We will set aside the conversation regarding RESPA permissibility of such fees. HUD, as prudential regulator of RESPA, maintained that such fees constituted a RESPA violation; however most courts have held that fees not split with others do not violate RESPA Section 8(b). Therefore real estate brokers charging or intending to charge such fees should consult with informed counsel re same and, at minimum, ensure the fee is fully disclosed to the consumer, is for services actually performed, and is reasonably priced based on the value of such services.*

Moving forward, under the TRID Rule, commission and other broker-related charges will be itemized under the "Other" section of the "Other Costs" Table on Page 2 of the Closing Disclosure. Along the same lines, the TRID Rule requires that gross commission be shown, regardless of who holds the earnest money deposit. In the past, where brokers holding earnest money deposits asked for "net commission" checks, the appropriate method for disclosing same on the HUD-1 settlement statement was to reflect commission paid at settlement on Line Item 703, while disclosing any commission netted from earnest money deposit held by broker disclosed on blank line 704 or other blank line on in the 700's section of the HUD-1.

In contrast, under the TRID Rule, the gross commission must be disclosed regardless of who holds the earnest money deposit. The best way to handle broker-held earnest money deposits is for the broker to deliver the earnest money deposit, via broker check, to the title (settlement) agent and the agent cut a gross commission check to the broker. *Since this method does not suit some real estate brokers, under the TRID Rule, the title (settlement) agent will disclose the gross commission in the method discussed hereinabove and, where the broker is holding the earnest money and wants a net commission check, a credit to the buyer/borrower for earnest money held by broker will presumably be disclosed under "Other Credits" in Section L of the Borrower's Transaction Table located on Closing Disclosure Page 3.*

PRIVACY ISSUES IMPACTING CLOSING DISCLOSURE DISTRIBUTION

The TRID Rule warns that the laws in some States may prohibit Buyer/Borrower information being provided to the Seller or Seller information being provided to the Buyer/Borrower. In the pre-technology era when HUD-1 settlement statements were prepared on a typewriter, the HUD-1 was a 6-part carbon form, with the Buyer/Borrower copy obliterating Seller-side information and vice-versa. The TRID Rule reminds us that certain information on the Closing Disclosure may not be appropriate for "sharing" purposes.

When the CFPB merged TILA and RESPA information into a single Closing Disclosure form, it ratcheted up the discussion about the importance of protecting Consumers' sensitive information to a whole new level. Consider how inappropriate it would be, pre-TRID, for a title (settlement) agent to distribute copies of the Buyer/Borrower's Final TIL to the Seller or to real estate brokers/agents. *Now that the Closing Disclosure merges TILA and RESPA information, most lenders are expected to limit distribution of such Disclosure to the Consumer [Borrower] and the title (settlement) agent.*

In turn, many realtors are busy amending real estate contracts and/or drafting *"Give Me a Copy!"* authorization forms for Buyer/Borrowers and Sellers to sign, so that they may receive copies of Closing Disclosures in advance of consummation or, at minimum, at time of consummation. *Title (settlement) agents are warned to be extremely careful regarding distribution,*

especially when caught between a rock and a hard place where realtors hand you their "Give Me a Copy!" authorization forms while loan closing instructions strictly prohibit such distribution.

Both lenders and realtors must recognize that title (settlement) agents are required to close in compliance with all transaction-governing documents including the real estate contract, the loan closing instructions, and the title commitment. Where such documents are *at odds* with each other, title (settlement) agents must inform all parties and guide them toward agreement. *For many title (settlement) agents, this is akin to "herding cats."*

> *So what's a title (settlement) agent to do, when caught in the middle, where each side – realtor and lender – demand that their conflicting directives be followed? Thankfully, in this case, the "tie-breakers" are the Buyer/Borrower and the Seller. Clearly, Buyer/Borrowers and Sellers each, independently, have the right to hand out copies of any of their respective documents to others – or to authorize title (settlement) agents to distribute same on their behalf. To ensure such authorization is knowingly and freely given, it is best for title (settlement) agents to obtain Buyer/Borrower and/or Seller written authorization directly, rather than through a third party.*

TREATMENT OF TITLE INSURANCE UNDER THE TRID RULE

Earlier we discussed the TRID Rule requirement that all title-related charges be prefaced by the word "TITLE - [ITEM NAME]" and alphabetized, as a subcategory of charges; then further alphabetized along with all other added line items. *Consider this a polite reminder!* In addition, for Owner's Title Insurance, the TRID Rule requires that the line item for same – which appears under the "Other" Section of the "Other Costs" Table on Page 2 of the Loan Estimate and Closing Disclosure – include the parenthetical description "(optional)" resulting in the following line item descriptor: "TITLE - Owner's Title Insurance (optional)".

Here we will discuss the fact that the CFPB, in writing the TRID Rule, requires that *actual costs* to be disclosed on the Closing Disclosure EXCEPT in the case of *title insurance premium*. In contrast, under State law, once title premium is filed, published or promulgated, it must be quoted, charged, and collected as filed, published or promulgated *unless* State law permits deviation, such as in the case of premium rebates [which most States prohibit].

Despite this, the TRID Rule requires that creditors [lenders] disclose Loan Policy [LP] premium at full rates, even where Simultaneous-Issue [SI-LP] rates actually [pursuant to State law] apply. At the same time, the TRID Rule requires a form of "higher math" when disclosing Owner's Policy [OP] premium. The Bureau takes the position that since the *total* of disclosed premiums should match the *total* of actual premiums, *It's All Good!* Sigh. It's *not*.

In a Bureau-created "Perfect World" where Buyer/Borrowers pay all title premium [OP and LP] on all purchase/sale/finance transactions and where State law does not regulate title premium based on filed/published/promulgated *categories*, the argument the Bureau makes about "totals" might make sense. But we *don't* live in a "Perfect World" and Buyer/Borrowers *don't* always pay all title premium and the laws in most States *do* regulate title premium based on *categories* of filed/published/promulgated rates.

In purchase/sale/finance transactions where the Seller pays the OP premium and the Buyer pays the LP premium, in most States, Buyer/Borrowers are entitled to pay a significantly lower SI-LP premium rather than the TRID-disclosed full LP premium. *See the following example, where the full OP is $1,000, the full LP is $800, and the reduced SI-LP is $100 and where the Seller contractually agrees to pay OP premium, while the Buyer/Borrower agrees to pay the LP premium.*

Policy/Payee	Actual Premium	TRID Disclosed Premium
OP / Seller Paid	$1,000	$ 300
LP / Buyer/Borrower Paid	$ 100	$ 800
Total Combined Premium	$1,100	$1,100

The result – unless *corrected* elsewhere on the Closing Disclosure – is that the Seller *underpays* premium by $700, while the Buyer/Borrower *overpays* premium by $700. *It is somewhat ironic that the Consumer [Borrower] is over-charged $700 just because the CFPB decided – in the spirit of transparency and simplicity – to require that creditors [lenders] disclose title premium in amounts other than as State filed/published/promulgated. After all, isn't it a Dodd-Frank Act directive, in establishing the CFPB, that the Bureau protect consumers by ensuring transactions are simple and transparent?*

Although the CFPB discussed Seller-paid OP in a 2015 webinar and offered three suggestions for how to correct the disclosure, so both the Seller and Consumer [Borrower] pay the correct [actual] amount of the premium – lenders and/or title (settlement) agents who prepare Closing Disclosures are warned that the CFPB also requires that providers *not* rely on informal guidance proffered by Bureau staff. The CFPB disclaimer that accompanies all written guidance documents, webinars and seminars points providers in the direction of the TRID Rule and Official Interpretations ["Commentary"] which is to be followed, regardless of information presented informally by Bureau staff. Therefore, of the three suggested corrections proffered by the CFPB staffers during the aforementioned webinar, only *one* actually complies with the TRID Rule.

> Because title insurance premium [both LP and OP] is disclosed on Page 2 as *specific line item charges,* the correction should be made on such specific "line item" lines. Using the example above, that means the Closing Disclosure should show the Buyer/Borrower paying $100 of the $800 LP Premium, with the other $700 is disclosed in the Seller column [paid at closing]. The $300 OP Premium disclosed in the "Other" Section of the "Other Costs" Table should be disclosed as Seller [paid at closing]. *The reason this is the correct method to use, is that the TRID Rule, when discussing "credits" states that where a credit is given to the Buyer/Borrower for a specific charge appearing on Page 2, the credit should be shown on the specific line item as Seller-paid or Other-paid, rather than as a general credit appearing on Page 3.*

Note: For a thorough review of this topic, please access the *March 2015 Letter* to State Governors, Insurance Commissioners, and Attorneys General as well as the *July 2015 Letter* to the CFPB available at www.KooglerGroup.com.

TO SIGN OR NOT TO SIGN: SIGNATURE/CERTIFICATION ISSUES

The TRID Rule Loan Estimate and Closing Disclosure forms include a creditor-optional "Confirm Receipt" area. A Consumer [Borrower] who signs this area is only confirming receipt of the document. Many industry professionals wonder why the "Signature/Certification" page that appears on HUD-1 forms does not also appear on Closing Disclosures. *The answer is that neither RESPA [HUD-1] nor the TRID-Rule [Closing Disclosure] requires signature/certification.* Signature/Certification is a requirement of loan type [e.g., FHA requirement] or a requirement [e.g., by FNMA-FMAC] for the loan to be sold into the secondary market. Such requirements will carry into the future, meaning that Signature/Certification pages will be attached to Closing Disclosures, just as they have been attached to HUD-1 settlement statements in the past.

> *HUD, at Question 374 in the FHA Single Family Housing Policy Handbook, states that "FHA does not wish for anyone to make a false certification. Because this is a model document, FHA will accept the tailoring of this phrase to the actual circumstances. Thus, if the Settlement agent does not prepare the closing disclosure, he or she should remove or strike through the statement "which I have prepared" before executing the Settlement Certification."*

CONCLUSION

The topics addressed in this article only skim the top of the TRID-Rule. Those seeking additional information are encouraged to take the 8-hour *Integrative TILA-RESPA Final Rule Program* available online at *www.KooglerGroup.com* which includes the 330-Page *TRID Study Manual*. Those completing the Program will receive, via email, all post-Program *Education Matters: TRID E-News Bulletins*, which explore topics of greatest concern to title (settlement) agents as well as lenders and realtors. In addition, those completing the Program may forward implementation questions to *KarenKoogler@KooglerGroup.com*. Additional federal compliance items available at www.KooglerGroup.com include the 550-page *Federal Compliance Risk Management Manual* and the 660-page *Multi-State Study Manual for Closing Agents*.

This Special Report is an expansion of an October 2015 article commissioned by a National Housing News publication. Readers are encouraged to forward the Report to other Industry Professionals with whom they work, in an effort to kick-start TRID conversations and enhance communication regarding TRID Rule implementation.

