

Practice Update

Regulation Z, COVID-19, and Bona Fide Personal Financial Emergency Waivers

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On April 29, 2020, the Consumer Financial Protection Bureau (CFPB) issued an [interpretive rule](#) clarifying Regulation Z's bona fide personal financial emergency provisions in the context of the COVID-19 pandemic. The CFPB issued the interpretive rule to explain Regulation Z's emergency provisions and how to make use of those provisions when working with a borrower affected by the pandemic. The CFPB specifically addressed bona fide personal financial emergencies under Regulation Z's right of rescission rules and TILA-RESPA Integrated Disclosure (TRID) Rule, as well as the interplay between COVID-19's effects and TRID's changed circumstances requirements.

Right of Rescission

Regulation Z provides consumers with the right to rescind certain credit transactions. For open-end credit, Regulation Z § 1026.15(a) provides consumers with the right to rescind certain extensions made under credit plans secured by the consumer's principal dwelling, such as a HELOC. Regulation Z also provides the right of rescission applicable to certain closed-end credit, such as non-purchase money mortgage loans. 12 C.F.R. § 1026.23(a). For both open- and closed-end credit, a consumer has three business days to rescind the transaction, but this waiting period may be waived if the consumer determines the extension of credit is needed to meet

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a bona fide personal financial emergency. 12 C.F.R. §§ 1026.15(e); 1026.23(e). The regulation requires a consumer to give a written statement specifically waiving or modifying the right and also including a brief description of the emergency. Regulation Z comments 15(e)-2, 23(e)-2.

Both the right of rescission and the bona fide personal financial emergency waiver provisions have existed since TILA's enactment in 1968, but the mortgage industry typically encounters consumers relying on emergency waivers during natural disasters. The CFPB explained it decided to issue the interpretive rule because it received a number of questions about the provisions from creditors, industry representatives, and State regulators about how the provisions apply in the unusual context of the COVID-19 pandemic. The interpretive rule provided a three-prong test, clarifying that:

1. if a consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency;
2. the consumer's brief statement describing the emergency identifies a financial need that is due to the COVID-19 pandemic; and
3. the emergency necessitates consummating the credit transaction before the end of the three-day rescission waiting period, then the consumer has a bona fide personal financial emergency that would permit the consumer to utilize the modification and waiver provisions.

Although this three-prong test only reiterates the requirements already established in Regulation Z, lenders and servicers should be encouraged by the CFPB's willingness to articulate how the law applies to situations involving COVID-19.

TILA-RESPA Integrated Disclosure

Like the right of rescission provisions, Regulation Z's TRID provisions require disclosure delivery within set timeframes. Regulation Z § 1026.19(e)(1)(iii)(B)

requires creditors to deliver the Loan Estimate to consumers no later than seven business days before closing. Regulation Z § 1026.19(f)(1)(ii)(A) requires consumers to receive the closing disclosure no later than three business days before closing. And, as with the right of rescission, Regulation Z allows consumers to modify or waive these waiting periods in the event of a bona fide personal financial emergency.

The CFPB articulated the same three-prong test would apply for the same reasons the CFPB determined an interpretive rule would help facilitate compliance in the context of the right of rescission. A consumer can waive the seven-day period for applicable to the Loan Estimate and the three-day period applicable to the Closing Disclosure if:

1. the consumer determines the extension of credit is needed to meet a bona fide personal financial emergency;
2. the consumer provides a brief written statement describing the emergency and identifying a financial need due to the COVID-19 pandemic; and
3. the emergency necessitates consummating the credit transaction before the end of the applicable waiting period.

If these conditions are met, the consumer is deemed to have a bona fide personal financial emergency permitting the consumer to utilize the modification and waiver provisions, subject to Regulation Z's other the applicable requirements.

The CFPB reiterated that neither the rescission nor TRID modification and waiver provisions permit creditors to use printed forms for consumers to agree to such modifications or waivers. The CFPB pointed out that this prohibition also applies to electronic disclosures, providing an example stating "the creditor cannot include a pre-populated waiver form within a batch of electronic disclosures provided to the consumer under the TRID Rule,

Regulation Z, and other regulations.” 85 Fed. Reg. 26319 fn. 11 (May 4, 2020). The interpretive rule also stated that although Regulation Z does not require creditors to inform consumers of the availability of the modification and waiver provisions, the CFPB encourages creditors to voluntarily inform consumers of these options during the COVID-19 pandemic. *Id.* at 26320.

Changed Circumstances

CFPB extended the logic it applied to bona fide personal financial emergencies to TRID’s changed circumstances provisions. Regulation Z § 1026.19(e)(3)(iv)(A) permits creditors to provide a revised loan estimate if changed circumstances affect previously disclosed settlement charges. The Regulation defines the term “changed circumstances” to include “an extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction.” The interpretive rule articulates the CFPB’s view that the pandemic is an example of an extraordinary event beyond the control of any interested party. As a result, a creditor may provide revised estimates of settlement charges consumers would incur if the COVID-19 pandemic causes a change in previously disclosed charges.

ECOA Valuations

Although the interpretive rule was not issued under Regulation B, which implements the Equal Credit Opportunity Act, the CFPB also issued a compliance aid addressing the ECOA valuations rule. Regulation B § 1002.14(a) requires creditors to provide applicants copies of all appraisals and other written valuations developed in connection with an application for a loan secured by a first lien on a dwelling. The copies must be provided promptly upon completion or three business days before consummation or account opening, but the regulation permits a consumer to waive the timing requirements under certain circumstances. Regulation B comment 14(a)(1)-6. The CFPB’s compliance aid reminds creditors that Regulation B

provides this flexibility and waivers may be appropriate in situations involving COVID-19.

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