

TRID Closing Disclosures Guide

- Combined vs. Separated
- What is Shared with Real Estate Professionals

June 2020

Closing a real estate transaction on time and based on clear and accurate information is a priority for real estate professionals, regardless of whether the agent is representing the buyer or the seller in the transaction. However, whether a real estate professional can obtain closing information for the buyer and/or seller is often not the same from transaction-to-transaction.

There are legal reasons for when a real estate professional can view buyer or seller information grounded in the TILA-RESPA Integrated Disclosure regulations (“TRID”) and federal and state privacy laws. The following summary addresses common issues experienced by real estate professionals as it relates to closing information including:

- when buyer and seller information is often disclosed on a single, combined Closing Disclosure (“CD”) in some transactions;
- when buyer and seller information is disclosed on two, separate CDs in other transactions; and,
- an agent’s ability to obtain settlement information for both parties to the transaction where separate buyer and seller CDs are provided.

1. TRID Gives a Lender the Discretion to Combine Buyer and Seller Information on a Single CD or to Require a Settlement Agent to Prepare a Separate Seller CD

TRID requires the lender to prepare the buyer’s CD and requires the settlement agent to prepare the seller’s CD.¹

If the CD prepared by the lender for the buyer includes all of the terms of the seller’s transaction, the settlement agent is allowed under TRID to provide a copy of that CD to the seller to satisfy the settlement agent’s disclosure obligation.²

However, the regulations do not require that the seller receive the same version of the CD that the buyer receives. The settlement agent is permitted to provide the seller with a separate CD that contains only the information applicable to the seller’s transaction.

TRID gives the lender the *discretion* to require this separation of buyer and seller transaction information. The Commentary to Section 1026.39(t)(5)(v) provides that where state law prohibits the sharing of a buyer’s information with the seller or “in any other

In reality, the settlement agent closes a loan based on the instructions provided by the lender. If a lender dictates that a consumer’s transaction information on the buyer’s CD *cannot* be provided to the seller, the settlement agent has no choice but to prepare a separate CD for the seller containing *only* the actual terms of the seller’s transaction.

¹ See 12 C.F.R. §§ 1026.19(f)(1), (f)(4)(i).

² See 12 C.F.R. § 1026.19(f)(4)(i), Comment 1.

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situation where the creditor in its discretion chooses to do so,” the lender may assist the settlement agent in providing a separate Closing Disclosure to the seller.

Under TRID, some lenders may choose to combine the buyer’s and seller’s transaction information on a single CD for the buyer and allow settlement agents to provide this single CD to sellers. Other lenders may choose to require the settlement agent to disclose the seller’s transaction information separately on a seller-only CD.

2. Compliance with Privacy Laws Impacts How Lenders Choose to Disclose Buyer and Seller Information on the CD

Lenders and settlement agents that separate buyer and seller information into separate CDs likely are concerned about the scope of the exemptions in federal and state privacy laws that permit disclosures of a consumer’s personal information only to the extent necessary to affect the consumer’s transaction.

For example, the federal Gramm-Leach-Bliley Act (“GLBA”),³ as implemented by Regulation P,⁴ generally requires a financial institution (e.g., a lender) to provide a consumer with an initial privacy notice and a reasonable opportunity to opt-out (or obtain the consumer’s affirmative opt-in consent) prior to sharing the consumer’s non-public personal information with a non-affiliated third party.⁵

There are various exceptions to the GLBA requirement that allow a financial institution to disclose personal information without notice or consent. **One such exception provides that a financial institution may disclose personal information to a third party “as necessary to effect...a transaction that a consumer requests or authorizes, or in connection with...processing a financial product or service that a consumer requests or authorizes.”⁶**

Based on this GLBA exception, some lenders may disclose the terms of the buyer’s mortgage loan transaction to the seller as part of a combined CD because that disclosure is a “usual, appropriate or acceptable method” of carrying out the transaction, particularly given that TRID expressly contemplates such an option.⁷

The Gramm-Leach-Bliley Act (“GLBA”) and implementing Regulation P govern the privacy practices of financial institutions.

There are exceptions within GLBA that permit, but not require, lenders to disclose buyer’s personal information. Therefore, lenders may instead follow TRID to protect buyer’s personal information by separating the buyer and seller CDs.

³ 15 U.S.C. § 6801 *et seq.*

⁴ 12 C.F.R. Part 1016.

⁵ *Id.* § 1016.4(a)(2).

⁶ *Id.* § 1016.14(a). For this purpose, “necessary to effect” means, in relevant part, that the disclosure is either required, or is a usual, appropriate or acceptable method, to carry out the transaction and record, service, or maintain the consumer’s account in the ordinary course of providing the financial service or financial product. § 1016.14(b).

⁷ Such a creditor might also point to the Commentary to Section 1026.39(t)(5)(v) that refers only to situations in which state law prohibits the sharing of a buyer’s information with the seller, which arguably implies the practice is permissible under federal law.

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However, other lenders may take the position that since there is an available option under TRID that is more protective of the buyer's privacy (i.e., separating the buyer and seller CDs), the disclosure of the buyer's information to the seller is not strictly "required" to carry out the transaction and, thus, is not permitted under the GLBA exception.

Another exception to the GLBA notice and opt-out requirements authorizes a lender to disclose a consumer's protected information "to comply with Federal, state, or local laws, rules and other applicable legal requirements."⁸ Once again, however, lenders may take the position that this exemption does not apply with respect to the disclosure of buyer information to a seller because TRID gives creditors the option of separating the disclosures – i.e., the provision of the buyer's information to the seller is not legally mandated.

State financial privacy laws generally mirror the federal GLBA, although some states may subject certain lenders to more stringent limitations. These more restrictive state privacy laws may require lenders to separate buyer information from seller information on two CDs.

3. Privacy Laws Permit an Agent to Receive a Copy of Their Client's CD, but Not Necessarily a Copy of the Other Party's CD Where Separate CDs are Provided

The GLBA permits a lender to provide personal information to a consumer's agent in a transaction.⁹ Thus, it should not violate the GLBA for the lender or settlement agent to provide the buyer's CD to the buyer's agent, or the seller's CD to the seller's agent.¹⁰

However, if a lender is concerned that GLBA exceptions do not clearly authorize it to disclose a buyer's transaction information to the seller, the lender similarly will not authorize the provision of a buyer's CD to the seller's real estate agent.

In transactions where buyers and sellers receive separate CDs (i.e. with the seller's version containing only his or her transaction information), real estate professionals should not expect that lenders will authorize the seller's agent to receive a copy of the buyer's CD. Likewise, the buyer's agent also is not likely to receive a copy of the seller's CD.

⁸ *Id.* § 1016.15(a)(7)(i).

⁹ 12 C.F.R. § 1016.15(a)(2)(v).

¹⁰ See 82 Fed. Reg. 37752 (Aug. 11, 2017) (suggesting that the GLBA exceptions at issue would apply *only* to the provision of the consumer's CD to the consumer's agent or broker and to the provision of the seller's CD to the seller's agent or broker).

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For those transactions where buyers and sellers receive separate CDs with the seller's version containing only his or her transaction information, the buyer and his/her agent will at least have information as to all costs and fees paid by the seller on the buyer's CD.

4. When Lenders Require Separate Buyer and Seller CD, TRID Dictates Different Content for the Two Disclosures

When a lender requires that separate CDs are prepared for the buyer and the seller, TRID dictates which information must appear on the buyer's CD and which information must appear on the seller's CD.

With regard to the buyer's CD, the regulations permit only one modification to be made; the lender may omit the Summary of the Seller's Transaction on page three of the Closing Disclosure.¹¹ The TRID regulations require any closing costs paid by the seller (including real estate commissions) to be disclosed on page two of the buyer's Closing Disclosure in all circumstances.

With regard to the seller's CD, the regulations permit the removal of any and all information regarding the buyer's terms of the transaction, including:

- any closing costs paid by the consumer;
- summaries of cash needed to close the loan;
- the identity and contact information of the buyer's lender; and,
- all loan-related information (loan terms, projected payments, loan disclosures, adjustable payment and interest rate tables, and loan calculations like the annual percentage rate).¹²

The regulations allow the settlement agent to either leave the buyer sections of the seller's CD blank or delete these sections from the form altogether.¹³ If the settlement agent opts to delete the buyer sections from the seller's CD, TRID provides a model form the settlement agent can use as the seller's CD.¹⁴

Real estate professionals are likely to encounter lenders that permit the disclosure of both the terms of the buyer's and seller's transactions on the same CD, which is given to both the buyer and the seller.

You are also likely to encounter lenders that include both the buyer and seller transaction information on a CD provided to the buyer (or, at least, seller closing costs) and that require settlement agents to prepare a separate CD for sellers containing only the seller's transaction information. Both approaches are legal under TRID and arguably reasonable under the GLBA.

¹¹ 12 C.F.R. § 1026.38(t)(5)(v)(A).

¹² *Id.* § 1026.38(t)(5)(v)(B), (C).

¹³ *Id.* § 1026.38(t)(5)(vi).

¹⁴ 12 C.F.R. Part 1026, App. H-25(l).