TRID-Speak: The "Consummation" Conundrum

Background. On October 3, 2015, the Consumer Finance Protection Bureau's "Know Before You Owe" program, aka "TRID",[1] was rolled out. It was predicated on a belief that the entire financial crisis of 2007/08 was due to the fact that residential borrowers were snookered into taking out high risk loans, and By Golly, the "Bureau", as they call themselves, was gonna make things right.[2] The result has been 1,888 pages of regulations that presaged much industry handwringing – some of it justified.

At the CFPB's site for real estate professionals (here), the CFPB describes its new program, which has attempted to fold two long-time federal regulations, the 1968 Truth in Lending Act ("TILA") and the 1974 Real Estate Settlement Procedures Act ("RESPA") into a single set of laws:

> The Know Before You Owe mortgage initiative is designed to empower borrowers with the information they need to make informed mortgage choices. It includes the implementation of the TILA-RESPA Integrated Disclosure rule, which is often referred to as "TRID." We prefer Know Before You Owe (and since getting past jargon is a first step, we think you might prefer it too). (Underscore mine.)

The irony of this statement is that the new TRID rules thrive on "jargon," inventing new terms for old forms,[3] in one case; in another, using a single term, "business day," to mean two different things;[4] and in another, coming up with an entirely new term, "consummation." Why is this new term, "consummation," important? For two reasons, both relating to the timing for delivery of lender documents to a borrower:

1. The Loan Estimate must be delivered to a borrower not less than seven day prior to consummation. Thus, if a Loan Estimate is revised, the transaction may not be consummated less than seven business days after it has been provided to the borrower. If a settlement is scheduled during the waiting period, the creditor may not use the revised Loan Estimate unless settlement is postponed. §1026.19(e)(1)(iii)(B)

2. The Closing Disclosure must be received at least three days prior to "consummation." §1026.19(f)(1)(ii) If received within the three business day period, the date of consummation must be postponed at least until that period has elapsed.[5]

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[1] TILA-RESPA Integrated Disclosure Guide to the Loan Estimate and Closing Disclosure Forms.

[2] I submit the vast majority of borrowers understood the banks were giving away easy money with risky repayment terms, but they also believed - as did the banks and their regulators, all the way up to Fed Chair Alan Greenspan - that real estate would never lose value. Thus, the risk was manageable, since if the gamble didn't work out, borrowers could either refinance or re-sell. It was an acceptable bet.

[3] Such as renaming the "Good Faith Estimate" to "Loan Estimate," and the "HUD-1 Settlement Statement" to the "Closing Disclosure."

[4] See: https://www.google.com/search?q=trid%20business%20day%20definitions Note, this link is to several TRID sites addressing business days. One single site cannot be referenced, since much of the CFPB information is contained in PDFs that simply download from Google. There is no single URL.

[5] Note, however, there are only three events that can actually cause a closing date to be moved: The only three changes that would require a new three-day review period are: (1) Increasing the annual percentage rate (APR) by more than 1/8 of a percentage point for a fixed-rate loan or 1/4 of a percentage point for an adjustable-rate loan (decreasing the

Definition of Consummation. If "consummation" was defined as the closing date, or the settlement date, there would be no issue or confusion. But life isn't that simple in the alternative universe of bureaucrateese. TRID describes "consummation" as follows:

> 2.1.5 Consummation: Consummation is not the same thing as closing or settlement. *Consummation occurs when the consumer becomes contractually obligated to the creditor on the loan*, not, for example, when the consumer becomes contractually obligated to a seller on a real estate transaction. (§ 1026.2(a)(13)) (Emphasis mine.)

For our purposes, this means when the borrower is contractually obligated to repay the loan – in other words, when the borrower signs the promissory note, or a similar debt instrument. Elsewhere in their Frequently Asked Questions (here) the CFPB explains that consummation could be the same as closing…but not in all cases.

CFPB's Explanation For Choosing "Consummation" Over "Settlement" or "Closing." In a painfully convoluted explanation[6], the bottom line is that "consummation" is a TILA term, and "settlement" (which is synonymous with "closing" for our purposes) is a RESPA term. The former is an *event,* and the latter is a *process*. The powers that be opted for "consummation," which is more consistent with the single-event closing process followed in some states, but not others.

Escrow States. You see, when real estate transactions are closed, the formal process varies between states. They can be roughly divided into two different camps; one, such as Oregon, involves the use of an escrow, acting as a neutral third party, pursuant to written instruction from the seller and buyer. These states, mostly in the west, such as Oregon, Washington, California, Nevada, Idaho, Hawaii, Arizona, Texas, New Mexico, Wyoming, and Montana, are called "escrow states." However, several states have laws declaring that engaging in the business of closing real estate transactions for others is the practice of law, meaning that the service may *only* be provided by licensed lawyers. These states are sometimes referred to as "non-escrow states" or "attorney

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interest rate or fees doesn't cause a delay); (2) The addition of a prepayment penalty; or (3) Changes in the loan product, from a fixed-rate to an adjustable-rate loan, for example.

[6] "The Bureau believes integrating the Closing Disclosure requirements in Regulation Z also satisfies the Dodd-Frank Act integration mandate. To meet the integration mandate, the Bureau must reconcile several important differences between RESPA and TILA. For example, to reconcile the different timing requirements under RESPA and TILA with respect to when the Closing Disclosure must be provided, the final rule generally requires that the Closing Disclosure be provided three business days before "consummation." Regulation Z currently defines "consummation" as "the time that a consumer becomes contractually obligated on a credit transaction." See § 1026.2(a)(13). Regulation X, by contrast, provides that the RESPA settlement statement must be delivered by "settlement," which is defined as "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan." See 12 CFR 1024.2(b). As noted by commenters representing the views of settlement agents, discussed in the section-by-section analysis of § 1026.19(f)(1)(ii)(A), "consummation" and "settlement" may not necessarily occur at the same time. To ensure consumers consistently receive a single, integrated Closing Disclosure in a timely manner, the Bureau believes it must reconcile these differences. Accordingly, as discussed in more detail in the section-by-section analysis of § 1026.19(f)(1)(ii)(A), the final rule requires that the Closing Disclosure be received three business days before "consummation." Thus, as described above, the Bureau believes integrating the TILA and RESPA requirements applicable to the Closing Disclosure in § 1026.19(f)(1)(i) will satisfy TILA, RESPA, and the Dodd-Frank Act's integration mandate, will facilitate industry compliance, and will enhance consumers' understanding of their transactions." (Underscore added.)

states,” and are generally the older states[7] along the east coast and areas of the south. Some states permit versions of both closing protocols.

In escrow states, in order for “closing” or “settlement” to occur, several events must happen – not necessarily on the same day. *It is a process,* and includes the following: (a) The seller has signed a deed, conveying title to the buyer; (b) The buyer has signed the loan documents, including the promissory note and deed of trust. and paid the downpayment and closing costs; (c) The lender has funded the loan; Escrow has (d) recorded the seller’s deed and buyer’s deed of trust; and (e) Disbursed the net sale proceeds to the seller.[8]

Under Oregon law, which follows the escrow closing process, ORS 696.505 provides:

> As used in ORS 696.505 (Definitions for ORS 696.505 to 696.590) to 696.590 (Penalty amounts): (1) Close an escrow means the final disbursement of all funds, property and documents in an escrow as directed by written escrow instructions from the principals.

Significantly, these events can occur over a period of days. For example, say an Oregon seller went to escrow and signed the closing documents, including the deed of conveyance to the buyer on Wednesday; on Thursday, the buyer signed the closing documents, including the promissory note and deed of trust to the lender, and paid the downpayment and closing costs; then on Friday, the lender funded the loan, at which time escrow records the seller’s deed and the buyer’s deed of trust and disburses the net seller proceeds (after payoff of underlying liens and costs of escrow). The transaction has now “closed.”

Under this scenario, in Oregon, “closing” or “settlement” covered the period of Wednesday – Friday. If the events on Friday failed to occur, it could not be said that closing was completed. Yet, in TRID-speak, consummation technically occurred on Thursday.

Attorney States. Although laws and customs can vary, closings in these states are more of a *single event*, where the parties, sometimes including the lender’s attorney, meet at one time and place to close the entire transaction (including disbursement) on a given day. When the buyer signs the promissory note at the closing table, the loan is “consummated.” *Thus, it appears that the older, more populous, urban states prevailed in TRID’s adoption of the lawyer-centric term, to describe closing.*

TRID’s Cop-Out. So how did the CFPB manage to impose on every lender, mortgage broker, and escrow company in the country, a term that does not uniformly describe the closing process?

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[7] Based on statehood. Look at it this way: in the older states, like New York, the lawyers got to the state politicians sooner, and made sure the real estate closing process was regarded as the practice of law, and reserved to licensed members of the bar.

[8] Admittedly, this is an oversimplified description, and ignores all of the work escrow and title do in addition, in order to make sure all liens and objectionable encumbrances are cleared, obtaining payoffs of all pending liens that must be removed, assuring that title is marketable, and generally shepherding the transaction through from start to finish.

Simple. They punted. Even though they defined "consummation" as "…the time that a consumer becomes contractually obligated on a loan…" the Official Interpretation states that:

> When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. §1026.2(a)(14)

Hmmm. This interpretation is patently circular, and entirely misses the point. Clearly under Contract Law 101 in most states, when one signs a contract, such as a promissory note, it becomes binding. The real issue is not whether the note is nominally "binding," but when "consummation" – as a line in the sand - occurs. Is it *event* (e.g. simply signing the promissory note), or is it a *process* (e.g. when the sequential closing steps have occurred – *regardless of whether it is over one day or several*)?

And lest you believe the CFPB has this distinction clear in its own collective consciousness, let me cite you to TILA 15 U.S. Code § 1635, which deals with the borrower's right of rescission in certain credit transactions. Here, the right of rescission is *not* based solely upon when the borrower signs the promissory note, i.e. the "consummation" event, but other events, as well:

> "…the obligor shall have the right to rescind the transaction until midnight of the third business day following the (a) *consummation of the transaction* or (b) the *delivery of the information and rescission forms* required under this section (c) together with *a statement containing the material disclosures* required under this subchapter, *whichever is later*…." (I inserted (a), (b), and (c) and added italics.)

Following implementation of TRID on October 3, 2015, it appeared possible that perhaps the confusion about "consummation" could be cleared up if the Oregon Legislature were to step in and pass a law containing a workable definition for the lending and escrow industries. I asked Kirsten Anderson at the Oregon Department of Consumer and Business Services the following question:

"I'm writing a TRID article for a client to publish, and wanted to confirm with you that DCBS does not presently plan on submitting some proposed legislation this Session to clarify when "consummation" occurs. If not, I'm wondering if you have any guidelines for Oregon lenders and mortgage brokers on the issue?"

Here is Kirsten's excellent response, which she has permitted me to share:

"No legislation that I'm aware of. I had a Policy Analyst research this. This is was she found: Under Oregon law, consummation is generally when a consumer becomes contractually obligated to pay the loan; e.g., "the borrower and the lender agree as to the essential terms of the mortgage transaction." Booras v. Uyeda, 295 Or. 181, 666 P.2d 791 (1983); Genest v. John Glenn Corporation, 298 Or. 723, 744, 696 P.2d 1058 (1985) (stating that Booras governs such claims). In Booras, the Supreme Court held that, "[t]o be entitled to specific performance, a contract must be definite in all material respects, with nothing left for future negotiation." 295 Or. at 191, 666 P.2d 791.

So, we've been using when the consumer become obligated to the loan. That could be at signing, but it could be at funding. The most conservative position we can take from an enforcement standard is that point the consumer has signed the loan documents accepting the loan and by proffering the funds, the lender has accepted and the loan is consummated. But, again, in certain circumstances it could be before then. It's hard to be more specific because the

research the Policy Analyst did on the subject for me shows that courts often look to the underlying documents. If there was agreement on the loan terms and the consumer signed the documents, that could be consummation under the Booras standard, but apparently there have been loan documents that include clauses giving the lender an out until the funds are disbursed. Since we can't see all the documents in advance to know if some provision of the contract gave the lender until funding (sometimes the brokers we examine don't have the loan documents themselves so we can't see if there's a clause), we've been using funding as the rule of thumb in general when determining a violation. But lenders need to think about their own specific documents and whether a court would find that they have consummated the loan just when the consumer has signed. *[Note: This expresses the Division's position as it relates to the interpretation and application of the Oregon Mortgage Lender Law, ORS Chapter 86A, and the rules associated with those statutes. Different facts or conditions may require the Division to reach different conclusions, and the Division reserves the right to change its position if other material facts come to light that warrant a change in the Division's decision or a change in the law affects how the Division exercises its regulatory authority.]*

Conclusion. Does this pose an impossible situation for Oregon lenders and mortgage brokers going forward? I suspect it's not insurmountable for the following reasons: (a) They will likely try to make sure that their Loan Estimates are as timely and accurate as possible, and rarely amended as closing approaches; (b) They will likely deliver their Closing Disclosures sooner rather than later in the escrow process so, that closing deadlines are avoided if at all possible; and (c) As Kirsten suggests above, they should consider clarifying their lending documents to make sure that the loan does not become "legally binding" until the entire closing process is fully completed, including execution and recording of all required documentation (not just the lender's loan documents), and funding and disbursement has occurred. ***~PCQ***