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Interpretive Letter

Division of Credit Unions Interpretive Letter I-14-05

DATE: December 29, 2014

TO: Washington State Credit Unions

AND TO: Interested Third-Party Forms Vendors

FROM: Linda Jekel, Director
Division of Credit Unions

RE: Discontinuing Use of State-Mandated "Disclosure Summary" under RCW 19.144.020

Summary

It has come to the attention of the Washington State Department of Financial Institutions ("DFI") that certain Washington State-chartered banks, savings banks, and credit unions (collectively referred to as "regulated institutions") may still be using an unnecessary separate "disclosure summary" for 1-4 family residential home loan applications. The "disclosure summary" was originally required when RCW 19.144.020 was enacted in 2008. Notwithstanding significant amendments made to RCW 19.144.020 in 2012, DFI is informed and believes that the practice of using the separate "disclosure summary" may still be occurring, in whole or in part, due to third-party vendors that may still include the "disclosure summary" within its menu of required forms.

In 2013, the Consumer Financial Protection Bureau ("CFPB") issued a Final Rule amending Regulation Z, also known as the Truth in Lending Act ("TILA"), and Regulation X, also known as the Real Estate Settlement Procedures Act ("RESPA"), by combining the Truth-in-Lending Statement and Good Faith Estimate disclosure requirements into one form ("TILA/RESPA Loan Estimate").[1] This CFPB Final Rule takes effect August 1, 2015.

[1] Sections 1098 and 1100A of the Dodd-Frank Wall Street Reform and Consumer Protection Act direct the CFPB to publish rules and forms that combine certain consumer disclosures for applying for and closing on a mortgage loan. Consistent with this requirement, under 12 CFR Part 1024 and 1026, the CFPB amended Regulations X and Z to establish new disclosure requirements and forms in Regulation Z for most closed-end consumer credit transactions secured by real property. In addition to combining the existing disclosure requirements and implementing new requirements imposed by the Dodd-Frank Act, the Final Rule provides extensive guidance regarding compliance with those requirements. The

The amendments to TILA and RESPA together, essentially render the Washington State "disclosure summary" as unnecessary if the regulated institution: (1) uses the newly combined CFPB TILA/RESPA Loan Estimate form; or (2) uses existing iterations of the Truth in Lending Statement and Good Faith Estimate until the Final Rule takes effect on August 1, 2015.

Therefore, the Director of the Division of Credit Unions determines that if the proper CFPB TILA/RESPA disclosures are made, the separate "disclosure summary" described in subsections (1) and (2) of RCW 19.144.020 is no longer required.

Statutory Interpretation

In December 2007, the Washington State Governor's Task Force on Homeowner Security issued its Final Report, which contained several recommendations to address residential mortgage market problems in Washington State. The Final Report included the creation of a separate "disclosure summary" to clarify certain terms and conditions for residential mortgage loan applicants. At the time, such disclosures were not adequately disclosed in the initial disclosures under: (1) TILA, governed at that time by the Federal Reserve Board ("FRB") under Regulation Z, and (2) RESPA, governed at that time by the Department of Housing and Urban Development ("HUD") under Regulation X.[2]

On the basis of the Task Force's Final Report, the 2008 Washington State Legislature enacted SHB 2770 (2008 c 108), which created Chapter 19.144 RCW. As originally enacted, Chapter 19.144 RCW applied to all "financial institutions" as defined in RCW 19.144.010(6), which included: Washington State-chartered banks, savings banks, credit unions, consumer lenders, mortgage brokers, mortgage loan officers, and other persons subject to licensure under the Washington Consumer Loan Act or Washington Mortgage Broker Practices Act.[3] Section 3 of SHB 2770 (2008 c 108 s 3), which was codified in the 2008 version of RCW 19.144.020,[4]

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Final Rule on this combined form was filed with the Federal Register on November 20, 2013, and becomes mandatory for all residential real estate loan applications taken on or after August 1, 2015. There are also proposed amendments to this Final Rule that, if adopted, become effective at the same time.

[2] This included certain disclosures of the following: (1) all fees and discount points; (2) possible interest rates and potential adjustments; (3) broker fees; (4) yield spread premium (if any) as a dollar amount; (5) prepayment penalties; (6) balloon payment (if any); (7) escrowing of property taxes and property insurance; (8) adjustment of loan payments (if at all) at the fully indexed rates; and (9) price added or premium charged for a "low-doc" loan (if any).

[3] RCW 19.144.010(6) declares: "'Financial institution' means commercial banks and alien banks subject to regulation under Title 30 RCW*, savings banks subject to regulation under Title 32 RCW, savings associations subject to regulation under Title 33 RCW, credit unions subject to regulation under Chapter 31.12 RCW, consumer loan companies subject to regulation under Chapter 31.04 RCW, and mortgage brokers and lenders subject to regulation under Chapter 19.146 RCW." [*Title 30 RCW has been re-codified as of January 5, 2015, as Title 30A RCW.]

[4] RCW 19.144.020, NEW SECTION. Sec. 3. **"**(1) In addition to any other requirements under federal or state law, a residential mortgage loan may not be made unless a disclosure summary of all material terms, as adopted by the department in subsection (2) of this section, is placed on a separate sheet of paper and has been provided by a financial institution to the borrower within three business days following receipt of a loan application. If any material terms of the residential mortgage loan change before closing, a new disclosure summary must be provided to the borrower within three days of any such change or at least three days before closing, whichever is earlier.
(2) The department [of financial institutions] shall adopt, by rule, a disclosure summary form with a content and format containing simple, plain-language terms that are reasonably understandable to the average person without the aid of third-party resources and shall include, but not be limited to, the following items: Fees and discount points on the loan; interest rates of the loan; broker fees; the broker's yield spread premium as a dollar amount; whether the loan contains prepayment penalties; whether the loan contains a balloon payment; whether the property taxes and

mandated a separate "disclosure summary" and the DFI, through its Division of Credit Unions, Division of Banks and Division of Consumer Services, prescribed rules for the content of the form.

This "disclosure summary" requirement came at a time when Federal mortgage regulation was in a heightened state of flux and preceded the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[5] Under that Act, Title X created the CFPB and transferred all rulemaking authority to the CFPB for TILA and RESPA from the FRB and HUD, respectively. There had been discussions for over a decade of combining the initial TILA and RESPA disclosures and making other modernizations and improvements by way of a single initial disclosure form satisfying both TILA and RESPA. Upon the effective date of the CFPB in July 2011, the CFPB launched into a comprehensive overhaul of the requirements of initial disclosure under TILA and RESPA and eventually came up with a combined TILA/RESPA Loan Estimate which will become mandatory as of August 1, 2015.[6]

Meanwhile, the Legislature determined during the 2012 Legislative Session that the public policy objectives of the Governor's Task Force had already been fulfilled. Not only had certain practices ceased to exist in the marketplace in the wake of Financial Crisis, there was encouragement that the newly created CFPB would make a comprehensive modernization of all residential real estate lending disclosures. In particular, the Legislature reasoned that the separate "disclosure summary" that it mandated in 2008 was no longer necessary if mortgage lenders and mortgage brokers were in compliance with Federal disclosures under TILA and RESPA that were now being shaped and monitored by the CFPB. Accordingly, the Washington State Legislature amended RCW 19.144.020 (effective June 7, 2012) by Section 18 of SHB 2255 (2012 c 17 s 18), adding a subsection (4), as follows:

> (4) ***Disclosure in compliance with the real estate settlement procedures act, 12 U.S.C. Sec. 2601 [sic], and Regulation X, 24 C.F.R. Sec. [sic] 3500, as it exists on the effective date of this section, shall be deemed to comply with the disclosure requirements of this section.*** If needed, the director may adopt rules to implement and incorporate other changes in the disclosure summary as necessary due to federal law.

[Emphasis added.]

Based on the language in RCW 19.144.020(4), the Director of the Division of Credit Unions has determined that the Legislature was referring in essence to whatever "Good Faith Estimate" requirements existed under Federal law as of June 7, 2012. Therefore, if a financial institution is

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property insurance are escrowed; whether the loan payments will adjust at the fully indexed rates; and whether there is a price added or premium charged because the loan is based on reduced documentation.
(3) The director [of the department of financial institutions] may, at his or her discretion, require by rule other information relating to a residential mortgage loan to be included in the disclosure summary if the director determines that it is necessary to protect consumers. The director [of the department of financial institutions] may adopt rules creating a standard form of disclosure summary to be used as a guide by financial institutions in fulfilling the requirements of this section."

[5] P.L. 111-203 (July 21, 2010).
[6] See again *Footnote 1* above.

using an initial disclosure form that complies with RESPA and Regulation X as of June 7, 2012, then there is no longer a need to use the separate "disclosure summary."

The question has been posed, however, as to the effect of the soon-to-be-mandatory, combined TILA/RESPA Loan Estimate adopted by the CFPB upon an interpretation of RCW 19.144.020(4). A narrow view of RCW 19.144.020(4) might suggest that upon the effective date of the new TILA/RESPA Loan Estimate (August 1, 2015), the interpretation expressed above is no longer valid. However, this does not take into account additional considerations that bear on a prospective application and proper statutory interpretation of the first sentence of RCW 19.144.020(4).

The first sentence of RCW 19.144.020(4) is not without ambiguity. For example, while the language of RCW 19.144.020(4) does not say so, the Legislature intended to refer to the entire Real Estate Settlement Procedures Act, which only begins at 12 U.S.C. §2601. In addition, the Legislature used "Sec.," which properly denotes reference to a Regulation X "section number." However, there is no Section 3500. Regulation X is 24 C.F.R. Part 3500, which is what the Legislature intended. It can logically be deduced that the Legislature was trying to convey that compliance with RESPA and Regulation X as of June 7, 2012, no longer necessitates use of the separate "disclosure summary."

Why didn't the Legislature simply state that compliance in perpetuity with RESPA and Regulation X obviates the requirement of the separate "disclosure summary"? While a Washington State statute may refer to another Washington State statute and automatically include any amendments to the latter made at a later date,[7] the same cannot be said of reference to Federal statutes. Indeed, if the same statutory presumption were applied to Federal statutes referenced in Washington State law, this could be deemed an abrogation of the sovereign authority of the Washington State Legislature to the U.S. Congress. Accordingly, the reference to "June 7, 2012" was probably inserted by the Washington State Legislature in RCW 19.144.020(4) for that reason. After considering the circumstances surrounding the somewhat ambiguous language of RCW 19.144.020(4), the Director of the Division of Credit Unions concludes that the 2012 Legislature intended prospective compliance with RESPA on or after June 7, 2012, to obviate the needs for the separate "disclosure summary."

Moreover, RESPA, as amended by the Dodd-Frank Act, declares, at 12 U.S.C. § 2616, as follows:

> "[RESPA] does not annul, alter, or affect, or exempt any person subject to the provisions of [RESPA] from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of [RESPA], and then only to the extent of the inconsistency. The [CFPB] is authorized to determine whether such inconsistencies exist. The [CFPB] may not determine that any State law is inconsistent with any provision of this chapter if the [CFPB] determines that

[7] RCW 1.12.028, added in 1982 (1982 c s 1), declares: "If a statute refers to another statute of this state, the reference includes any amendments to the referenced statute unless a contrary intent is clearly expressed."

> such law gives greater protection to the consumer. In making these determinations the [CFPB] shall consult with the appropriate Federal agencies."

Notwithstanding the above, it is the view of the Director of the Division of Credit Unions that by its enactment of RCW 19.144.020(4), the Washington State Legislature was expressing its intent to no longer require initial disclosure requirements independent of CFPB rulemaking under RESPA. Accordingly, by reason of 12 U.S.C. § 2616, coupled with the broad rulemaking mandate Congress granted the CFPB under the Dodd-Frank Act,[8] any present or future RESPA disclosure requirements made by the CFPB, including the TILA/RESPA Loan Estimate (effective August 1, 2015), supersede and preempt RCW 19.144.020 unless the Washington State Legislature otherwise declares so expressly with future legislation.

Conclusion

Therefore, the Director of the Division of Credit Unions determines that the separate "disclosure summary" described in subsections (1) and (2) of RCW 19.144.020 is no longer required if the proper CFPB TILA/RESPA disclosures are made. This interpretive statement has general applicability for all Washington State-chartered banks, savings banks, credit unions, and for any third-party forms vendors, or any parties similarly situated.

The Division of Credit Unions does not provide legal advice. This interpretive letter is applicable to all state-chartered credit unions and is not a substitute for legal advice given to a credit union.

If you have any questions, please contact Linda K. Jekel, Director of Credit Unions, at linda.jekel@dfi.wa.gov, or (360) 902-8778.

[8] See 12 U.S.C. § 5511.