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The unintended consequences of the CFPB and the insignificance of sellers in new transactions

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As the summer begins, real estate conveyancers across the country are preparing for August 1. On that day, the new Truth-in-Lending/RESPA Integrated Closing Disclosure (TRID) goes into effect. One of the changes orchestrated by the Consumer Finance Protection Bureau (CFPB), TRID is intended to stream-line the closing forms provided to residential borrowers. Presumably, more than half of those borrowers will be obtaining a mortgage loan in connection with the purchase of their new home. But while the CFPB braintrust has concerned themselves with protecting and helping borrowers, sellers (and their agents and lawyers) are wondering how they will be affected by the changes geared solely to protect borrowers.

For the purposes of the TRID, borrowers are consumers. Sellers, though they are entering into a transaction to transfer what is often their largest single asset, are not. From the transactional practitioner's standpoint, most sellers will use the funds from the sale of their home to purchase a new home, and, it is not unusual to see those transactions take place on the same day. While not "consumers" as defined by the CFPB, sellers certainly have a substantial financial stake in the closing transaction.

In transactions occurring on or after August 1, the HUD Settlement Statement and Truth-in-Lending are replaced by a single Closing Disclosure (CD). This document will show borrower the terms of their loan, as well as all the charges and credits involved in the transaction. Unlike present practice, this form will be created by lenders, with settlement agent's assistance. The seller's charges and credits can also be found on this form, and it is the sole responsibility of settlement agent to provide it to seller. Unlike borrower, seller does not have three business days before closing to review this form. Instead, they may review it at the closing table for the first time.

As the CD will be a combination of today's HUD and TIL, it will include sensitive borrower information related to their loan. Accordingly, the settlement agent cannot give the seller the same CD that is provided to Borrower. Either the personal financial information must be redacted or a seller's closing disclosure must be prepared separately, only showing seller's fees and credits. Many lenders are requiring that the sellers receive the separate seller CD. Settlement agents may use the CFPB seller CD form, or their own form.

As with most residential closings, many issues or charges come up just before the closing: issues discovered on final walk through; fees associated with obtaining smoke certificates or certificates of occupancy; final water and sewer readings; final oil adjustments, etc. If fees resulting from these matters, or anything not related to the loan itself, need to be added to the CD "at the closing table," instead of holding up the closing, the CFPB has softened its original rule so that an amended CD may be executed and submitted to the lender post-closing. But if something triggers a re-evaluation of the loan or the value of the property (i.e., work completed that needs to be re-appraised), this

could result in a 3 business day delay of closing.

In addition to the CD, August 1 will see the arrival of the "Loan Estimate," which is expected to affect the timing between offer and closing. For example, the process for applying for a mortgage will change, such that the borrower will submit an application to the lender. Lender must provide the loan estimate to borrower within three business days. The borrower then has ten business days to determine whether they choose to go forward with the loan transaction. Once borrower agrees to proceed, Lender then begins to process the loan and orders the appraisal. This could be three weeks after the original application. Commitments will be issued later, and closings will need at least 3-4 additional weeks for loans to process.

Many questions are left unanswered as to how this new process will work. For example, who is going to obtain the condominium or HOA fees for the CD, and who pays for to obtain it? What happens if the regulations imposed by the federal government are the reason the buyer can't perform? Will the seller seize buyer's deposit under the liquidated damages clause of the P&S? Or, will seller allow buyer to move in based on a "use and occupancy agreement?" And what effect will the "time is of the essence" clause of the P&S play?

Going forward, real estate professionals will need to properly advise and prepare their seller-clients for the bumpy road ahead and the possibility of drawn out transactions, delays and deals that fall through.

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