

WHO GETS WHAT?

GRAMM–LEACH–BLILEY AND TRID

Delivery of Closing Disclosure Forms to Parties Involved in Real Estate Transactions



Seller:

What form of Closing Disclosure must a settlement agent give to a seller?

The settlement agent is responsible for providing a Closing Disclosure to the seller; the question is whether the seller gets:

- a. A full Closing Disclosure with all buyer/borrower and seller information (including buyer/borrower Nonpublic Personal Information (NPI));
- b. A full Closing Disclosure with buyer/borrower information redacted as permitted by the Rule; or
- c. Only a seller 2-page Closing Disclosure.

Only a 2-page seller's Closing Disclosure or a 5-page seller's Closing Disclosure with the **buyer/borrower's information redacted** should be delivered by the settlement agent to the seller unless the parties request otherwise. ¹

Lender:

Must a settlement agent provide a copy of the seller's Closing Disclosure to the lender?

The settlement agent is responsible for creating and delivering a Closing Disclosure to the seller and the Rule mandates that a copy of the seller's Closing Disclosure be given to the creditor. ²

Mortgage Broker:

May a settlement agent provide a copy of the buyer/borrower's Closing Disclosure to a mortgage broker?

Given the mortgage broker's role in the transaction, they may be provided a copy of the buyer/borrower's Closing Disclosure and the buyer/borrower **does not** have to consent to sharing the Closing Disclosure with the mortgage broker. ³

Real Estate Agent or Broker:

May a settlement agent provide a copy of the buyer/borrower's or seller's Closing Disclosure to a real estate broker or agent?

5-Page Combined Closing Disclosure

In order to release the 5-page Closing Disclosure with both the buyer/borrower's and seller's information disclosed to a real estate broker, agent or other third party, the settlement agent **should require**:

- » a waiver of the right to opt out of sharing of NPI from both the borrower/buyer and seller
- » permission to release the Closing Disclosure from the lender

5-Page Closing Disclosure – Borrower's Charges Shown and Seller's Charges Redacted

In order to release the 5-page Closing Disclosure with only the borrower's information disclosed to a real estate broker, agent or other third party, the settlement agent **should require**:

- » a waiver of the right to opt out of sharing of NPI from the buyer/borrower
- » permission to release the Closing Disclosure from the lender

5-Page Closing Disclosure – Seller's Charges Shown and Borrower's Charges Redacted or 2-Page Seller Disclosure

In order to release the 5-page Closing Disclosure with only the seller's information disclosed or the 2-page seller's Closing Disclosure to a real estate broker, agent or other third party, the settlement agent **should require**:

- » a waiver of right to opt out of sharing of NPI from the seller. ⁴

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Legal Citation

¹ The Rule provides support for all three options:

The buyer/borrower and seller are permitted under the TRID rule to both get the full 5-page fully completed Closing Disclosure. In the Preamble (TRID page 1065-1066) the CFPB states that: “the inclusion of the summaries of the consumer’s and seller’s transactions enable consumers to fully provide effective advance notice to home buyers of settlement costs”, and that “Often, costs associated with one transaction are accounted for or allocated between the parties and have a direct effect on the other transaction. For example, seller concessions from the real estate purchase contract can change the availability or terms of the loan transaction if the concessions are large enough to change the loan-to-value ratio and the amount of the consumer’s down payment.” In the Staff Interpretation relating to the seller disclosure requirement, the CFPB states “The settlement agent complies with this provision by providing a copy of the Closing Disclosure provided to the consumer, if it also contains the information under § 1026.38 relating to the seller’s transaction, or alternatively providing the disclosures under § 1026.38(t)(5)(v) or (vi), as applicable.” (Those disclosures being the ones with the buyer/borrower’s information redacted.)

The seller could also receive a 5-page Closing Disclosure where the buyer/borrower information is blank. The Rule at 12 CFR § 1026.38(t)(5)(v) says that the form can be modified to separate the information of the borrower and seller. In that case the information disclosed to the seller can omit the following on Page 1: Loan Information, Loan Terms, Projected Payments, Costs at Closing; Page 2: Origination Loan costs (as paid by borrower) Other Costs (as paid by borrower); Page 3 Cash to Close calculation; all of the page 4 disclosures; and the Loan Calculations and Other Disclosures on page 5.

Finally, the Rule at 12 CFR § 1026.38(t)(5)(vi) also permits the disclosure of the seller’s information on a 2-page seller only form (Model Form 25(l))

² 12 CFR § 1026.19(f)(4)(i) requires that the settlement agent provide the seller with a disclosure ‘reflecting the actual terms’ of the transaction. Section 1026.19(f)(4)(iv) further requires that the seller disclosure also be given to the ‘creditor’ (a defined term meaning the person extending the credit and to whom the debt is payable. (12 CFR § 1026.2(a)(17)). Therefore the complete seller disclosure, whether as part of the full 5-page Closing Disclosure or the seller only 2-page Closing Disclosure, must be given to the funding lender. Under Gramm-Leach-Bliley (GLB), the seller has no right to refuse to share any information on the Closing Disclosure with the buyer/borrower’s lender since 12 CFR § 1016.15(a)(7) has an exception to the right to opt out of the sharing of Nonpublic Personal Information (NPI, a defined term at 12 CFR § 1016.3(p)) where it is required by a federal regulation.

³ The TRID rule addresses the role of the mortgage broker only in terms of the issuance of the loan estimate, and the term ‘mortgage broker’ is not specifically defined within the TRID Rule. Rather there is a cross reference in Comment 19(e)(1)(ii) to 12 CFR § 1026.36(a)(2) where a mortgage broker is defined as “any loan originator that is not an employee of the creditor.” Consequently, the sharing of NPI (and thus the permissibility of the settlement agent delivering a completed 5-page Closing Disclosure to the mortgage broker) will be analyzed under GLB. While the general rule under GLB is that the entity in possession of NPI cannot disclose it to a nonaffiliated third party unless the consumer has the right to opt out of the sharing of the information (12 CFR § 1016.10), there are exceptions. With regard to sharing the Closing Disclosure with a mortgage broker, it is permitted under the exceptions in 12 CFR § 1016.14(a) – the disclosure is necessary to effect a transaction the consumer has requested (the processing of the mortgage loan transaction) and the disclosure is to provide a record of the transaction to the consumer’s broker (12 CFR § 1016.14(b)(2)(iii)).

⁴ The most aggressive reading of GLB section 1016.14(b)(2)(iii) would include real estate brokers and agents in the group of ‘agents’ that can receive information without the opt out rights. Since this analysis is under GLB, the seller is a consumer, and the real estate agent is his agent or broker. However, the real estate agent may be looking for a completed 5-page Closing Disclosure in which case the buyer/borrower’s NPI is also included.

The more conservative approach is to rely on the provision in GLB Section 1016.15 which permits disclosure with the consent of, or at the direction of the consumer. Clearly the Closing Disclosure has buyer/borrower NPI and arguably it has seller NPI, so both consents would be required to use this section of the GLB.

In addition, since the lender (creditor) is the ‘owner’ of the buyer/borrower’s Closing Disclosure; they have potential liability under both state and federal law in the event of a breach.

Under this approach the settlement agent should require waivers of the right to opt out of sharing NPI from both the seller and buyer/borrower and permission to release the Closing Disclosure from the lender.