



CFPB: Know Before You Owe Proposed Amendment Q&A (Part 2)

QUESTION #1

Does the proposed amendment clarify the bona fide financial emergency waiver provisions of the rule?

ANSWER #1

No. The Bureau does not address or alter the bona fide financial emergency waiver in the final TILA-RESPA Disclosure rule with the proposed amendment.

QUESTION #2

Does the Bureau specifically delineate what types of liability apply to lender and settlement agents for errors or mistakes in the disclosures?

ANSWER #2

No. It appears that the Bureau believes this is a matter for future enforcement actions and the courts to decide.

QUESTION #3

Are property taxes and other fees still subject to tolerances under §1026.19(e)(3)(i)?

ANSWER #3

No. In February 2016, the Bureau corrected this typographical error and clarified property taxes, property insurance premiums, homeowner's association dues, condominium fees, and cooperative fees are not subject to tolerances, whether or not placed into an escrow or impound account. The Bureau proposes to clarify that estimates of these fees are not subject to tolerance, as long as they are in good faith and consistent with the best information reasonably available to the creditor at the time of disclosure, regardless of whether the actual amount paid by the consumer exceeds the disclosed amount.

QUESTION #4

Does the proposed amendment address the confusion created by the written list of service providers (WLP)?

ANSWER #4

Yes. If a particular charge for services is paid by the consumer, the proposed amendment requires the written list of settlement service providers (WLP) to specifically identify the service. However, if the creditor knows that the service is provided as part of a package or combination of settlement services offered by a single provider, and the consumer is permitted to shop for all services provided in the package, the creditor does not need to identify each specific service separately on the WLP. Title services, for example, could be listed as a package of services on the WLP, rather than requiring itemization of each individual service in the package on the WLP. The amendment also adjusts the tolerance from 10% to zero, if the consumer is not allowed to shop and the creditor fails to provide a WLP. When no list is provided, the 10% tolerance still applies as long as "the creditor permits the consumer to shop."

QUESTION #5

What charges paid by affiliates of the creditor are not subject to tolerances?

ANSWER #5

“No tolerance” fees remain “no tolerance” even if paid by an affiliate. The proposed amendment seeks to prospectively clarify that (A) prepaid interest; (B) property insurance premiums; (C) amounts placed into an escrow, impound, reserve, or similar account; (D) charges paid for required services selected by the consumer when the service provider is not on the WPL; and (E) charges paid for services not required by the creditor (i.e. owner’s title insurance) are excluded and not subject to the zero or 10% tolerance, even if provided by an affiliate or loan originator of the creditor. However, the proposed amendment adds a requirement that such charges must be “bona fide,” regardless of whether they are paid to an affiliate. To be bona fide, the affiliate charge must be “lawful and for services that are actually performed.”

QUESTION #6

I have heard that the proposed amendment provides clarification regarding disclosure of construction loans. Is there anything the settlement agent should know about the amendment?

ANSWER #6

Yes. The Bureau’s proposal would impose a new requirement that, if construction loan inspection and handling fees are collected after consummation, they would be disclosed in an addendum under the heading “Inspection and Handling Fees Collected After Closing” in both the Loan Estimate and Closing Disclosure, rather than in the loan cost table. The creditor may disclose a loan to finance the construction of a dwelling as a single transaction or as more than one transaction if the loan meets the condition that it “may be permanently financed by the same creditor,” unless the consumer expressly states that the consumer will not obtain permanent financing from the creditor. The creditor must generally make both construction and permanent financing available to qualifying consumers. If the consumer applies for construction and permanent financing separately, the creditor would be required to provide Loan Estimates within three days of receipt for each application. The proposal also includes cross-references of comments to construction loans throughout the rule.

QUESTION #7

Does the proposed amendment provide any guidance on how to disclose construction costs?

ANSWER #7

Currently, disclosure of construction costs connected with the transaction that the consumer will be obligated to pay, and payoff of existing liens secured by the property or payoffs of unsecured debt, ARE disclosed as Loan Costs. If they are collected after consummation, the Bureau proposes that such fees should be disclosed in Section H on both the Loan Estimate and Closing Disclosure, unless they are disclosed under the optional alternative calculating cash to close table. The disclosures will still be subject to “good faith” and must be “bona fide.”

QUESTION #8

We have experienced some confusion on how to apply money given by family members or other third parties at the real estate closing. Does the proposed amendment address this?

ANSWER #8

Yes. The proposal seeks to clarify that the requirement to disclose any money or other payments made by family members or third parties not otherwise associated with the transaction, only applies to money or payments provided at the real estate closing. Any amount provided to consumers by third parties in advance of the real estate closing, including family members not otherwise associated with the transaction, would not be required to be disclosed under revised § 1026.38(j)(2)(vi).

QUESTION #9

Does the amendment address the disclosures of amounts owed by the seller but payable to the consumer after the real estate closing?

ANSWER #9

The Bureau is proposing to revise comment 38(j)(1)(v)-1 to clarify that the amounts disclosed can include amounts owed to the seller, but payable to the consumer after the real estate closing, for example: “any balance in the seller’s reserve account held in connection with an existing loan, if assigned to the consumer in a loan assumption; any rent the consumer would collect after closing for a time period prior to closing; and any tenant security deposit.” The amounts owed to the seller but payable to the consumer after the real estate closing would be listed under the heading “Adjustments.”

QUESTION #10

How should seller credits be disclosed on the Closing Disclosure?

ANSWER #10

The Bureau proposes to clarify that specific seller credits may be disclosed on the seller credit line or reflected in Seller-Paid column on the Closing Disclosure. Creditors may use lender credits for an amount that exceeds tolerances on increases in closing costs. The proposed amendment would clarify that, if there is a difference between the amount of seller credits disclosed on the CD and LE that is not attributed to rounding of the disclosed, the creditor must disclose a statement that the consumer should see the details disclosed in the seller-paid column. The Bureau also proposes new comment 38(i)(7)(iii)(A)-1 with examples of the required statement.

QUESTION #11

Can settlement agents now share the Closing Disclosure with REALTORS®?

ANSWER #11

Possibly not. The Bureau proposes to add comment 38(t)(5)(v)-1 to clarify that “*at its discretion, the creditor may make modifications to the Closing Disclosure (CD) form to accommodate the provision of separate Closing Disclosure forms to the consumer and the seller*” and the three methods by which a creditor can separate such information. The Bureau further proposes to add comments 38(t)(5)(v)-2 and -3 to provide examples where “*the creditor may choose to provide separate Closing Disclosure forms to the consumer and seller.*”

The Bureau also proposes to clarify that the creditor is to assist the settlement agent in providing the seller’s CD and that the settlement agent may share the seller’s CD with the creditor. Notwithstanding anything the Bureau has said in the proposed amendment, the creditor may choose to prohibit the settlement agents from providing the disclosures to REALTORS® in their closing instructions. The CFPB does not expressly state that sharing the CD with REALTORS® is permissible. **Be sure to read closing instructions carefully.** It is also a best practice to continue to obtain appropriate waivers and releases from a buyer and seller to help protect your business in the event of an inadvertent breach of privacy and security of a customer’s non-public personal information.

QUESTION #12

When will this amendment become effective?

ANSWER #12

The CFPB expects to issue the final rule on or before April 1, 2017. This is a target date, as the CFPB will need to review the public’s comments to the proposed amendment. The CFPB proposes a 120-day implementation period, which may make the final effective date sometime on or around August 1, 2017.

QUESTION #13

Does the rule clarify whether the creditor may provide revised disclosures for informational purposes?

ANSWER #13

Yes. The Bureau seeks to add a comment to clarify that a lender is not prohibited from providing revised disclosures for informational purposes. This includes situations where the creditor is not using a revised disclosure to reset the baseline for tolerance. The disclosures provided for tolerance for informational purposes must be based on the “best information reasonably available to the creditor at the time the disclosure is provided to the consumer,” so the disclosures are still subject to “good faith” under the rule.

The CFPB seeks input from a wide range of stakeholders and invites the public to submit written comments on the proposal. Visit www.regulations.gov and follow the instructions for submitting, or email federalregistercomments@cfpb.gov; include Docket Number CFPB-2016-0038 in the subject line. Comments are due by October 18 and will be weighed carefully before final regulations are issued.