AMI ASSOCIATION OF MORTGAGE INVESTORS

March 30, 2016

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau (CFPB)
1700 G Street, NW
Washington, D.C. 20552

Dear Director Cordray,

On behalf of the Association of Mortgage Investors (AMI), we write to express the mortgage investor community's concerns over the Bureau's "Know Before You Owe" mortgage disclosure rule ("the Rule"). The recent evidence is that the Rule, while extremely well-intentioned, has resulted in a climate of legal uncertainty and is chilling private investment in the U.S. mortgage market. We urge the Bureau to open a new public comment period to address the concerns of mortgage investors. We seek formal written guidance clarifying the liability for a violation of each individual TRID requirement, as well as, the scope and applicability of TRID's cure mechanisms.

The AMI was organized as the primary trade association representing investors in mortgage-backed securities, including university endowments and pension funds. The AMI was founded, in part, to play a primary role in the analysis, development, and implementation of mortgage and housing policy to help keep homeowners in their homes and provide a sound framework that promotes continued home purchasing. Since its formation, the AMI has been developing a set of policy priorities that we believe can contribute to achieving this goal. We are an investor-only group comprised of a significant number of substantial institutional investors in commercial and residential mortgage-backed (RMBS) and other asset-backed securities (ABS). Accordingly, our concerns focus on the Rule's impact and consequences, whether unforeseen, on mortgage availability and affordability.

We seek formal guidance clarifying whether the statutory authority for each TRID requirement is under RESPA or TILA, as well as the scope and applicability of TRID's cure mechanisms. Without clarification, investors will generally interpret the regulation in a strict manner, identifying any deviation from the rule as a ***material*** error that exposes an investor to full TILA liability. As lenders are implementing TRID, there are mistakes made. In some cases these mistakes are in-process and can be fixed going forward. In other cases, they are a matter of interpretation, and still others are due to individual human error, as mortgages contain numerous fields and clerical errors do occur. Generally, increased liability risk will result in additional costs that will ultimately be passed onto borrowers. We believe that it has already resulted in lower loan origination. It is not simply the probability of a lawsuit or potential legal costs – although those are certainly factors – there is reputational risk; increased

transaction and operational costs; and, post-crisis, there is little corporate tolerance for any legal or regulatory risks.

Some have stated that this is a minor concern because it only affects loans outside of the agency standards – and that is currently a small market. But it could have an outsized impact on the origination of loans that do not meet agency standards. This means that it will particularly impact lending for borrowers with few other options. Eventually, we believe that even agency loans could also undergo scrutiny should they experience delinquencies. The GSEs at that point may decide to review TRID documentation and penalize lenders who made even small clerical errors in the disclosures. Therefore, how to handle TRID errors, the ability to make corrections, and how to reduce resulting liability will be issues that the industry will need to deal with in the years to come.

***Clarification Over Liability Sought***

Since the Bureau's adoption of the Rule, legal experts have expressed concerns about the additional liability surrounding investment and loan origination. The specific liability that we seek clarification on arises from private right of action under TILA. Your public comments surrounding TRID's limited impact on liability are appreciated in the context of an originator exam, such as detailed in your letter to the Mortgage Bankers Association (MBA) dated December 29, 2015.[1] However, legal experts advise that these comments are neither legally binding nor do they clarify the legal uncertainty around liability for violations of TRID.

Experts noted the following example. In your letter to the MBA, you explain:

> *[T]he listed disclosures in 15 U.S.C. § 1640(a) that give rise to statutory and class action damages do not include either the RESPA disclosures or the new Dodd-Frank Act disclosures, including the Total Cash to Close and Total Interest Percentage.*

The analysis by industry legal experts results in a far less optimistic picture than portrayed. In contrast to the vast legal authority is that beyond RESPA, a broader category of liability exists under TILA. Borrower lawsuits under TILA regarding TRID violations could result in statutory damages, borrower defenses and set-offs against investor claims in a foreclosure action. However, because the statutory authority for many requirements under TRID is unclear, the industry does not know whether many violations of TRID carry liability under TILA. Without a clear picture of the liability for TRID violations, the industry is taking a conservative approach and rejecting the purchase of loans for immaterial errors (see Appendix I, II, and III). Potential liability against loan investors and bond investors must be more clearly defined.

Accordingly, the AMI and mortgage investors welcome additional specific and formal guidance from the Bureau clearly defining the contours of TILA liability for violations of each TRID requirement.

[1] http://mba.informz.net/MBA/data/images/CFPB%20reponse%20to%20MBA%20TRID%20letter.pdf

Additionally, formal guidance or rulemaking would be welcome regarding the scope of the "cure mechanisms" under TRID.

***Description of Process and Background***

Secondary market investors that buy mortgages (also known as "whole loans" or "loans") from primary lenders generally choose to retain the mortgages in portfolio, sell them as whole loans to another investor, or aggregate a pool and issue residential mortgage-backed securities ("RMBS") to be sold to fixed income investors. Prior to purchasing whole loans, an investor typically engages a third-party due diligence firm to review each loan in three areas: credit, collateral, and compliance. If a loan is intended for securitization, the investor will request that the diligence firm supply a rating agency grade for each of the three areas. Each rating agency has its own criteria and grading scheme for the various diligence firms to use in performing loan evaluations. As part of their review, due diligence firms also verify that loans meet investor and rating agency eligibility criteria and identify exceptions when eligibility criteria is not met.

Due to uncertainty around the new TRID rules, all TRID errors (including those that one could view as technical or clerical in nature) are being identified by due diligence providers as material exceptions to rating agency and investor compliance criteria because they are considered to be non-compliant with TRID. As a result, these technical or clerical errors end up receiving the same rating agency grade as the seven areas that the CFPB identified as likely to result in statutory damages under TRID. While investors will typically work with the primary lender to cure TRID exceptions as permitted under the rule, many exceptions cannot be cured. Without a cure, an investor must decide if it is willing to purchase a loan with a TRID error, regardless of its materiality or impact to the consumer.

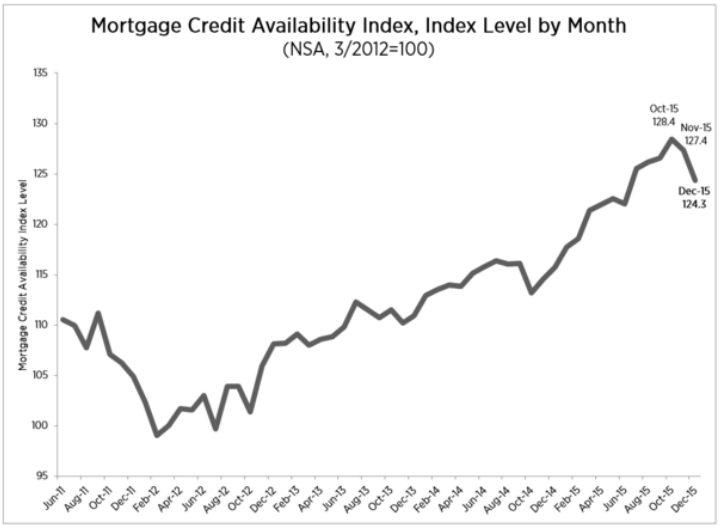
In the securitization process, investors select multiple rating agencies to rate the transaction. As part of the ratings process, the rating agencies review pertinent information about the transaction, including the loan characteristics, reports prepared by due diligence providers, and the cash flow structure of the bonds issued as part of the securitization. When rating agencies issue their report, they provide the required credit enhancement levels for the bonds to achieve the ratings requested by the issuer. The list of material exceptions on the loans and their corresponding lower rating agency grades may result in an increase in the credit enhancement levels, making it more costly for aggregators to securitize a pool of loans and, consequently, increases the overall cost to produce mortgage loans (typically, with such costs borne by the borrowers).

**The Rule's Impact on The Mortgage Market: Chills Mortgage Availability and Affordability**

In the 100+ days since the Rule has gone into effect, numerous press and industry observers have commented on its scope and impact. The nearly universal feedback is that the Rule is ambiguous and therefore viewed as extremely problematic.

Many such examples have been reported in the press. First, Moody's Investors Service recently reported that TRID compliance violations are running rampant among newly originated loans. Analysts also report that several third-party firms have reviewed a number of recent mortgage loans for TRID compliance and found violations in more than 90% of the loans.[2] Second, origination volumes for November 2015 were markedly down, especially in California. These news reports are well known to industry participants.

As the following graph illustrates, the operational impact of the Rule is coincident with a significant decline in mortgage credit availability for December 2015. Some may suggest that this is either mere coincidence or that it is a blip as things shake out concerning the Rule's implementation. Investors, however, remain concerned about any obstacle toward restoring capital into the U.S. mortgage market.




Source: Mortgage Bankers Association; Powered by AllRegs® Market Clarity®

***Specific Examples Concerning Mortgage Investors***

The following are examples of issues that we, as mortgage investors, are observing in pre-purchase diligence reviews. In the near term, TRID-related issues are causing a significant percentage of loans to be deemed ineligible by investors. The biggest hurdle to overcome at the present is the narrow scope of 1026.19(f)(2)(iv) (clerical corrections). A high percentage of the defects we are seeing involve numeric values that cannot be addressed through a corrected CD. In each of these examples, the defects do not impact the borrower's final costs. While the CFPB has provided an informal grace period for good faith efforts for lenders to comply with TRID, such grace period does not extend to the secondary market because borrowers may still bring a private right of action under TILA. Consequently, investors remain very concerned with the possible action that borrowers may bring for defects on loans that have occurred during the CFPB's grace period.

[2] http://www.housingwire.com/articles/35808-moodys-trid-violations-found-in-90-of-recently-reviewed-mortgages

*Example 1.* Values from the last LE issued do not match the LE value in the Calculating Cash to Close table of the CD. This appears to be a data mapping issue in the lender's operating systems or with their document vendors. This value is present for comparison purposes and has no impact on the borrower's actual closing costs or cash to close. The purpose is to allow the borrower to compare the last LE (for which s/he has a copy) to the final closing costs.

LE Calculating Cash to Close:

| Calculating Cash to Close | |
|---|---|
| Total Closing Costs (J) | $20,779 |
| Closing Costs Financed (Paid from your Loan Amount) | $0 |
| Down Payment/Funds from Borrower | $186,000 |
| Deposit | -$15,000 |
| Funds for Borrower | $0 |
| Seller Credits | -$2,610 |
| Adjustments and Other Credits | $0 |
| **Estimated Cash to Close** | $189,169 |

CD Calculating Cash to Close:

| Calculating Cash to Close | Use this table to see what has changed from your Loan Estimate. | | |
|---|---|---|---|
| | Loan Estimate | Final | Did this change? |
| Total Closing Costs (J) | $15,562.00 | $21,565.12 | **YES** • See **Total Loan Costs (D)** and **Total Other Costs (I)** |
| Closing Costs Paid Before Closing | $0 | -$525.00 | **YES** • You paid these Closing Costs **before closing** |
| Closing Costs Financed (Paid from your Loan Amount) | $0 | $0 | **NO** |
| Down Payment/Funds from Borrower | $186,000.00 | $186,000.00 | **NO** |
| Deposit | -$15,000.00 | -$15,000.00 | **NO** |
| Funds for Borrower | $0 | $0 | **NO** |
| Seller Credits | -$2,610.00 | $0 | **YES** • See Seller Credits in **Section L** |
| Adjustments and Other Credits | $0 | -$8,107.87 | **YES** • See details in **Sections K** and **L** |
| **Cash to Close** | $0 | $183,932.25 | |

*Example 2.* In a number of refinancing transactions, we have seen cases where the alternative Calculating Cash to Close table was used on the LE but the standard table was used on the CD. If the CD was corrected to use the alternative table and the values remained constant, we believe that this would not be a numeric change, but rather merely a formatting change. However, it is unclear whether the clerical error cure mechanism under TRID applies to this error.

Alternative LE Calculating Cash to Close:

| Calculating Cash to Close | |
|---|---|
| Loan Amount | $0 |
| Total Closing Costs (J) | -$11,343 |
| Estimated Total Payoffs and Payments | $0 |
| **Estimated Cash to Close ☒ From ☐ To Borrower** | $11,343 |
| **Estimated Closing Costs Financed (Paid from your Loan Amount)** | $0 |

Standard CD Calculating Cash to Close:

| Calculating Cash to Close | Use this table to see what has changed from your Loan Estimate. | | |
|---|---|---|---|
| | Loan Estimate | Final | Did this change? |
| Total Closing Costs (J) | $11,343.00 | $10,342.93 | YES • See Total Loan Costs (D) and Total Other Costs (I) |
| Closing Costs Paid Before Closing | $0 | $0 | NO |
| Closing Costs Financed (Paid from your Loan Amount) | $0 | $0 | NO |
| Down Payment/Funds from Borrower | $847,500.00 | $847,500.00 | NO |
| Deposit | $0 | $0 | NO |
| Funds for Borrower | $0 | $0 | NO |
| Seller Credits | $0 | $0 | NO |
| Adjustments and Other Credits | $0 | -$47,436.64 | YES • See details in Sections K and L |
| **Cash to Close** | $858,843.00 | $810,406.29 | |

*Example 3.* In the 12/29/2015 letter from the CFPB to the MBA, a reference was made to 15 U.S.C. § 1640 (b) and (c) and the ability for the correction of errors. It would be helpful to have more clarity on this topic. Historically, § 1640(b) was applied to correcting material violations (*e.g.* APR, finance charges, etc.). On the other hand, § 1640(c) was not frequently relied upon by the industry because it requires, among other things, a "the preponderance of the evidence" and may be interpreted differently by different courts. Is it the CFPB's opinion that the ability to correct errors under § 1640(c) extends to the issue identified in the examples above?

*Example 4.* Further, investors seek further clarity regarding this application of the cure provisions in TILA. The letter states,

> *"[You ask] about cure provisions for violations of the rule. The Know Before You Owe mortgage disclosure rule provides for the issuance of a corrected closing disclosure, even after closing. This can be used, for example, to correct non-numerical clerical errors or as a component of curing any violations of the monetary tolerance limits, if they exist. As a general matter, consistent with existing Truth in Lending Act (TILA) principles, liability for statutory and class action damages would be assessed with reference to the final closing disclosure could, I many cases, forestall any such private liability."*

Accordingly, investors wish to know whether the CFPB is maintaining that any error on the LE can be cured by issuing a subsequent corrective LE or a CD? If that is the case, then can one correct an error without a valid COC? The CFPB also has stated that it does not believe these loans should be rejected by investors for formatting and minor errors. It would be valuable for the CFPB to provide a concrete list of examples they believe should not cause the loan to be rejected and the statute in which they are providing cover for those defects. By way of example, investors/originators keep getting loans with errors in the index description, specifically when the index lists "LIBOR" and fails to specify a duration (*i.e.*, a 6-month, 12-month, etc). AMI investor members believe this is fatal, whereas sellers do not. Accordingly, the market needs the CFPB to provide clarity. Finally, within the TILA framework, it is argued that one has a 60-day cure provision once a defect has been identified. Under TRID, we have two specific cure provisions to cure a tolerance cure or a non-numeric technical defect within 60 days of consummation. Again, investors are faced with a dilemma that could result in jeopardy, which timing is correct for tolerance cures: the 60 days from consummation as TRID states or 60 days from discovery as TILA states?

In response, mortgage investors wish to constructively engage the Bureau about opening a meaningful dialogue, introducing certainty and clarity to the framework for liability for TRID violations, and developing a reasonable series of corrective steps toward the end of preserving private capital in the U.S. mortgage market.

Please do not hesitate to contact AMI if you would like us to further brief you regarding these concerns. Thank you.

Sincerely,

CHRIS KATOPIS
*Executive Director*
Association of Mortgage Investors

CC: Patricia McClung, Assistant Director, Mortgage Markets

**Appendix I - Frequent Loan Estimate Defects**

- Non-numerical clerical errors on the Loan Estimate (*e.g.*, improper shading and formatting).
- Lender name and address information missing from the top of the Loan Estimate form.
- Loan Terms table lists incorrect information or is incomplete (*e.g.*, inaccurate Product Type description).
- The Estimated Taxes, Insurance, & Assessments checkboxes are inaccurate or incomplete. Descriptions of the type of charge are missing to the right of "Other" checkbox when box is checked.
- Numerical computation errors on the Loan Estimate (*e.g.*, itemization of Loan Costs do not total the Total Loan Costs on page two of the Loan Estimate, Loan Costs and Other Costs do not total Estimated Closing Costs in the Costs at Closing table on page one of the Loan Estimate).
- The Estimated Closing Costs are not calculated in the same manner as the Total Closing Costs disclosed on page 2 of the Loan Estimate.
- Prepaids table does not include the applicable time period covered by the amount to be paid by the borrower and the total amount paid.
- Initial Escrow Payment at Closing table does not include amount escrowed per month for each item, the number of months collected at consummation and the total amount paid.
- Contact Information table is incomplete for the creditor and/or mortgage broker.
- Other Considerations table is incomplete. (e.g. whether or not the subsequent purchaser can assume the loan on the original terms checkbox is not selected, a statement detailing any amount that may be imposed for a Late Payment is not provided).

**Appendix II - Frequent Closing Disclosure Defects**

- Non-numerical clerical errors (*e.g.*, improper shading and formatting).

- Missing or incomplete Closing Information (*e.g.*, missing closing date, missing settlement agent name, file#), Transaction Information (*e.g.*, seller name and address), and Loan Information (*e.g.*, missing loan ID #).

- The Estimated Taxes, Insurance, & Assessments checkboxes are inaccurate or incomplete and description of the type of charge is missing.

- The Closing Costs are not calculated in the same manner as the Total Closing Costs disclosed on page 2 of the Closing Disclosure.

- Numerical computation errors (*e.g.*, itemization of Loan Costs do not total the Total Loan Costs on page two of the Closing Disclosure, Loan Costs and Other Costs do not total Closing Costs in the Costs at Closing table on page one of the Closing Disclosure).

- Loan Costs table includes fees for services not previously disclosed.

- Prepaids table does not include the applicable time period covered by the amount to be paid by the borrower and the total amount paid.

- Initial Escrow Payment at Closing table does not include amount escrowed per month for each item, the number of months collected at consummation and the total amount paid.

- Other Costs table includes fees not previously disclosed.

- Fees listed under the Closing Cost Details section of the Closing Disclosure do not match Closing Cost Details on the most current revised Loan Estimate issued.

- Calculating Cash to Close table does not reflect "Yes" when amount changed from Loan Estimate to Final. When the answer to the question is "Yes", there is no indication where the consumer can find the amounts that have changed on the Loan Estimate.

- Appropriate checkboxes on Loan Disclosures table are not checked.

- Loans closed prior to three day waiting period.

## Appendix III – Examples of Technical and Minor Errors Frequently Cited As TRID Violations

***Rounding and Decimal Points***

- TRID: LE Total Interest Paid (TIP) calculation discrepancy LE issued 11/224/15 reflects a TIP of 148.85%, which is not carried out to 3 decimal places. LE issued 12/9/15 reflects a TIP of 152.363%, which is over disclosed by 0.002% when compared to TPR data.

- TRID: LE Loan Calculation Discrepancy. The Loan Estimate Issued 11/4/2015 reflects 155.10% as the "Total Interest Percentage (TIP)". Our calculation shows an unrounded figure of 155.099%. The TIP should not be rounded to 2 decimal places as reflected on the LE and should remain out to three decimal places.

- TRID: Loan Estimate Loan Calculation Deficiency. The Loan Estimate issued 10/30/2015 has the TIP Figure on the Comparisons Table rounded incorrectly to 2 places. The Calculation of the TIP is 77.869% and the LE reflects 77.87%. The TIP figure should be rounded to 3 decimal places and show 77.869%

- TRID: LE issued 12/15/15 TIP amount of 161.68% is incorrectly truncated to 2 decimal places.

- TRID: Loan Estimate Loan Calculations TIP variance- LE dated 12/11/2015 shows 142.858% LLN data shows 142.86% it appears that LE was rounded to 2 decimal places when it should be disclosed to 3 decimal places.

- TRID: LE issued 11/18/15 TIP Deficiency – Disclosure shows 82.600% however LLN data shows 82.595%. It appears that the TIP was rounded up it should be disclosed at 3 decimal places if applicable.

- TRID: Loan Calculation Discrepancy - LE dated 11.5.15 reflects a TIP of 130.79%. LLN data reflects 130.788%, indicating that the TIP disclosed on the LE was rounded to 2 decimal places.

- TRID: Closing Disclosure Loan Calculations CD issued 1/14/2016 (signed) TIP shows as 133.719% TPR Data shows 133.720%.

- TRID: Closing disclosure loan terms-Interest Rate - **Comment: 01/04/2016 - Interest rate on LE and CDs is not properly rounded to two decimal places. Rate should be rounded to 8.37% (vs. 8.370% when there are only two decimal places. Correction required per 1026.19(f)(2)(ii).

- TRID: Loan Estimate rounding error- initial LE dated 11/5/2015 is not properly rounded it should be truncated at 6.5% not 6.500%.

***Abbreviations***

- TRID: LE Loan Costs/Other Costs Deficiency - The "Title - CPL" Fee is not labeled correctly on the Loan estimates. CPL is not an Acceptable abbreviation and should reflect "Closing Protection Letter".
- TRID: CD Loan Costs and/or Other Costs Deficiency -Post-consummation CD dated 1/26/16 provided in the file abbreviates "Fed X". No fee should be abbreviated.
- TRID: Loan Estimate Deficiency - **Comment: 12/29/2015 - The Loan costs section of the loan estimates have a fee labeled as "PEST". This is an unclear abbreviation of the fee charged to the borrower and abbreviations are not acceptable for labeling of fees. Technical violation as fee was not charged on final CD.

***Miscellaneous***

- TRID: Interim CD Total Interest Paid (TIP) discrepancy CD issued 12/29/15 reflects a TIP of 152.301%, which is over disclosed by 0.002% when compared to TPR data.
- TRID: Loan Calculations Discrepancy. The TOP is off by $1.61 and the TIP is off by 0.001%.
- TRID: Closing Disclosure Loan Calculation Deficiency. The TIP calculation on the Closing Disclosure reflects 202.814%, LLN data reflects 202.787%, a difference of 0.027%.
- TRID: Loan Estimate disclosed the Courier, wire, and storage fees on the same line in the closing costs section. Each fee should be disclosed on its own line.
- TRID: Closing Disclosure dated 12/22 (Initial) show several title fees listed in section B, which should be in C as they were a shoppable service and the borrower selected the service provider.

- TRID: Loan Estimate- Contact Information - missing the lender and loan officer's NMLS numbers.
- TRID: Loan Estimate Deficiency - LE dated 11/05/2015 is marked as Yes for the other box, however the other box is not checked which is required when Other Box is marked as yes.
- TRID: Loan Estimate Loan Costs and/or Other Costs Deficiency 1) LE dated 11/4/15: Section C fees out of alphabetical order. Not all title fees begin with the required "Title - ". 2) LE dated 12/23/15: "Title Sub Escrow Fee" in Section C is not disclosed properly and is out of alphabetical order.
- TRID: Loan Estimate Loan Costs and/or Other Costs Deficiency - LE dated 12/1/15 does not preface all Title fees with "Title -".
- TRID: CD issued 1/22 TIP is under disclosed by .022% when compared to TPR Data.
- TRID: LE Deficiency. LE provided missing the Unit# in the property address.
- TRID: Shoppable / Non-Shoppable Fee Defect - LE shows all title fees listed in section B, however the Service Providers List reflects these are shoppable items and therefore should be listed in section C.
- Loan Estimate is Incomplete with Blanks or N/A's: Loan Estimates are missing Applicants' mailing address.
- TRID: CD issued 1/27 Missing File Number in Closing Information Section.
- TRID: Closing disclosure Loan Costs and/or Other Costs deficiency - CD shows Credit Report Paid to detail as Other, rather than the third party name who provided the report.
- TRID: Loan Estimate Loan Costs/Other Costs Deficiency 1) LE dated 10/21/15: Section C fees are out of alphabetical order.