

LEGAL UPDATES

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## CFPB Targets Mortgage Closing Costs as Junk Fees

### Service

Consumer Financial Services

### Industry

Financial Services & Capital Markets

### Professionals

MIKE G. SILVER  
WASHINGTON:  
202.378.5854  
MIKE.G.SILVER@  
HUSCHBLACKWELL.COM

SHELBY LOMAX  
NASHVILLE:  
615.949.2240  
SHELBY.LOMAX@  
HUSCHBLACKWELL.COM

On March 8, 2024, the CFPB issued a blog post signaling a new front in its focus on “junk fees”—mortgage closing costs. Notably, the CFPB suggests that title insurance, credit report and appraisal, origination, and other closing fees are driving up housing costs and that some of them are “high and increasing due to little competition,” and states that it may issue rules and guidance to “improve competition, choice, and affordability.” But the blog post fails to indicate how mortgage closing costs—which must be disclosed under the statutorily-mandated 2013 TILA-RESPA Integrated Disclosure (TRID) rule the CFPB promulgated after a lengthy process of developing and testing new disclosure forms—are “junk fees.” Nor does the CFPB indicate what authority it would use to issue guidance or rules addressing the price of these fees.

### Summary of CFPB blog post

The CFPB cites particular concern with the fact that to pay closing costs, a borrower must pay a smaller down payment amount or find another avenue to finance these fees. Additionally, the CFPB expresses concern that these costs are largely fixed, regardless of the loan size.

To support its assertions, the CFPB notes that total loan costs increased from 2021 to 2022 by 21.8%. The CFPB also cites how more borrowers paid discount points in 2022 versus any other year and states that discount points may not save borrowers money. However, these data points appear easily rebuttable. The CFPB fails to acknowledge that in 2022, interest rates took a sharp increase, jumping from 3.22% in January to 7.08% in October. This rate hike followed record low rates in 2021, when rates were as low as 2.65%. Furthermore, the pronounced home price increases during the same period are largely ignored as a contributing factor to the closing cost increases. Closing costs (particularly loan origination costs and realtor commissions) are sometimes tied to the loan amount or home price. And consumers who expect

to stay in their homes for the long term may prefer to buy down their rates by paying discount points.

The CFPB places special emphasis on two key closing costs: title insurance and credit reporting fees. The CFPB describes how lenders, not consumers, are the ones selecting title insurance coverage “from a very small universe of providers.” And it takes issue with how lender’s title insurance protects the lender yet is paid by the borrower. Increasing lender’s title insurance costs raises policy issues for consumers, and some lenders also may object to having to fund TRID “tolerance cures” frequently for overstated estimates. But the CFPB’s description of the issue paints a broad brush. For example, it overlooks the fact that obtaining lender’s title insurance benefits the borrower indirectly insofar as it permits the borrower to finance the purchase of a home, since the lender needs assurances that its security interest in the property will be protected from the consequences of title defects. The CFPB also criticizes credit reporting fees, noting that the industry is “highly concentrated, with a just a handful of dominant players dictating the price of credit reports and scores.” While this may be accurate, addressing this problem through additional regulation of mortgage lenders would appear to misalign the policy solution with the policy problem.

The CFPB concludes by asking consumers for input on how mortgage closing costs are affecting their ability to obtain affordable housing, and by stating that it will continue analyzing mortgage closing costs and issue rulemaking or guidance as necessary. While the CFPB has not published this potential rulemaking on the Semiannual Rulemaking Agenda, it could be added as an action item in the near future, and the proposal may be preceded by a Request for Information (RFI) or Advance Notice of Proposed Rulemaking (ANPR) to gather early stakeholder input.

### **Analysis**

Perhaps it was inevitable that the CFPB would target mortgage closing costs in its larger “junk fee” initiative. However, by aiming its fire in this direction, the CFPB appears to be casting doubt on its prior policy choices regarding the TRID rulemaking, its first high-profile initiative. As noted, the CFPB invested a great deal of resource and expense to implement the statutory mandate to integrate the TILA “TIL” and RESPA “HUD-1” forms and design the new Loan Estimate and Closing Disclosure. These forms were developed through ten rounds of qualitative consumer testing and later quantitative testing. Moreover, a policy concern noted in the blog post—lack of consumer shopping—was a primary goal of the rulemaking. During the 2013-2015 implementation period, the CFPB responded to industry compliance challenges by amending the rules. Then, in 2020, the CFPB completed a mandatory five-year “look-back” and gave the TRID rule a relatively clean bill of health, and the CFPB did not put TRID reforms on the rulemaking agenda. Nevertheless, the CFPB now implies the TRID rule has failed to protect consumers, with little explanation for this change in position.

Assuming the blog post’s premise is correct (which is questionable, as described above), the CFPB’s logical response would be twofold: (1) amend the TRID Rule to bolster its efficacy and (2) step up its

RESPA enforcement efforts to address the market-distorting effects of kickbacks. By raising the specter of a choice, competition, and affordability problem, however, the CFPB foreshadows more potent action. Yet any substantive attempt to lower closing costs may run headlong into authority challenges. RESPA is not a price-setting statute, a point made abundantly clear by the Supreme Court in its unanimous 2012 decision in *Freeman v. Quicken Loans*. Nor does the Dodd-Frank Act permit the CFPB to regulate the price of insurance (see 12 U.S.C. 5517(f)), since that has traditionally been under the purview of the states. And while the CFPB has not been shy about flexing its UDAAP authority, even a cursory analysis would find roadblocks. For example, how can consumers be said to lack understanding or have an inability to protect their interests when they are being provided enhanced disclosures under more stringent timing requirements pursuant to TRID? Again, these are forms and timing requirements the *CFPB itself* rigorously tested and initiated via a rulemaking process.

Ultimately, the CFPB could simply be signaling a policy concern about which it may lack legal authority to take concrete action—in other words, a classic “bully pulpit” move, and one that is timed with other administration-wide efforts. Moreover, a pending settlement in consumer litigation against the National Association of Realtors would change the way real estate commissions are structured, the effect of which could significantly reduce closing costs for borrowers seeking purchase-money financing. Consequently, while stakeholders are right to take notice of the CFPB’s blog post and wonder what may happen next, they should be reminded of the CFPB’s historical activity on mortgage disclosures and the larger market context.

### Contact us

Husch Blackwell attorneys are available to help companies navigate the CFPB’s activities regarding mortgage regulation and closing costs. One of the co-authors of this client alert worked at the CFPB for over 12 years, served as lead regulatory subject matter authority for RESPA matters, and helped draft the TRID rule. If you have questions, contact Mike G. Silver, Shelby Lomax, or your Husch Blackwell attorney.