The Koogler Group
Education Matters

Date: December 14, 2015

To: Patricia McClung, Assistant Director of Mortgage Markets
Consumer Financial Protection Bureau
1700 G Street NW
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Copies: [See Distribution List on Final Page]

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Re: "Follow the Rule" – TRID Clarity on Owner's Title Premium, Seller Credits, and Related TRID Topics

It is best to use a *color printer* if printing a hard copy, as the letter is *color-coded* to aid comprehension – or you may read it online at *www.KooglerGroup.com*.

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My intention in writing this letter is to help the CFPB help lenders and title (settlement) agents better understand and comply with the TRID Rule regarding title insurance premium. As a leading industry author/educator – author of 31 industry prelicensing and regulatory compliance textbooks spanning 30+ years, including the most recent *Federal Compliance Trilogy* [*Integrative TILA-RESPA Final Rule Study Manual; Federal Compliance Risk Management Manual;* and *Multi-State Study Manual for Closing Agents 2nd Edition*] – our company successfully delivered a full-day TRID Rule Implementation Program [classroom and online] to over 4,500 title (settlement) agents, attorneys, loan originators, and realtors.

> *Although I do not agree with the CFPB's treatment of title insurance under the TRID Rule nor treatment of title (settlement) agents under the TRID Rule and CFPB Bulletin 2012-03, my primary focus as an industry educator is on consumer protection and regulatory compliance. As I explain to title insurance, mortgage lending, and real estate professionals, when it comes to federal and state laws, rules, and regulations, there are only two choices: (1) comply; or (2) comply while lobbying for change, if one believes such laws, rules, and regulations are too restrictive. Circumvention is never an option.*

I believe it is important for you to understand my professional perspective prior to reading this letter – as it is *genuinely* my intention to *"help you help lenders and title (settlement) agents better understand and comply with the TRID Rule"* even though I do not agree with the treatment of title insurance under the Rule. To be clear, lack of agreement does *not* correlate to lack of support. I *fully support* industry-wide compliance with the TRID Rule and have worked diligently, since the Rule was published in November 2013, to get industry professionals to understand the Rule's complexities by translating *"regulatory-world policies"* into *"real-world" practices*. I hope the content of this letter will demonstrate my personal and professional commitment to helping the CFPB help industry participants successfully implement the TRID Rule in a manner which will truly foster consumer protection.

# CFPB Disclaimer – "Follow the Rule"

While the Bureau provides extensive guidance, via industry webinars and published guidance documents, the overarching *warning* via disclaimer to "Follow the Rule" is consistently reinforced and should be observed by industry professionals.

> Disclaimer
> This presentation does not represent legal interpretation, guidance or advice of the Bureau. While efforts have been made to ensure accuracy, this presentation is not a substitute for the Rule. *Only the Rule and its Official Interpretations can provide complete and definitive information regarding requirements*. This document does not bind the Bureau and does not create any rights, benefits, or defenses – substantive or procedural – that are enforceable by any party in any manner.

Shortly after the TRID Rule was published, the industry sought guidance on various matters, including title insurance, which were areas of concern and confusion. In some cases, it was pointed out that information within the Final Rule's *preamble* was at odds with information set forth elsewhere in the Rule. The Bureau stated that the November 20, 2013 Final Rule contained three distinct parts: (1) *Preamble* summarizing why the Rule was issued, the Bureau's legal authority, reasoning behind the Rule, responses to comments, and impact of the Rule; (2) *Regulatory Text* which amends Regulation Z and begins on page 1365 of the Rule; and (3) *Official Interpretations* of the Rule which begin on Page 1644. The Bureau subsequently attached the blanket disclaimer to all webinars, published guidance documents, and other presentations given by Bureau spokespersons reminding the industry to follow the Rule [Regulatory Text] and Official Interpretations.

## ALTA's November 23, 2015 Letter to the CFPB

ALTA recently sent the Bureau a letter regarding confusion stemming from how to disclose an owner's title insurance policy [*premium*] when the Bureau's mandatory calculation method produces a negative figure as the disclosed amount for such policy, as well as confusion regarding seller credits.

*The Rule is actually quite clear on both points. I have addressed this issue through numerous Education Matters: TRID E-News Bulletins provided to those who complete the TRID Rule Implementation Program. Part of the Program includes ongoing support via email and E-News Bulletins, where I answer participants' questions pertaining to the Rule and provide Rule citations re same.*

We begin with a *"short answer"* including Rule citations regarding both points. From there, we address the *cause* of confusion and how to *cure* it which results in compliance with *both* the TRID Rule *and* state-regulated [filed/published/promulgated] title insurance premium. Finally, we address related compliance issues in an attempt to fully understand *who* is confused, *why* confusion persists, from *where* it arises, and *what* to do to bring clarity to TRID Rule implementation. The *when* of the equation is obvious – *we need to eradicate confusion with clarity now, before it snowballs out of control.*

## Owner's Title Insurance Premium

The "negative" OP figure *seems* to arise where "reissue" OP premium – rather than "full" OP premium – is used to calculate the TRID Rule *disclosed* "OP" premium. *Such is the case, to date, with file samples provided to our office by numerous agents who inquire regarding the "negative" number. When we recalculate using full OP – as required by the TRID Rule – the disclosed OP result is a positive number.* Although I don't agree with the CFPB's approach to calculating the amount of OP premium, the required calculation is quite clear that *full* OP premium is to be used in such calculation [*See* §1026.37(g)(4)-2(ii)]:

§1026.37(g)(4) Other [Final Rule Pages 1802-1803 – Referencing the Loan Estimate]

1. *Owner's title insurance policy rate.* The amount disclosed for an owner's title insurance premium pursuant to §1026.37(g)(4) is based on a basic owner's policy rate, and not on an "enhanced" title insurance policy premium, except that the creditor may instead disclose the premium for an "enhanced" policy when the "enhanced" title insurance policy is required by the real estate sales contract, if such requirement is known to the creditor when issuing the Loan Estimate. This amount should be disclosed as "Title – Owner's Title Policy (optional)," or in any similar manner that includes the introductory description "Title –" at the beginning of the label for the item, the parenthetical description "(optional)" at the end of the label, and clearly indicates the amount of the premium disclosed pursuant to § 1026.37(g)(4) is for the owner's title insurance coverage. See comment 37(f)(2)-4 for a discussion of the disclosure of the premium for lender's title insurance coverage.

2. *Simultaneous title insurance premium rate in purchase transactions*. The premium for an owner's title insurance policy for which a special rate may be available based on the simultaneous issuance of a lender's and an owner's policy is calculated and disclosed pursuant to §1026.37(g)(4) as follows:

i. The title insurance premium for a lender's title policy is based on the full premium rate, consistent with §1026.37(f)(2) or (f)(3).

ii. The owner's title insurance premium is calculated by taking the full owner's title insurance premium, adding the simultaneous issuance premium for the lender's coverage, and then deducting the full premium for lender's coverage.

§1026.38(g)(4) Other [Final Rule Pages 1841-1842 – Referencing the Closing Disclosure]

1. Costs disclosed. The costs disclosed under §1026.38(g)(4) include all real estate brokerage fees, homeowner's or condominium association charges paid at consummation, home warranties, inspection fees, and other fees that are part of the real estate closing but not required by the creditor or not disclosed elsewhere under §1026.38.

2. *Owner's title insurance premium*. In a jurisdiction where simultaneous issuance title insurance rates are permitted, any owner's title insurance premium disclosed under §1026.38(g)(4) is calculated by using the full owner's title insurance premium, adding any simultaneous issuance premium for issuance of lender's coverage, and then deducting the full premium for lender's coverage disclosed under §1026.38(f)(2) or (f)(3).

Section 1026.38(g)(4)(i) requires that the disclosure of the cost of the premium for an owner's title insurance policy include "Title – " at the beginning of the label. In addition, §1026.38(g)(4)(ii) requires that the disclosure of the cost of the premium for an owner's title insurance policy include the parenthetical "(optional)" at the end of the label when designated borrower-paid at or before closing.

3. Guidance. For additional guidance on use of the term "(optional)" under §1026.38(g)(4)(ii), see comment 37(g)(4)-3.

4. Real estate commissions. The amount of real estate commissions pursuant to §1026.38(g)(4) must be the total amount paid to any real estate brokerage as a commission, regardless of the identity of the party holding any earnest money deposit. Additional charges made by real estate brokerages or agents to the seller or consumer are itemized separately as additional items for services rendered, with a description of the service and an identification of the person ultimately receiving the payment.

The Rule is also quite clear that "Other" itemized charges – which includes optional Owner's title insurance coverage – are to be shown on CD Page 2, Other Costs Table, and charged to the appropriate party – e.g., Borrower, Seller, or Other.

§1026.38(g)(4) [12 CFR Part 1026 (Regulation Z)]

4. Other. Under the subheading "Other" and in the applicable column as described in paragraph (g) of this section, an itemization of each amount for charges in connection with the transaction that are in addition to the charges disclosed under paragraphs (f) and (g)(1) through (3) for services that are required or obtained in the real estate closing by the consumer, the seller, or other party, the name of the person ultimately receiving the payment, and the total of all such itemized amounts that are designated borrower-paid at or before closing.

i. For any cost that is a component of title insurance services, the introductory description "Title —" shall appear at the beginning of the label for that actual cost.

ii. The parenthetical description "(optional)" shall appear at the end of the label for costs designated borrower-paid at or before closing for any premiums paid for separate insurance, warranty, guarantee, or event-coverage products.

## Disclosure of Seller-Credits

Further, the Rule is equally clear that, when a *credit* is given to the consumer [borrower] – be it Lender-credit, Seller-credit, or Other-credit – if the credit applies to a *specific* line item charge appearing on CD Page 2 [Loan Costs Table or Other Costs Table] the credit is to appear on that *specific* line, denoted as a "Seller paid At Closing", "Seller paid Before Closing", or "Other" charge, with the added caveat that, if a *specific* Lender-credit shown as an "Other" charge, the letter "L" may be added to differentiate it as a Lender-credit vs. a non-lender "Other" credit. [*See* §1026.3738(i)(7)-1] In contrast, if the credit is *not* tied to a specific charge, it would then be shown as a general [lump sum] credit on CD page 3.

§1026.38(j)(2)(v) Seller credits [Final Rule Pages 1858-1859]

1. *General seller credits.* When the consumer receives a generalized credit from the seller for closing costs or where the seller (typically a builder) is making an allowance to the consumer for items to purchase separately, the amount of the credit must be disclosed. *However, if the seller credit is attributable to a SPECIFIC "Loan Cost" or "Other Cost" listed in the Closing Cost Details tables*, pursuant to §1026.38(f) or (g), *that amount should be reflected in the seller-paid column in the Closing Cost Details tables* under §1026.38(f) or (g). [*emphasis added*]

2. *Other seller credits.* Any other obligations of the seller to be paid directly to the consumer, such as for issues identified at a walk-through of the property prior to closing, are disclosed under §1026.38(j)(2)(v).

§1026.38(j)(2)(vi) Credits from any party other than Seller or Creditor

1. *Credits from any party other than the seller or creditor.* Section 1026.38(j)(2)(vi) requires disclosure of a description and the amount of items paid by or on behalf of the consumer and not disclosed elsewhere under §1026.38(j)(2). For example, credits a consumer receives from a real estate agent or other third party, other than a seller or creditor, are disclosed pursuant to §1026.38(j)(2)(vi). *However, if the credit is attributable to a SPECIFIC closing cost listed in the Closing Cost Details tables* under §1026.38(f) or (g), *that amount should be reflected in the paid by others column on the*

> Closing Cost Details tables and not in the disclosure required under §1026.38(j)(2)(vi). Similarly, if a real estate agent rebates a portion of the agent's commission to the consumer, the rebate should be listed as a credit along with a description of the rebate, which must include the name of the party giving the credit.

## Catalyst for Confusion

*The primary catalyst for confusion stems from lack of indepth "meaningful" education on the TRID Rule*. Most mortgage lending personnel and title (settlement) agents did not attend indepth *nuts-and-bolts* TRID implementation courses. This is especially true of *front line personnel* [loan and settlement processors] who independently or collaboratively prepare Closing Disclosures. Instead, most relied on short webinars and multi-speaker seminars which, at best, skimmed the surface of the Rule and, at worst, were presented as loss-leaders for retailing industry-sponsored third-party services.

*There are no "easy answers" or "quick fixes" when it comes to the TRID Rule.* The Bureau, itself, struggled in its attempts to successfully integrate components of two independently-created Acts – TILA [1968] and RESPA [1974]. TILA was designed to promote the informed use of consumer credit by requiring disclosures about its terms and cost. RESPA was designed to help consumers become better shoppers for settlement services on federally-related mortgage loan transactions and to eliminate kickbacks and referral fees that unnecessarily increase the cost of certain settlement services.

*A prerequisite for properly preparing a Closing Disclosure is to understand not just "what" to put "where" – but the "why" of it all.* That's the hard part – because "why" takes *time* to understand. You can program a computer to put "what-where" without having to explain "why" because "why" does not matter. *But people are not computers.* While they may ask for or demand an *"easy answer"* or *"quick fix"* to a pressing problem, at the end of the day they remain frustrated if they cannot *understand the "why" of it all.* Short-cut responses do *not* promote long-term solutions. It's the educational equivalent of the adage: *"Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime."* Education matters. And *meaningful* education takes time. Those who wish to successfully [and safely] *implement* the TRID Rule must invest *time* in meaningful education. They must continue to ask *"why"* until their thirst for knowledge is sated – for knowledge is power.

*Learning a new "Language" is challenging*. While mortgage lenders are conversant in TILA and RESPA, most title (settlement) agents are only conversant in RESPA. For the most part, TILA – *that with which lenders, as creditors, must comply* – creates *confusion* for non-lenders, be they consumers, title (settlement) agents, or realtors. That the TRID Rule pulls primarily from TILA, with only a gentle nod in the direction of RESPA, creates a built-in barrier to understanding.

*Change is hard.* In truth, change is *not* hard. The difficulty or challenge is overcoming one's *resistance* toward change. Once you break through resistance, change is *easy* as you *"become one"* with it and use it to your advantage. By actively seeking knowledge; fearlessly engaging in trial and error; making mistakes and learning from them; and "mastering" change you adapt your psyche to the *change-process* – moving from fear and resistance to acceptance which flows from faith in your own abilities.

*Fear of retribution*. Here, "we" [mortgage lenders and title (settlement) agents] need a little help from our "friends" [the CFPB and fellow federal regulatory agencies]. By now the Bureau *must* realize that no matter what you say or put in print [*see excerpt from CFPB October 2, 2015 Press Release*] those within the industry simply do not *believe* you.

> "During initial examinations for compliance with the rule, the Bureau's examiners will evaluate an institution's compliance management system and overall efforts to come into compliance, recognizing the scope and scale of changes necessary for each supervised institution to achieve effective compliance. Examiners will expect supervised entities to make good faith efforts to comply with the rule's requirements in a timely manner. Specifically, examiners will consider: the institution's implementation plan, including actions taken to update policies, procedures, and processes; its training of appropriate staff; and, its handling of early technical problems or other implementation challenges."

Despite citing a similar approach taken in initial examinations for compliance with the mortgage rules that became effective in January 2014 [nearly two years ago], the industry seems more focused on the *"education-through-enforcement"* approach the Bureau has *recently* taken regarding RESPA violations. To the industry at large it *feels* like a *"take no prisoners"* approach, which places the CFPB and the industry on what is *perceived* as opposite sides of the same problem. *I believe we are all on the same side of the problem, but just don't know it because everyone seems to be speaking a different language.*

## Consumer Clarity on Title Insurance

Before delving into the TRID Rule, let's pause and look at the following excerpts from *Your home loan toolkit* guide as well as the *"ask CFPB"* information posted on the Bureau's website regarding *title insurance:*

Title insurance [Your home loan toolkit]
When you purchase your home, you receive a document most often called a deed, which shows the seller transferred their legal ownership, or "title," to the home to you. Title insurance can provide protection if someone later sues and says they have a claim against the home. Common claims come from a previous owner's failure to pay taxes or from contractors who say they were not paid for work done on the home before you purchased it.

Most lenders require a Lender's Title Insurance policy, which protects the amount they lent. *You may want to buy an Owner's Title Insurance policy, which protects your financial investment in the home.* The Loan Estimate you receive lists the Owner's Title Insurance policy as optional if your lender does not require the policy as a condition of the loan.

Depending on the state where you are buying your home, your title insurance company may give you an itemized list of fees at closing. This itemized list may be required under state law and may be different from what you see on your Loan Estimate or Closing Disclosure. That does not mean you are being charged more. *If you add up all the title-related costs your title insurance company gives you, it should match the totals of all the title-related costs you see on your Loan Estimate or Closing Disclosure. When comparing costs for title insurance, make sure to compare the bottom line tota*l.

What is lender's title insurance? [Updated 10/23/2015]
Lender's title insurance is usually required to get a mortgage loan. Lender's title insurance protects your lender against problems with the title to your property—for example, if someone sues to say they have a claim against the home. Lender's title insurance does not protect your investment in the home (your equity). If someone sues with a claim against your home, you are the first person responsible. The lender's title insurance policy only covers claims that impact the lender's loan. To protect your equity in the event of a title problem, *you may want to purchase an owner's title insurance policy*.

What is owner's title insurance? [Updated 10/26/2015]
When you purchase your home, you receive a document most often called a deed, which shows the seller transferred their legal ownership, or "title" to their home, to you. Title insurance can provide protection if someone later sues and says they have a claim against the home from before you purchased it. Common claims come from a previous owner's failure to pay taxes or from contractors who say they were not paid for work done on the home before you purchased it. *Most lenders require you to purchase a lender's title insurance policy*, which protects the amount they lend. *You may want to buy an owner's title insurance policy*, which can help protect your financial investment in the home.

*You can usually shop for your title insurance provider separately from your mortgage. If you shop for title insurance, you may be able to save money*. *If you choose to buy owner's title insurance*, the total cost will usually be lower if you use the same provider for both the lender's policy and the owner's policy, compared to buying them separately. Depending on the state where you are buying your home, your title insurance company may give you an itemized list of fees at closing, which may be different than what is shown on your Loan Estimate or Closing Disclosure. This does not necessarily mean you are being charged more. Learn more about title insurance.

*Why is the title insurance premium on the Loan Estimate and Closing Disclosure different from the premium listed on the paperwork I received from the title insurance company? Am I being charged more?* [Updated 10/2/2015]

*You're not necessarily being charged more* if the amounts on your loan forms are different from your title insurance paperwork. Depending on the state where you are buying your home, your title insurance company may give you an itemized list of fees at closing. The itemized list of fees required under state law may be displayed differently than the same fees on the Loan Estimate or on the Closing Disclosure. That does not necessarily mean you are being charged more. *If you add up all the title-related costs your title insurance company gives you, it should match the totals of all the title-related costs you see on the Loan Estimate or on the Closing Disclosure. When comparing costs for title insurance, make sure to compare the bottom line total.*

## Buyer/Borrower vs. Seller-Paid OP Premium

Who pays title premium – Owner's Policy [OP] premium and Loan Policy [LP] premium – is a matter determined primarily through contract negotiation between buyers and sellers or [occasionally] addressed by state law. While *jurisdictional custom* [which may be state, county or local custom regarding *"who pays what"* costs and fees] plays a part – to the extent that some Board/BAR Contracts include preprinted language *re* same – preprinted contract clauses and jurisdictional customs can be altered with the stroke of a pen or via contract addenda. Industry professionals – realtors, lenders, loan originators, and title (settlement) agents – are particularly prone to telling uninformed sellers, buyers, and borrowers that certain costs, fees, and transaction "steps" are set in stone. They are not. *Whether we are dealing with buyers and sellers on purchase/sale transactions or borrowers on new loans or refinance transactions, those directly involved in such transactions do have choices.*

Historically, buyer/borrowers and sellers had limited contact with title (settlement) agents prior to the closing. As such – and as the 2007 GAO Report states: *"Consumers find it difficult to comparison shop for title insurance because it is an unfamiliar and small part of a larger transaction that most consumers do not want to disrupt or delay for comparatively small potential savings. In addition, because consumers generally do not pick their title agent or insurer, title agents do not market to them but to the real estate and mortgage professionals who generally make the decision. This can create conflicts of interest if those making the referrals have a financial interest in the agent. These and other factors put consumers in a potentially vulnerable situation where, to a great extent, they have little or no influence over the price of title insurance but have little choice but to purchase it."*

To that end, the Bureau is to be commended for informing consumers [borrowers] that they can *"usually shop for your title insurance provider separately from your mortgage."* As the *home loan toolkit* – like the TRID Rule – is focused squarely on the mortgage loan, it is not surprising that terms such as "purchase", "seller" and "contract" are primarily limited to information related to title insurance. However, as new home loans outpace refinance loans by nearly 2-to-1 – and since the Title Insurance section of the *toolkit* and Bureau website information addresses both OP and LP coverage – it seems a perfect opportunity to emphasize consumers' right to choose providers and address, with greater clarity, the fact that in many, if not most, purchase/sale/finance transactions, sellers pay OP premium while buyer/borrowers pay LP [or SI-LP] premium.

If we are to believe the GAO Report that *real estate and mortgage professionals* generally make the decision regarding title agent or insurer – and history has proven this to be the case – it would seem of great benefit to *borrowers who are also buyers* to accurately inform them that "who pays" is generally a matter of negotiation between buyer and seller. *I fully understand that the Bureau may not want to "go there" since information relating to anything beyond creditor, borrower, and credit transaction is generally outside of the Bureau's purview; however, if you are open to considering a slight "revision" to the information cited hereinabove, we would be happy to assist.*

While references to *adding up all title-related costs* and *comparing totals*, can be helpful information for borrowers who pay *both* OP and LP premium, the math falls apart [*at least on paper*] on transactions with Seller-paid OP and Buyer-paid LP. Much of this letter provides Rule citations and Official Interpretations for title insurance premium disclosure under the TRID Rule and, also, the proper [*Rule-compliant*] manner in which to disclose seller credits for specific items, such as title insurance premium.

***Note:*** *It was only after addressing title premium and seller credits that I chose to expand the letter to other TRID Rule issues that continue to be matters of concern for lenders, title (settlement) agents, and realtors – and send copies of the letter to all State Insurance Regulators as well – to keep them apprised of the ongoing problems impacting title agents which, left untended, may result in unwarranted consumer complaints and/or UDAP allegations. It is genuinely my intention to bring matters to light that, if addressed properly, will result in successful [for consumers] and safe [for industry providers] implementation of the TRID Rule.*

# TRID Rule – From Confusion to Clarity

*Actions speak louder than words*. Government and industry must start speaking the same language in order to effectively solve problems, such as those set forth above.

*Again, the TRID Rule is actually quite clear on disclosure of title premium and seller credits.* You just need to know where to *look* for the answers. Let's explore this further to gain understanding of the larger underlying issue. Much of the confusion for title (settlement) agents revolves around treatment of title insurance under the Rule. As the Bureau is aware, industry professionals are deeply concerned regarding *disclosing* title insurance premium in amounts other than *actual* [filed/ published/promulgated] rates. The Bureau cited that commentary raised by title insurance professionals and others *"related to State law prohibitions and regulation of insurance are inapposite in a situation where the party providing the Loan Estimate, the creditor, is not subject to the legal requirements of State insurance laws."* Similarly, since creditors are responsible and liable for preparation and delivery of the Closing Disclosure, the same *"inapposite"* perspective carries over from "early" disclosure to "final" disclosure. *Therein lies the frustration for title (settlement) agents and, secondarily, for mortgage lenders.*

## The "Why" Factor of Frustration Regarding Disclosure of Title Premium and Seller-Credits

Looking back for a point of beginning [*the "why" factor*], the November 2008 RESPA Final Rule moved the industry from *actual* fees disclosed on *individual* HUD-1 lines – which, from an industry perspective, provided *full transparency* of costs and fees in a *"line for every item and every item on its own line"* fashion – to a *"lump and dump"* format established by HUD in an effort to curtail *"fee proliferation"* of mortgage and title/settlement costs and fees. In 2009, the Director of Enforcement stated that *"HUD no longer wants to see fee proliferation."* This resulted in a double roll-up of fees – administrative/processing fees rolled into a single fee which was further rolled into a single *"loan origination"* or *"title services"* fee. The two main *"lump and dump"* HUD-1 entries were Lines 801 and 1101. As to the latter, HUD-1 Page 2, Line 1101 included both *title services* fees and *LP Premium*.

Regarding *seller-credits,* anything disclosed on the Good Faith Estimate [GFE] was required to be charged to the buyer/borrower on HUD-1 Page 2, even if the contract showed it as seller-paid. *This included seller-paid OP premium*. Once charged to the buyer/borrower, the amounts that were to be seller-paid were added up and disclosed as a lump sum [general] seller-credit on HUD-1 Page 1.

Regarding *title insurance premium*, title (settlement) agents quoted *actual* owners policy [OP] and loan policy [LP] premium. As to the latter, this included *accurately* quoting simultaneous-issue loan policy [SI-LP] premium, where applicable. The November 2008 RESPA Final Rule required that on all purchase/sale/finance transactions, the OP premium be disclosed in GFE Box 5 even if the lender had knowledge that the contract showed OP premium as seller-paid – just as the RESPA Rule required that anything shown on the GFE be carried forward and disclosed as a buyer/borrower charge on the HUD-1.

This was also the first time *tolerances* were introduced into the equation, which caused lenders to become concerned that if they disclosed *actual* [filed/published/promulgated] OP and SI-LP premium *accurately* on the GFE – and the buyer/borrower opted out of obtaining owner's title coverage – that they [as creditors] would be "out-of-tolerance" and end up having to refund overages to buyer/borrowers. *Although not factually correct, the "fear factor" resulted in lenders choosing one of three GFE to HUD-1 paths: (1) disclose actual OP and SI-LP premium as quoted by title (settlement) agents; (2) up-end [reverse] the OP and SI-LP fees; or (3) add the OP and SI-LP together, divide by 2 and show half in GFE Box 4 [title services and LP premium] and half in GFE Box 5 [OP premium].*

Despite some industry concern from title (settlement) agents regarding the manner in which some lenders disclosed OP and LP premium on the GFE, the concern was *offset* by the fact that the disclosure problem could be "cured" on the HUD-1 which was prepared by title (settlement) agents. *The "cure" began by disclosing actual OP and SI-LP premium on HUD-1 Page 2 and ended [on Seller-paid OP transactions] with a general Seller-credit disclosed on HUD-1 Page 1.*

*Why should we care about the past? We should care because what lenders and title (settlement) agents were taught by the November 2008 RESPA Final Rule is the same knowledge brought forward to the November 2013 TRID Rule – and is the same [2008-2010] knowledge many lenders and title (settlement) agents are attempting to apply to the [2013-2015] TRID Rule. Many, if not most, do not understand how fully the TRID Rule changes things, because they are not reading the "fine print" of the Rule.*

*A large part of the problem is that title (settlement) agents are no longer in charge of the "final" disclosure*. The TRID Rule is fundamentally a "Lender-choice" Rule. Lenders [creditors] are responsible and liable for determining whether they will prepare and deliver the Closing Disclosure to the consumer [borrower] or outsource preparation and/or delivery to title (settlement) agents [as service providers]. Primarily due to liability issues, most, but not all, lenders are choosing to prepare and deliver the 5-page CD to the consumer [borrower] directly. As such, *control* of the "final" disclosure has been wrested from title (settlement) agents who now function in a "one-down" position in service to the lenders. And, since, as the CFPB states in the TRID Rule [Page 859] – *"creditors [are] not subject to the legal requirements of State insurance laws"* – it should come as no surprise that *lenders* have little or no interest in whether *actual* premium is properly quoted, charged, and collected in compliance with State insurance laws. They have *"no skin"* in that particular State-regulated game.

> *But title (settlement) agents DO have a stake in the game. Not only must they comply with the Federal TRID Rule, they must also comply with State Insurance Regulations.* To *not* comply with State insurance regulations carries with it a high probability of consumer complaints including UDAP [State] or UDAAP [Federal] allegations. Even the CFPB admits that consumers may become confused, citing that *"the creditor can communicate to those consumers who are confused that the total amount of the title insurance premiums shown on the Loan Estimate are the same as the total amount of the title insurance premiums calculated under State law or common practice that are disclosed or advertised by title underwriters and title agents."* [Final Rule Page 860] With the CFPB closely monitoring *consumer complaints*, this is an added worry thrust upon title (settlement) agents, over which they have little or no control.

As stated hereinabove, most lenders are choosing to prepare and deliver the 5-page CD to the consumer [borrower] directly. In turn, they look to title (settlement) agents for accurate title/settlement costs and fees [e.g., OP and LP premium; title search and examination fees; settlement (closing) fees] for purposes of preparing both "early" [LE] and "final" [CD] disclosures. In addition, most also require that title (settlement) agents "hunt and gather" the balance of non-loan third-party costs and fees which they in turn use to "populate" the 5-page CD. *At the end of this letter we will address the "pass-through" or "trickle-down" liability clauses popping up in many lenders' loan closing instructions.*

The *result* of lender-prepared CDs is that title (settlement) agents who have a *significant* amount of skin in the game are left with little or no control with which to protect *themselves* – while first and foremost protecting consumers [buyer/borrowers *and* sellers] by ensuring that both parties [as applicable to Seller-paid OP and Buyer-paid SI-LP purchase/sale/finance transactions] pay *actual* [filed/published/promulgated] OP and SI-LP premium as regulated by State insurance laws.

## Title Premium and Seller Credit Examples

*They say a picture is worth a thousand words.* Let's hope *math* holds the same power! For all examples provided hereinbelow, we assume the following SAMPLE information:

1. Assume a Seller-paid OP and Buyer/Borrower-paid LP purchase/sale/finance transaction.
2. Assume the following *actual* [filed/published/promulgated] title premium per State-regulated rate classification:

   $1,000 Full OP Premium [Full OP]
   $ 650 Reissue OP Premium [Reissue OP] – *We will use this to illustrate the "negative" number creating concern*
   $ 800 Full LP Premium [Full LP]
   $ 100 Simultaneous-Issue LP Premium [SI-LP]

3. Assume compliance with §1026.37(g)(4)-2 regarding OP and LP calculations for TRID disclosure purposes.
4. Assume compliance with *specific* "Seller-credit" method required under §1026.38(j)(2)(v)-1.
5. Assume Consumer did shop for title insurance, placing LP charges in CD Page 2, Loan Costs Table, Section C.
6. Assume our united goal is to comply with *both* Federal TRID Rule *and* State Insurance Regulations.

Four EXAMPLES appear on the following page. The boxes to the LEFT are TRID Rule disclosures. Example #1 is TRID Compliant but not compliant with State Insurance Regulations. Example #3 is neither TRID compliant nor compliant with State Insurance Regulations. Examples #2 and #4 include adjustments in Borrower and Seller charge columns to make them TRID compliant and compliant with State Insurance Regulations. The boxes to the RIGHT reflect actual [filed/published/promulgated] rates based on applicable [SAMPLE] rate classifications.

Example #1

While the combined LP + OP premiums in both boxes total $1,100.00 if we left it this way, the Borrower would *overpay* $700 and the Seller would *underpay* $700 and while the CD disclosures are TRID-compliant [using TRID math], the charges as disclosed are in violation of State Insurance Regulations. Title insurance premium is filed, published, or promulgated in rate classifications and, once filed, published, or promulgated, must generally be quoted, charged and collected per such rate classifications.

| C. Services Borrower Did Shop For | Borrower | Seller |
|---|---|---|
| TITLE – Loan Policy Premium | $800 | |
| H. Other | Borrower | Seller |
| TITLE – Owner's Policy Premium | | $300 |

| Actual Charges | Borrower-Paid | Seller-Paid |
|---|---|---|
| SI-LP Premium | $100 | |
| Actual Charges | Borrower-Paid | Seller-Paid |
| Full OP Premium | | $1,000 |

Example #2

Compare the LEFT box from Examples #1 and #2. The adjustments made in Example #2 are fully compliant with both the TRID Rule disclosure requirements and compliant with State Insurance Regulations.

| C. Services Borrower Did Shop For | Borrower | Seller |
|---|---|---|
| TITLE – Loan Policy Premium [$800] | $100 | $700 |
| H. Other | Borrower | Seller |
| TITLE – Owner's Policy Premium [$300] | | $300 |

| Actual Charges | Borrower-Paid | Seller-Paid |
|---|---|---|
| SI-LP Premium | $100 | |
| Actual Charges | Borrower-Paid | Seller-Paid |
| Full OP Premium | | $1,000 |

Example #3

This is our "Reissue OP" Example where we end up with a negative number [$650 + $100 - $800 = -50] even though our combined LP + OP premiums in both Boxes total $750. We are neither TRID Rule nor State Insurance Regulations compliant, because the TRID Rule requires that we use Full OP [$1000] rather than the lower Reissue OP [$650] in our calculation.

| C. Services Borrower Did Shop For | Borrower | Seller |
|---|---|---|
| TITLE – Loan Policy Premium | $800 | |
| H. Other | Borrower | Seller |
| TITLE – Owner's Policy Premium | | –50 |

| Actual Charges | Borrower-Paid | Seller-Paid |
|---|---|---|
| SI-LP Premium | $100 | |
| Actual Charges | Borrower-Paid | Seller-Paid |
| REISSUE OP Premium | | $650 |

Example #4

Compare the LEFT box from Examples #3 and #4. The adjustments made in Example #4 are fully compliant with both the TRID Rule disclosure requirements and compliant with State Insurance Regulations.

| C. Services Borrower Did Shop For | Borrower | Seller |
|---|---|---|
| TITLE – Loan Policy Premium [$800] | $100 | $700 |
| H. Other | Borrower | Seller |
| TITLE – Owner's Policy Premium [$300] | | –50 |

| Actual Charges | Borrower-Paid | Seller-Paid |
|---|---|---|
| SI-LP Premium | $100 | |
| Actual Charges | Borrower-Paid | Seller-Paid |
| Full OP Premium | | $650 |

*Although Example #4 still reflects a negative charge in the Seller column, the TRID disclosed amounts of $800 and $300 comply with TRID Rule calculations AND the Borrower AND Seller column charges comply with State Insurance Regulations – e.g., the Seller ends up paying $650 Reissue OP and the Buyer/Borrower pays $100 SI-LP. As a reminder, the TRID Rule requires that if credits are given for specific items appearing on CD Page 2 Loan Costs Table and Other Costs Table such credits must be shown in the appropriate charge columns. Remember, also, that actual [filed/published/ promulgated] title premium must be charged in compliance with State Insurance Regulations. Finally, we must also close in compliance with the "who pays what" clauses of the purchase/sale contract.*

## "TRID-Adjacent" Title Premium Issues Impacting Title (Settlement) Agents

Regarding the difference between TRID *disclosed* OP and LP premium and *actual* [filed/published/promulgated] premium per State-regulated rate classifications, there will continue to be a "disconnect" because "Federal" requires one thing while "State" requires another. Regardless of TRID *disclosed* premium requirements, at the end of the day Buyer/Borrowers and Sellers must pay *actual* premium in accordance with State insurance regulations *and* in accordance with the *"who pays what"* clauses in the purchase/sale contract.

In the EXAMPLES set forth on the preceding page we "assumed" a transaction in which the purchase/sale contract called for Seller-paid OP premium and Buyer/Borrower-paid LP premium. In *some* transactions, the Buyer/Borrower may pay *both* OP and LP premium. When the latter occurs – *and assuming the Buyer/Borrower wants the "optional" OP coverage* – the TRID Rule calculations arrive at *total* LP + OP premium that, when added together is the exact same amount of *actual* LP + OP premium. However, for title (settlement) agents, there remains a "disclosure disconnect" per rate-classification which could be deemed a violation of State Insurance Regulations relating to *reporting* of title premium in accordance with appropriate rate classifications.

In Example #1, although $800 [Full LP] + $300 [TRID math OP] = $1,100 AND $100 [SI-LP] + $1,000 [Full OP] = $1,100 [the latter being our Sample *actual* premiums for the two rate classifications] – it is possible that title agents in *some* States could experience a "reporting" violation because TRID disclosed premium for the two policies [OP and LP] is not in compliance with actual premium for each rate classification. *Let me quickly add that in filed/published rate States, I do not foresee this as being as problematic as it might be in the three promulgated-rate States [Florida, New Mexico, and Texas]. However, it is always "best" to fully comply with Federal and State law in this type of situation.*

> *A copy of this letter was forwarded to all State Insurance Commissioners to apprise them of ongoing "TRID-adjacent" issues impacting Title (Settlement) Agents. This follows the March 2015 letter to all State Governors, Insurance Commissioners, and Attorneys General and my subsequent appearance before the NAIC Title Insurance Task Force where I was asked to introduce the topics of concern relating to the TRID Rule. The earlier letter is available for review at www.KooglerGroup.com. My purpose in keeping State Regulators involved is to protect title (settlement) agents and title insurers from unwarranted consumer complaints regarding the "disconnect" between disclosed and actual premium.*

## Negative Numbers and Negative Charges

Regarding *negative numbers* appearing in CD Page 2 charge columns [see Example #4], nothing in the Rule prohibits disclosing a negative number. Most references to *negative numbers* in the Rule address Seller/Borrower debit/credits appearing on CD Page 3. However, whether a Seller credit is disclosed on CD Page 3 as a *general* [lump sum] credit or adjustment, or disclosed on CD Page 2 as a *specific* credit – *any* credit given by the Seller to the Borrower is referenced in the Rule as a *negative charge* to the Borrower. Referencing our earlier title premium examples, if CD Page 2 discloses $800 as LP Premium, but the Borrower is only contractually obligated to pay *actual* SI-LP of $100, the Rule-compliant method is to *disclose* $800 [full LP] but *charge* the Borrower $100 in the "Borrower paid At Closing" column and *charge* the Seller $700 on the same line item, in the "Seller paid At Closing" column. *Under the Rule, the $700 charge to the Seller is deemed a negative charge [credit] to the Borrower.*

As to *negative charges,* Page 1702 of the Final Rule states that *"Specific Lender credits are specific payments, such as a credit, rebate, or reimbursement, from a Creditor to the Consumer to pay for a specific fee. Non-specific Lender credits and specific Lender credits are negative charges to the Consumer."* Since the issue of where *specific* credits [be they Seller, Lender, or Other credits] are to be disclosed – on CD Page 2, Loan Costs Table or Other Costs Table – it stands to reason that Rule requirements for specific *Lender* credits also apply to specific *Seller* credits. So, to paraphrase the Rule, *"Specific Seller credits are specific payments, such as a credit, rebate, or reimbursement, from the Seller to the Buyer/Borrower to pay for a specific fee. Non-specific and specific seller credits are negative charges to the Buyer/Borrower."*

Again, *nothing in the Rule prohibits disclosing a negative number*. Every credit given by the lender, seller, or "other" party to the consumer [borrower] is deemed to be a *negative charge* to the consumer and when shown, acts as a *negative number* by the fact that it is *subtracted* from the total amount owed by the consumer [borrower]. Wrapping it up, although Example #4 shows a *negative* fifty dollars ["-50"] in the Seller's charge column for the OP Premium [Section H], when that amount is deducted from the $700 shown in the Seller's charge column [Section C] for the LP Premium, the resultant *actual* amount paid by the Seller is $650 which is in compliance with the *actual* reissue OP Premium.

Before leaving this subject, let's address *reissue* premium from a State-regulatory position. It is unlikely that a transaction would involve *both* a lowered reissue OP *and* a lowered simultaneous-issue LP – meaning it is unlikely that we would encounter a *"negative number"* situation such as that set forth in Example #4. Instead, it would be more common to find regulatory language regarding *simultaneous-issue* transactions where OP and LP policies covering identical land are issued simultaneously, stating that the premium for the OP *"shall be the original Owner's Rate"* while the premium for the SI-LP *"shall be $"X" for the amount of insurance not in excess of the OP."* In this case the SI-LP premium referenced as $"X" is based on *actual* [filed/published/promulgated] premium which, in most states falls somewhere between $10 and $100. Consequently, we would end up ditching Example #4 for Example #2, the latter in compliance with *both* TRID Rule *and* State Insurance Regulations.

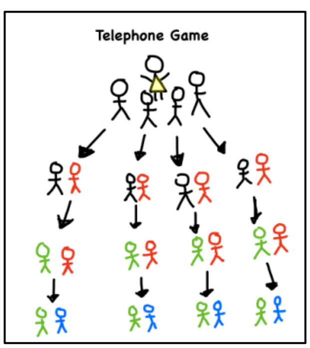
## Confusion flowing from CFPB Webinar on Seller-Paid OP Premium

Part of the Bureau's March 26, 2015 Webinar addressed the following question: *"If the Owner's title policy disclosed on the Closing Disclosure is not the same amount of the premium quoted by the title underwriter, how does a creditor show that a seller has agreed to pay for the owner's title insurance?"*

Although the Bureau spokesperson provided three possible approaches for handling the situation, only *one* came close to complying with the TRID Rule *and* with State Insurance Regulations. The approach that came close to full compliance was that *"the remaining credit could be applied toward any other title insurance costs including the lender's title insurance cost."*

As set forth hereinabove, the TRID Rule is quite *specific* that credits – be they Seller, Lender, or Other credits – for *specific* items be disclosed on Closing Disclosure Page 2 and charged in the appropriate charge column. *This includes Seller-credit for owner's title insurance which should be disclosed on CD Page 2, Other Costs Table, Section H (Other).*

Confusion arises when Bureau personnel, in an attempt to be helpful, provide suggestions that are not specifically supported by the Rule and its Official Interpretations. *Such was the case in the March 2015 Webinar.* Our TRID students received a detailed *Education Matters: TRID E-News Report* that transcribed the Seller-paid OP portion of the Webinar and then worked through each suggestion made by the CFPB spokesperson, proving that only *one* suggestion came close to being in full compliance with the Rule and its Official Interpretations. Unfortunately, there are tens of thousands of mortgage and title professionals who did *not* attend in-depth "nuts and bolts" TRID Rule implementation training who listen to Bureau- and/or industry-sponsored webinars and *assume* what they hear – *or "think they heard"* – is chapter-and-verse of the TRID Rule. They either forget or are not aware of the Bureau disclaimer that *"only the Rule and its Official Interpretations can provide complete and definitive information regarding requirements"* and the accompanying warning that information presented by Bureau personnel *"does not represent legal interpretation, guidance or advice of the Bureau…and is not a substitute for the Rule."*




*This is akin to playing the "Telephone Game" where the message received by the last person is never the same message as that communicated by the first person. While certainly fun for everyone as a parlor game, the results can be dire when applied to miscommunicating TRID Rule requirements. This occurred with some of our TRID students who – in an attempt to shorten long TRID answers [with Rule and Official Interpretation citations] – paraphrased lengthy replies "in their own words" and, in so doing, completely miscommunicated important TRID Rule information to others. That is why we require all TRID questions be submitted in writing and respond to them in writing with a warning not to paraphrase the information but, rather, forward the written Q+A in its entirety.*

As stated earlier, there are no *"easy answers"* or *"quick fixes"* when it comes to the TRID Rule. Much of the struggle and subsequent confusion comes from those who impatiently *demand* easy answers and quick fixes. We are often asked to present full-day 8-hour educational programs, like the TRID Rule Program, as a half-day session or one-hour Webinar. As I tell students, if I could safely and sufficiently teach them everything they need to know about TRID in one hour, I would be *thrilled* to do so. It simply cannot be done. Even with a full-day 8-hour Program, we still only have time to touch lightly on certain subjects. That is why all TRID students receive a copy of the 300-page TRID Study Manual *and* all subsequent *Education Matters: TRID E-News Bulletins*, *and* are encouraged to email us any TRID-specific questions that arise during actual Rule implementation.

## Other "TRID-Adjacent" Issues Worth Mentioning

Provided you have not yet fallen asleep, let's address a few other "TRID-adjacent" issues impacting mortgage lending personnel, title (settlement) agents, realtors, and others. *In the spirit helping the Bureau help others properly understand and implement the TRID Rule, if you would like detailed educational information regarding the following issues – or other issues of concern – please email your questions to KarenKooger@KooglerGroup.com and I will be happy to respond to you in writing.* We continue to provide State Regulators free training on issues relating to the title insurance (settlement services) industry and are pleased to offer the same support to CFPB personnel. An example of unfettered *regulatory-education-industry collaboration* occurred during implementation of the 2008 RESPA Final Rule. The Koogler Group worked closely with HUD personnel, including providing HUD copies of the RESPA Final Rule Study Manual, comparing answers to FAQs received by HUD and, separately, by our office, and ensuring Rule clarifications provided by HUD were immediately email-blasted to over 6,000 lenders and title (settlement) agents who completed our full-day RESPA Final Rule Program. We remain hopeful that we can achieve the same level of collaboration with CFPB personnel.

## Privacy Issues and the 5-Page Closing Disclosure

Privacy issues relating to the 5-page Closing Disclosure is a leading cause of concern and confusion for many industry professionals – even more so than title insurance premium and where to place Seller-credits. Lenders and title (settlement) agents are "all over the map" as to what information will be populated on the 5-page CD, whether a separate 2-page Seller CD is required, whether a separate "third form" settlement statement is needed, and "who" is entitled to get copies of "what".

*We must look back, prior to October 3, 2015, at the bifurcated HUD-1 and Final TIL disclosures to gain perspective of this issue.* In *most* purchase/sale/finance transactions settlement agents would fully populate the HUD-1 settlement statement, showing both Borrower and Seller figures. Copies of the *signed and certified* HUD-1 were distributed to all parties including borrower, seller, lender, settlement agent, and realtors. The only time HUD-1 borrower/seller information was bifurcated was if State privacy laws required same or if one or both parties requested same. As for the Final TIL, once the settlement agent reviewed the TIL with the borrower and obtained borrower signature [where required] the borrower received a copy of the TIL, the settlement agent retained a copy in file with copies of the full transmittal file to the lender, and the lender received the original signed TIL. *It would have been inappropriate to distribute copies of the Final TIL to the seller or to realtors as such information is non-public in nature, pertaining to the borrower's loan terms and conditions.*

*Therein lies the problem with the 5-page Closing Disclosure.* The Dodd-Frank Act [DFA Page 1984] ordered that the CFPB *"publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of [RESPA and TILA] …with the purpose to facilitate compliance…and to aid the borrower in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures."* It is important that *industry professionals* understand that the CFPB acted in compliance with its DFA marching orders, as many still believe the CFPB came up with the integration idea on its own. *Not so!*

However, it is highly unlikely that anyone from Congress stopped to consider *why* the two forms [HUD-1 and Final TIL] existed as separate documents in the first place. Nor is it likely that anyone inquired as to the *sensitive nature* of the information contained in the TIL and what would happen if such information was *integrated* into a single Closing Disclosure form with the "early" intent [at point of initial form creation] of disseminating the fully-populated disclosure to both parties [Borrower *and* Seller] and, by extension, to others including realtors.

Regardless of the "who-what-when-where-why" of Congressional decision-making, TRID Rule Page 1223 states that *"regarding the concern that Form H-25 [5-page CD] illustrates both consumer and seller information on the same disclosure, causing confidentiality and privacy concerns, the Bureau observes that [the Proposed Rule] permitted creditors to disclose consumer [borrower] and seller information on separate disclosures, and permitted a version of the Closing Disclosure that contained only information that pertained to the seller. These provisions are adopted as proposed, renumbered as § 1026.38(t)(5)(v) and (vi)."*

Just as it is important for the *industry* to understand why the CFPB created a 5-page CD and a separate 2-page Seller CD – it is equally important that the *Bureau* understand what makes this so *frustrating* for industry professionals. Initially, the 5-page CD like anything else new, was resisted by the industry. Upon further inspection of CD Page 2, lenders and settlement agents realized that they could soon put the November 2008 RESPA Final Rule "lump and dump" bundled fees era behind them and begin *itemizing* charges which pretty much everyone agrees provides greater transparency. *Good job CFPB!* Next they looked at the five charge columns in awestruck wonder at the *additional transparency* provided, where specific itemized charges could be paid by two or more parties, all disclosed on the same specific line item. *Even better!* Slowly, industry professionals began climbing on board the TRID Train headed toward Transparency Station.

Yet even before the October 3, 2015 TRID Rule "departure" date, lenders and settlement agents started hopping off the TRID Train in droves, pointing to the TIL and related loan information on CD Pages 1, 4, and 5 in worried wonder as to the sensitive nature of such information and corresponding federal and/or state privacy and safeguards issues. *As more and more lenders back away from fully populating the 5-page CD, requiring that settlement agents prepare a separate 2-page Seller CD – which in turn seems to necessitate an industry-created "third form" settlement statement" to "integrate" RESPA costs and fees information so as to support proper escrow administration – the frustration flows from the fact that, during workshops leading up to the Proposed Rule and via industry commentary regarding the Proposed Rule, lenders and settlement agents, among others, pointed to this very issue and suggested strongly that the CFPB not integrate TIL and HUD-1 information due to the sensitive nature of TIL information and the related privacy and safeguards concerns re same. The frustration flows from the Bureau dismissing such concerns by stating that "bifurcated" forms [here, relating to Final TIL and HUD-1 disclosures] are too confusing for consumers and, as such, the information must be integrated into a single form – only to end up with bifurcated Borrower/Seller Closing Disclosures that necessitate a "third form" settlement statement to support proper escrow administration.*

While this could well be a *"we told you so"* shout-out from Industry to Bureau, we return, round-robin to the fact that the Dodd-Frank Act *ordered* that the CFPB create an integrated form. From the Bureau's perspective, there is only *one form* for *consumers* who are defined as *borrowers*. Under the TRID Rule, consumers [borrowers] receive one *"early"* disclosure [Loan Estimate] and one *"final"* disclosure [Closing Disclosure] both of which integrate TILA [loan terms] and RESPA [costs and fees] information. In that respect, the CFPB fulfilled its obligations under the Dodd-Frank Act pertaining to integrated disclosures.

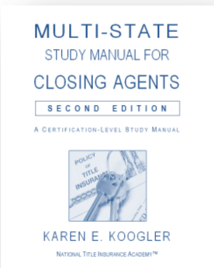
Transitioning from *Regulatory World* to *Real World*, we find that the majority of mortgage loan finance transactions are part of larger purchase/sale/finance transactions. *In October 2015, new purchase mortgage originations [1,035,800] were nearly double that of refinance originations [557,500]. This trend is expected to continue for the foreseeable future.* This further adds to *title (settlement) agents' frustration* in trying to simplify purchase/sale/finance transactions for *both* buyer/borrowers and sellers – especially when lenders' focus is solely on the consumer [borrower] as one would expect it to be. In turn, *lender frustration* has increased due to lender-liability issues involving *content, timing, and delivery* of the 3-page Loan Estimate and 5-Page Closing Disclosure to consumers [borrowers] as well as *privacy and safeguards* issues relating to same.

Such lender-liability issues have resulted, as noted hereinabove, in *most* [but not all] lenders choosing to directly prepare and deliver the 5-page CD [for lender-liability arising from content, timing, and delivery] – and *most* [but not all] lenders choosing to populate the 5-page CD with consumer-only [borrower] figures [for lender-liability arising from privacy and safeguards issues]. As to the latter concern [privacy and safeguards issues] *most* [but not all] lenders reportedly prohibit distribution of the 5-page CD to anyone other than the consumer [borrower] – directing that settlement agents prepare the 2-page Seller CD and deliver same to the seller at time of closing, with a copy to the lender. This directive flows from Final Rule Page 1392 which states that *"when the consumer's and seller's disclosures are provided on separate documents, the settlement agent shall provide to the creditor (if the creditor is not the settlement agent) a copy of the disclosures provided to the seller."*


*It should come as no surprise that independent small and midsize title (settlement) agents are concerned that lenders – in light of the TRID Rule coupled with CFPB Bulletin 2012-03 – may choose to take the settlement process in-house via lender-owned, lender-affiliated, or lender-preferred-partner providers, as the Bureau suggested might happen during workshops leading up to the TRID Proposed Rule. The Final Rule reinforces – in the language set forth above – that some lenders may be settlement agents. This is not a comforting thought for title (settlement) agents – nor should it be a comforting thought for consumer protection. It is possible if not probable that some national lenders may "partner" with "preferred" national title insurers – especially insurers that maintain large direct operations and vendor management services footprints. As such, it would behoove the CFPB to actively monitor such arrangements for RESPA violations, as history [incentives and inducements] will surely repeat itself.*

Regarding privacy and safeguards issues, additional concern and confusion arises regarding distribution of the 5-page CD to sellers and realtors. As noted hereinabove, *most* [but not all] lenders reportedly prohibit distribution of the 5-page CD to anyone other than the consumer [borrower] which is reasonable under the circumstances. This however, has led to questions relating to distribution of the 2-page Seller CD and questions relating to whose decision it is as to *"who gets copies of what."*

As a *pro-consumer, pro-compliance,* and *pro-industry* educator, I tend to approach compliance issues from a *very conservative* perspective. In light of lenders' renewed attempts – *via written loan closing instructions* – to transfer lender-liability to settlement agents for lender-compliance issues flowing from state and federal consumer financial protection laws, I encourage settlement agents to err on the side of caution by obtaining *written lender permission* to offset *written lender prohibition*. Lenders have attempted to transfer lender-liability to settlement agents for decades. Standard/Master loan closing instructions have long maintained that settlement agents are liable for notifying lenders in the event that anything contained in lender-prepared loan documents or lender-prepared loan closing instructions is in error or violates applicable state or federal laws. *All we are seeing now is a renewed effort by lenders to transfer as much liability as possible to title (settlement) agents and title insurers, the latter who issue Closing Protection Letters [CPL] to lenders on behalf of their respective agents.*




*We continue to encourage the CFPB and State Regulators to learn more about the valuable services performed by title (settlement) agents. To that end, if you are interested in learning more about our industry, we would be pleased to provide a complimentary copy of the 600-page Multi-State Study Manual for Closing Agents 2nd Edition which includes new TRID-related information. Please email us the contact persons' name and physical mailing address for UPS delivery. If you would also like copies of the Federal Compliance Risk Management Manual [based on CFPB Bulletin 2012-03] and the Integrative TILA-RESPA Final Rule Study Manual, we would be happy to ship those as well, at no charge. A brief Table of Contents for the MSM-CA and the TRID Study Manual appears at the conclusion of this letter.*

Distribution of Closing Disclosures to realtors has already become an issue. Certainly no one would argue that borrowers [and sellers], *individually*, have the right to distribute copies of their own documents, including CDs, to anyone they wish. However, in the past, as discussed earlier, in *most* purchase/sale/finance transactions prior to October 3, 2015, HUD-1 settlement statements were fully populated [Borrower and Seller sides] and distributed to all parties, including realtors. Few gave it any thought.

Currently – where we have *separate* CDs – the *reason* for two CDs generally flows from privacy and safeguards concerns tying to the 5-page CD. This in turn generally flows to *written lender prohibition* regarding distribution of the 5-page CD to anyone other than the borrower. In true domino effect, this raises questions pertaining to sensitive information [e.g., loan or judgment lien payoffs or other seller-debts to be paid from proceeds] that may be disclosed on the 2-page Seller CD. From there the questions arise regarding *"whose decision is it"* as to *"who gets copies of what"* pertaining to *both* Closing Disclosures.

Many realtors have revised purchase/sale contracts or designed *written permission slips* for customers [buyers and/or sellers] to sign authorizing the settlement agent to give the realtors copies of their respective CDs. *However, title (settlement) agents stand in the middle of purchase/sale/finance transactions owing co-equal duty to all parties to close in compliance with the three main transaction-governing documents:* (1) buyer/seller under the purchase/sale contract; (2) lender/borrower under the loan closing instructions; and (3) title insurer/named insured under the title insurance commitment. *This is an extremely important point, not to be overlooked or minimized.*

> For example, a title (settlement) agent who releases a copy of the 5-page Closing Disclosure to a realtor – based on a *written permission slip* signed by the buyer/borrower and given to them by the realtor – may still be deemed in violation of the lender's loan closing instructions where the lender, in writing, prohibits distribution of same. In turn, the lender could cite CFPB Bulletin 2012-03 which requires among other things that the lender [*creditor*] include in its written loan closing instructions [*contract*] with the title (settlement) agent [*service provider*] *"clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities"* and further, that the lender *"take prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate."*

With lenders already skittish about risk and lender-liability issues arising from the TRID Rule and Bureau "expectations" relating to due diligence monitoring of service providers flowing from CFPB Bulletin 2012-03, it comes as no surprise that many lenders are seeking ways to minimize the number of title (settlement) agents with whom they do business. The one-two punch of the TRID Rule and Bulletin 2012-03 seems to provide lenders an easy way out of existing business relationships. All they need do is transfer lender-liability for compliance matters to title (settlement) agents under written loan closing instructions, wait for a violation to arise – especially one tied to a *consumer complaint* – and then jettison agents from their approved closing lists by *"blaming the Bulletin."* Small and midsize title (settlement) agents do not possess the tools to effectively "fight back" against a regulatory deck which appears to be stacked against them.

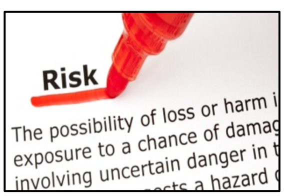
Back to the domino effect resulting in questions arising regarding *"whose decision is it"* as to *"who gets copies of what"* we arrive at the *safe* answer for title (settlement) agents, to get *written permission from all parties* involved in the transaction – including sellers, borrowers, and lenders. *Whoever has the right to prohibit distribution should be asked to provide written permission for distribution. No exceptions.*

Where realtors are concerned, there is a potential solution that does not involve distributing copies of Closing Disclosures. As discussed earlier, because *most* [but not all] lenders are going the bifurcated CD route – the 5-page for the borrower and the 2-page for the seller – *most* [but not all] title (settlement) agents are utilizing a "third form" settlement statement to support proper escrow administration. Such "third form" settlement statement compiles information from the 5-page CD and 2-page CD resulting in something akin to a HUD-1 settlement statement. *Since this is neither a TRID Rule form nor a lender/loan form, the issue of "distribution" of such "third form" is neither regulated under the TRID Rule nor by the lender. It is within the purview of the title (settlement) agent, subject only to State law and Seller and/or Buyer/Borrower discretion as to privacy issues.*


*A word of warning to title (settlement) agents* – some lenders have revised their loan closing instructions to dictate the use of the settlement statement created by ALTA. *Any "third form" settlement statement – including the one created by ALTA – is NOT a replacement for TRID Rule Closing Disclosures!*

*As a further caveat,* should a lender provide or require that the settlement agent prepare an *addenda* to the Closing Disclosure – e.g., *"for the purpose of including customary recitals and information used locally in real estate closings (for example, breakdown of payoff figures, a breakdown of the consumer's total monthly mortgage payments, an accounting of debits received and check disbursements, a statement stating receipt of funds, applicable special stipulations between consumer and seller, and the date funds are transferred). A reference such as "See attached page for additional information" should be placed in the applicable section of the Closing Disclosure."* [Final Rule Page 1854 referencing §1026.38(t)(5)(ix)] – the title (settlement) agent should obtain *written lender permission* to distribute copies of same to the same extent the agent would obtain *written lender permission* for distribution of the CD to which the addenda is attached.

## TRID Liability – The "Hot Potato" No One Wants Dropped in their Laps




As discussed earlier, many lenders are renewing attempts to transfer lender-liability to title (settlement) agents [and to title insurers providing CPLs to lenders on behalf of their respective agents] for lender-compliance issues flowing from state and federal consumer financial protection laws. To the extent the TRID Rule is a *"lender-choice"* Rule – e.g., lenders, as creditors, choose who prepares and delivers Loan Estimates [lender or mortgage broker] and who prepares and delivers Closing Disclosures [lender or settlement agent] – TRID is also a *"lender-liability"* Rule. It is understandable that – to the extent lenders rely upon settlement agents to *"hunt and gather"* costs and fees necessary to populate Pages 2 and 3 of the 5-page CD – lenders would want to hold settlement agents liable for any inaccuracies that may arise re same. However, Final Rule Page 1718 referencing §1026.19(f)(1)(i)-2(iii) [Settlement Agent] states clearly that the lender, as creditor, remains responsible :

If a settlement agent provides disclosures required by §1026.19(f)(1)(i) three business days before consummation pursuant to §1026.19(f)(1)(v), the "best information reasonably available" standard applies to terms for which the actual term is unknown to the settlement agent at the time the disclosures are provided. The settlement agent normally may rely on the representations of other parties in obtaining information, but if information about actual terms is not reasonably available, the settlement agent also must satisfy the "best information reasonably available" standard. Accordingly, the

> settlement agent is required to exercise due diligence to obtain information if it is providing the Closing Disclosure pursuant to § 1026.19(f)(1)(v). For example, for the loan terms table required to be disclosed under § 1026.38(b), the settlement agent would be considered to have exercised due diligence if it obtained such information from the creditor. *Because the creditor remains responsible under §1026.19(f)(1)(v) for ensuring that the Closing Disclosure is provided in accordance with §1026.19(f), the creditor is expected to maintain communication with the settlement agent to ensure that the settlement agent is acting in place of the creditor*. See comment 19(f)(1)(v)-3 for guidance on a creditor's responsibilities where a settlement agent provides disclosures.

*"Liability"* follows *"responsibility"* which places lenders, as creditors, in *"lead-liability"* position under the Rule. However, it does *not* absolve title (settlement) agents from liability. Comment 19(f)(1)(v)-2 regarding *settlement agent responsibilities* states that *"if a settlement agent provides any disclosure under §1026.19(f), the settlement agent must comply with relevant requirements of §1026.19(f)."* Such is the *"lay of the land"* in *Regulatory World.* Looking at it from a *Real World* perspective, liability [*among other things*] tends to flow downhill, *dumping liability* on those least able to protect themselves – namely title (settlement) agents.

As to the pecking order, the Dodd-Frank Act establishes CFPB supervisory and enforcement powers. The Bureau in turn releases CFPB Bulletin 2012-03 chock-full of Bureau expectations regarding creditor [lender] due diligence oversight of service providers [title (settlement) agents] – and later publishes the TRID Rule establishing creditor-responsibility translating into lender-liability. In response, many lenders "enhance" their loan closing instructions in an attempt to transfer lender-liability to settlement agents by incorporating heightened *indemnification clauses* pertaining to preparation and/or delivery of Closing Disclosures on behalf of lender, such as that shown below:

> *"Closing Agent shall fully indemnify and hold harmless (collectively "indemnify" and "indemnification") [Lender] and its directors, officers, employees, agents, partners, stockholders, representatives and affiliates (collectively, "Indemnified Parties") from and against all causes of action, claims, demands, orders, suits, damages, liabilities, losses, settlements, judgments, costs and expenses (including but not limited to reasonable attorney's fees and costs in responding to civil investigative demands or other inquiries by administrative agencies), whether or not involving civil litigation by a consumer or an enforcement action by a federal or state regulatory agency (to the extent permitted by such enforcement action), as well as voluntary reimbursements to consumers provided by [Lender] based on the good faith belief that a particular transaction might lead to the institution of any such action, suit or other proceeding hereinabove listed, or a third party claim, which arise out of or relate to any failure to comply with these Closing Disclosure Instructions or the master Closing Instructions provided to Closing Agent by [Lender] that were in effect at the time of the closing, in each case whether or not caused by the negligence of the Closing Agent or any other Indemnified Party and whether or not the relevant Claim has merit. In connection with this indemnification, the Indemnified Parties are presumed to be entitled to indemnification, and presumed to have acted under good faith belief in the provision of voluntary reimbursements to consumers. The Closing Agent shall have the burden of proof to overcome the presumption. This indemnification shall be binding upon the Closing Agent and its successors and assigns and shall inure to the benefit of the Indemnified Parties and their estate, heirs, legal representatives and assigns. [Settlement agents are required to sign indicating they have read, understand and agree to lender terms and conditions].*

As noted hereinabove, the one-two punch of the TRID Rule and Bulletin 2012-03 seems to provide lenders an easy way out of existing business relationships with title (settlement) agents. To the extent they are successful in transferring lender-liability for compliance matters to agents via their loan closing instructions – all they need do is wait for a violation to arise, especially one tied to a *consumer complaint* – and use it to jettison agents from their approved closing lists. Independent [small and midsize] title (settlement) agents do not possess the tools or financial wherewithal to survive an "indemnity" attack by large lenders.

## Lender-Choice TRID Rule Creates Chaos for Title (Settlement) Agents

It is important that *industry professionals* understand that the reason the TRID Rule is a Lender-choice Rule is because it is also a Lender-liability Rule – in that the bulk of information contained within the TRID Rule flows from the Truth-in-Lending Act [TILA] with only a nod in the direction of the Real Estate Settlement Procedures Act [RESPA]. That – in context with the foregoing section on liability [*among other things*] flowing downhill – is sufficient to create heightened *concern* for title (settlement) agents.

*So where does the chaos come into play?* From a *lender* perspective, the TRID Rule – among myriad other post-DFA mortgage rules and regulations – requires that lenders choose how to move forward in this heightened lender-liability environment. Looking at the TRID Rule and limiting our focus to who prepares and delivers the Closing Disclosure – *which, at first glance, appears to be a single choice each lender needs to make* – let's consider the expanded impact on both lenders and settlement agents:

1. Who will prepare the 5-page CD?
2. Who will deliver the 5-page CD?
3. Will the 5-page CD be fully populated or Borrower-only populated?
4. Who is responsible for "hunting and gathering" costs and fees necessary to populate the 5-page CD?
5. If the Settlement Agent is responsible for costs and fees, when must the Agent provide same to Lender?
6. If the 5-page CD is Borrower-only populated, who will prepare the separate 2-page Seller CD?
7. Who will deliver the separate 2-page Seller CD to the Seller?
8. If there are two separate CDs, is a CD Addenda for "customary recitals" required? If so:
    a. Who prepares the CD Addenda?
    b. Who delivers the CD Addenda?
9. Is a "third form" settlement statement necessary due to bifurcated CDs?
10. If there are changes to the 5-page CD after it is delivered to the Borrower, but prior to consummation:
    a. Who is responsible for communicating TILA-related ["significant"] changes?
    b. Who is responsible for communicating RESPA-related ["costs and fees"] changes?
    c. Who is responsible for preparing the revised pre-consummation 5-page CD?
    d. Who is responsible for delivering the revised pre-consummation 5-page CD to the Borrower?
11. If a Borrower requests one-day advance inspection of a revised CD, who is responsible for providing same?
12. If there are changes to the 5-page CD post-consummation:
    a. Who is responsible for communicating RESPA-related ["costs and fees"] changes?
    b. Who is responsible for preparing the revised post-consummation 5-page CD?
    c. Who is responsible for delivering the revised post-consummation 5-page CD to the Borrower?
13. If there are changes to the 2-page Seller CD at closing:
    a. Who is responsible for communicating RESPA-related ["costs and fees"] changes?
    b. Who is responsible for preparing the revised at-closing 2-page CD?
    c. Who is responsible for delivering the revised at-closing 2-page CD to the Seller?
14. If there are changes to the 2-page Seller CD post-consummation:
    a. Who is responsible for communicating RESPA-related ["costs and fees"] changes?
    b. Who is responsible for preparing the revised post-consummation 2-page CD?
    c. Who is responsible for delivering the revised post-consummation 2-page CD to the Seller?

*I've probably omitted a few choice-making moments, but my brain is tired!* Although the TRID Rule is pretty clear that where the Closing Disclosures are bifurcated, the settlement agent is responsible for preparing and delivering the 2-page Seller CD to the seller at time of closing [and delivering a copy to the lender] – our office receives questions from title (settlement) agents regarding lenders attempting to set their own parameters *re* same. Even if we remove all 2-page CD questions, there are a *bevy* of questions begging to be answered.

While each individual lender must *choose* the answer for each of the foregoing questions, when it comes to *implementing change* each lender *changes once*. After revising internal policies and procedures, the lender [hopefully] disseminates same to applicable lending personnel responsible for implementing such changes. *In short, one choice = one change. Job done!*

*Herein lies the chaos for title (settlement) agents who do business with myriad lenders*. To ensure full compliance with revised loan closing instructions – *factoring in that not all lenders do all things exactly the same way* – title (settlement) agents must comb through the fine print of loan closing instructions [some totaling 10-20 or more pages] to determine each lenders' specific *choice-points*. Once they determine the various directions in which various lenders are headed on each choice-point, title (settlement) agents must then communicate the various lenders' idiosyncrasies to all applicable settlement/escrow personnel who must, in turn adhere to same. In *Real World* application, this is akin to herding cats – especially for title (settlement) agents who do business with 10 or more lenders on a regular basis, plus at least that number on an occasional basis.

You may be thinking that it really can't be that hard – especially when the only two choices for most of the foregoing questions are *"lender"* or *"settlement agent"* – but you would be wrong, when you expand consideration to *other* TRID Rule factors, such as something as "simple" as what line item "terminology" to use on the Closing Disclosure. Consider Final Rule Page 1844:

> Paragraph 38(h)(4).
> 1. *Consistent terminology and order of charges*. *On the Closing Disclosure the creditor must label the corresponding services and costs* disclosed under §1026.38(f) and (g) *using terminology that describes each item, as applicable, and must use terminology or the prescribed label, as applicable, that is consistent with that used on the Loan Estimate to identify each corresponding item*. In addition, §1026.38(h)(4) requires the creditor to list the items disclosed under each subcategory of charges in a consistent order. If costs move between subheadings under §1026.38(f)(2) and (f)(3), listing the costs in alphabetical order in each subheading category is considered to be in compliance with §1026.38(h)(4). See comment 37(f)(5)-1 for guidance regarding the requirement to use terminology that describes the items to be disclosed.
>
> Comment 37(f)(5)-1 – Item descriptions and ordering.
> *Clear and conspicuous standard.* Section 1026.37(f)(5) requires creditors to label the loan costs disclosed pursuant §1026.37(f) using terminology that describes each item. A creditor complies with this requirement if it uses *terminology that is clear and conspicuous*, consistent with §1026.17(a)(1), *and describes the service or administrative function that the charge pays for in a manner that is reasonably understood by consumers* within the space provided in form H-24 of appendix H to this part. *For example, if a creditor imposes a fee on a consumer to cover the costs associated with underwriting the transaction, the creditor would comply with §1026.37(f)(5) if it labeled the cost "Underwriting Fee."* A label that uses abbreviations or acronyms that are not reasonably understood by consumers would not comply with §1026.37(f)(5).

Okay. That makes sense. Terminology *should* be clear and conspicuous, and *"reasonably understood"* by consumers.

> *That reminds me of my personal refinance loan that closed two weeks ago, where the notary "signing agent" leafed through the loan papers, handing me only the blank signature pages of the note and mortgage. Granted, I had advised the lender that I did not require a "formal" closing, considering what I do for a living – however, I was concerned at the number of blank signature pages used in the loan closing, which could essentially be attached to any document without my knowledge – such as was the case with blank signature/notarization pages signed by the thousands at the hands of robosigners and robonotaries during the foreclosure fraud fiesta of 2007-2012.*
>
> *Upon explaining to the notary that I wanted to review the documents before signing, she quickly regrouped and provided all documents for my reading pleasure. To her credit, she admitted that she did not know what half the documents meant, and when I refused to sign a couple of documents – one containing false statements and another that would give the lender limited signing authority on my behalf for revisions to closing documents made post-closing – she also knew enough to contact the title company to see what she should do regarding such refusal on my part.*

However, consider that something as "simple" as three different lenders with three different ideas of what certain settlement services should be called – and then factor in the requirement to "alphabetize" same:

| Lender A | Lender B | Lender C |
|---|---|---|
| Termite Inspection | Pest Inspection | Wood Destroying Organism Report |
| Title Search | Title Examination | Title Search/Examination |
| Title Commitment | Title Binder | Title Report |
| Settlement Fee | Closing Fee | Attorney Fee |

You get the idea. As each individual lender determines its own terminology, the lender inputs same into their automated doc prep systems. Whatever item terminology appears on the Loan Estimate the same terminology will automatically populate the lender-prepared 5-page Closing Disclosure. *But, what if two or three lenders choose to have settlement agents prepare the 5-page CD?* While that seems unlikely where national lenders are concerned, the situation does arise with smaller lenders. That means title (settlement) agents need to manually override their own doc prep systems to ensure that final CD terminology matches that of the various lenders with whom they do business. *It would also require that such lenders provide agents with a copy of the Loan Estimate for each transaction, so agents can ensure they are using LE terminology when preparing the CD.* Even where the lenders prepare the 5-page CD, it makes sense that the 2-page Seller CD [where used] should contain same/similar terminology. *This was rarely, if ever, a problem with title (settlement) agent-prepared HUD-1 settlement statements.*

The Bureau's observance that TRID Rule implementation requires increased communication and coordination of efforts between lenders and settlement agents is seriously *understated.* When we factor in the current level of *miscommunication* and *misunderstanding* by and between lending personnel and title (settlement) agents as to what the TRID Rule and Official Interpretations actually *require* vs. what people *think* is required – coupled with the impact flowing from CFPB Bulletin 2012-03 which, together, substantially and fundamentally changes the nature of the relationship between lenders [as *"creditors"*] and title (settlement) agents [as *"service providers"*] – and one can begin to sense the full extent of the challenges facing the overall industry.

## To Sign or Not to Sign…the Closing Disclosure

I would be remiss if I did not address the issues relating to Closing Disclosure *signature/certification*. As you are aware, the TRID Rule, while providing a signature area on both the Loan Estimate and 5-page Closing Disclosure for purposes of acknowledging borrower receipt, does not *require* signature. This is another "Lender-choice" provision within the Rule.

Final Rule Page 1876 regarding *Signature Lines* primarily addresses the addition of signature lines for purposes of confirmations of receipt of the disclosure by multiple borrowers [when the lender chooses to require such confirmation]. *However, it also states that "signatures for purposes other than confirming receipt of the form may be obtained on a separate page."* See below:

> Section 1026.38(t) does not restrict the addition of signature lines to the disclosure required by §1026.38, provided any signature lines for confirmations of receipt of the disclosure appear only under the "Confirm Receipt" heading required by §1026.38(s) as illustrated by form H-25 of appendix H to this part. If the number of signatures requested by the creditor for confirming receipt of the disclosure requires space for signature lines in excess of that provided on form H-25, an additional page may be added to accommodate the additional signature lines with an appropriate reference to the additional page. Such additional page should also contain the heading and statement required by §1026.38(s) in the format provided on form H-25. *Signatures for a purpose other than confirming receipt of the form may be obtained on a separate page*, and consistent with §1026.38(t)(1)(i), not on the same page as the information required by §1026.38.

Much industry confusion revolves around signatures and signature/certification. The same was true when the November 2008 RESPA Final Rule was published. In the *RESPA Final Rule Study Manual* [2008] and the *Integrative TILA-RESPA Final Rule Study Manual* – the latter published in October 2014, one year prior to the TRID Rule extended effective date of October 3, 2015 – we included a chapter titled *To Sign or Not to Sign – The Real Story behind Signature/Certification and Future Applicability of the False Claims Act.* That chapter traces the history of signature/certification requirements from 1986 through 2010. Subsequent to book publication, we continue to support TRID Rule implementation via *Education Matters: TRID E-News Bulletins* in which we answer the FAQs our office receives from those who attended the full-day TRID Rule Implementation Program [classroom and online]. During this time, we covered HUD's treatment regarding *settlement agent certification* on Closing Disclosures for FHA Loans. *Just that, alone, brought up myriad misconceptions and miscommunication about "what is required where and why"* as it pertains to signature alone [e.g., for receipt purposes] and signature/certification [as required for specific loan types and/or by the secondary investment market].

Many lenders have maintained existing clauses regarding signature/certification in their loan closing instructions with the minor revision of replacing HUD-1 settlement statement with Closing Disclosure. For example:

> "The Closing Disclosure *which I have prepared* is a true and accurate account of all receipts and disbursements of funds required to settle this transaction from the noted sources including the funds (i) to be paid out by me as Settlement Agents or (ii) as paid by others outside of this settlement and duly marked as "paid outside of closing" on the Closing Disclosure. All such receipts and disbursements are as set forth in the purchase agreement (if applicable) and/or the closing instructions from the Lender."

At issue – and as addressed by HUD regarding FHA loan transactions in HUD Handbook 4000.1, FAQ #374 – is *settlement agent liability* in signing the settlement agent certification area where the certifying statement, itself, constitutes making a *false statement*. See below:

> FAQ #374: *The Model Settlement Certification requires the Settlement Agent certifying that he or she has prepared the Closing Disclosure but the CFPB's requirements for issuing the new TRID Closing Disclosure will make this unlikely to be the case. Should the Settlement Agent sign the form anyway?*

HUD Response: *FHA does not wish for anyone to make a false certification. Because this is a model document, FHA will accept the tailoring of this phrase to the actual circumstances. Thus, if the Settlement agent does not prepare the closing disclosure, he or she should remove or strike through the statement "which I have prepared" before executing the Settlement Certification.*

Since the inception of HUD's signature/certification requirement for FHA loans in July 1986, signature/certification expanded into other loan types as well, especially for loans sold into the secondary investment market. During the now 30-year span in which the industry has incorporated signature/certification, many lenders obtain same on *all* loan types. In short, it has become yet another piece of paper in a pile of paperwork. Far too many settlement agents, like consumers, sign whatever is placed in front of them. Neither they nor the lenders requiring signature/certification stop to consider the liability flowing from the U.S. False Claims Act which arises when false certifications are made.

*Few have considered the heightened liability for settlement agents where lenders' prepare the 5-page Closing Disclosure and require that settlement agents sign a certification which states that they [as settlement agents] have prepared the CD.* We were among the first to bring the "disconnect" to HUD's attention regarding the certification language for FHA loans. We then notified our TRID students of the situation in our *Education Matters: TRID E-News Bulletin*. Today, we continue to cut and paste the information into emails we receive from title (settlement) agents who continue to encounter the "old" language in lender's loan closing instructions and on lender-prepared signature/certification pages attached to lender-prepared CDs.

*At no time should a settlement agent sign the certification page accompanying a lender-prepared CD without first striking through the "which I have prepared" wording.* Additional concern has been raised regarding language within the certification statement which places settlement agents in a position of liability pertaining to funds paid by others outside of settlement. Some claim that settlement agents would not necessarily be aware of such items – however the wording they are referring to is in regards to *"funds paid by others outside of this settlement and duly marked as "paid outside of closing" on the Closing Disclosure."*

*Assuming a lender-prepared CD, settlement agents must receive a copy of the 5-page CD* along with all other loan documents in order to properly close the transaction and administer escrow. *Most* [but not all] lenders – of those preparing the CD directly – coordinate with settlement agents regarding costs and fees and, upon preparing and delivering the 5-page CD to the Borrower three business days prior to consummation, provide a *copy* of same to the settlement agent in the event the Borrower contacts the agent in advance of consummation. Some lenders provide a copy along with the final loan closing package. Still other lenders have settlement agents prepare CD Pages 2 and 3 on their behalf, then merge that information with Pages 1, 4 and 5 before delivering the completed 5-Page CD to the Borrower. *The deviation in procedures again points to the TRID Rule being a "Lender-choice" Rule as well as the difficulty where settlement agents deal with multiple lenders requiring different things.*

To the extent a settlement agent – or someone working with or for the settlement agent – prepares CD Pages 2 and 3 relating to costs and fees associated with the transaction, there should be no need to revise the certification language prior to the settlement agent certifying the information as a *"true and accurate account of all receipts and disbursements of funds required to settle this transaction."* Similarly, where a settlement agent receives a lender-prepared CD which reflects all funds paid by others outside of settlement – evidenced by such items being duly marked as "Borrower-Paid Before Closing" or "Seller-Paid Before Closing" or "Other" – the agent should not be concerned with signing the certification statement as to such matters, *unless the settlement agent is aware that the lender has withheld or otherwise included false statements on the lender-prepared CD*.

Such was the case in the *2006 VA Interest Rate Reduction Refinance Loan [IRRRL] FCA lawsuit* brought by two mortgage brokers who, as whistleblowers, sued myriad banks for fraud, alleging that the banks defrauded military veterans in VA guaranteed home loans by hiding unallowable fees in mortgage documents. The lawsuit alleges that the banks' misconduct cost taxpayers hundreds of millions of dollars – and has been settled for a fraction of that amount. *What is notable is that – while the lawsuit focused on VA loans closed between 2001 and 2005 in Georgia – the same unlawful activity occurred on VA IRRRL loans throughout the country.* What makes it even worse is that the lawsuit was not unsealed until October 2011. The suit, as a case study, was immediately made part of all prelicensing and regulatory compliance classes offered through our company, to alert settlement agents of the misconduct and the potential fall-out of making false statements on [then] HUD-1 settlement statements and [now] Closing Disclosures. Once we began alerting attorney and non-attorney settlement agents of the underpinnings of the lawsuit, we were dismayed to discover that such unlawful activity continued, unabated, from 2006 through 2011 when the lawsuit was unsealed – and reportedly *still continues today* where settlement agents function as the *"unwitting goats who trust others [lenders] to their detriment"* – terminology which flowed from an early [1990's] FCA lawsuit involving a Mississippi closing attorney who the judge deemed *"an unwitting goat who trusted others to his detriment"* as opposed to a co-conspirator.

The "misconduct" occurred where lenders, who charged a 1% flat fee, instructed attorneys as closing agents to *rename* their [non-allowable] *attorney/closing fee* as an [allowable] *title search fee* and/or *title examination fee*. Once we began using the lawsuit as a case-study, many settlement agents reported being told the same thing by mortgage lenders. Reportedly, the common lender *explanation* for instructing settlement agents to *move* non-allowable attorney/closing fees to allowable HUD-1 line items [search/exam fees] was that lenders wanted to ensure that settlement agents got paid for their services. *How thoughtful of them!*

Settlement agents schooled to believe that *"they who hold the gold make the rules"* which translates into complying with all lender requirements, did as they were instructed to do. They moved their non-allowable fees to one or more allowable fees line items – *and subsequently certified the HUD-1 form as being a true and accurate account of the transaction*. Copies of certified HUD-1 forms were later used to document the mortgage loan fraud in the 2006 VA IRRRL lawsuit.

What lenders *withheld* from settlement agents is the *reason* why their attorney/closing fees were deemed *non-allowable* on VA IRRRL transactions. Where lenders charge a 1% flat fee in addition to other [allowable] itemized fees and charges the VA Lender Handbook states that *"the lender's flat charge is intended to cover all of the lender's costs and services which are not reimbursable as itemized fees and charges."*

Chapter 8 of the VA Lenders' Handbook provides a list of non-allowable fees – *those which must be covered by the lender out of its 1% flat fee* – which includes [but is not limited to] loan closing or settlement fees, doc prep fees, attorneys' services other than for title work, escrow fees or charges, and notary fees. The chapter regarding lenders' use of the 1% flat fee continues by stating that *"the lender's maximum allowable flat charge of one percent of the loan amount…is intended to cover all of the lender's costs and services which are not reimbursable as itemized fees and charges. The lender may pay third parties for services or do as it wishes with the funds from the flat charge, as long as the lender complies with RESPA."* With respect to *attorneys' fees*, the VA Lenders' Handbook goes on to state that *"the lender may not charge the borrower for attorney's fees. However reasonable fees for title examination work and title insurance can be paid by the borrower. They are allowable itemized fees and charges."* This was, reportedly, what some lenders pointed to as their defense in having [Georgia] attorneys *rename* their [non-allowable] attorney/closing fees as [allowable] title search/examination fees. *Of course this does not explain why the same lenders engaged in the same practices with non-attorney settlement agents throughout the country on VA IRRRL transactions.*

The case study serves as a prime example of what settlement agents should *not* do. Even where instructed to do so by lending personnel, they should *never* falsify information on HUD-1 settlement statements or Closing Disclosures. For obvious reasons, this is becoming an area of heightened concern and confusion. It is important – even though the TRID Rule does not govern signature/certification – that the Bureau be *aware* of these types of issues. *Awareness of Real World activities is the key to proper supervision and enforcement.*


*A second word of warning to title (settlement) agents* – there is considerable confusion regarding *signature for receipt of LE or CD* vs. *signature for other purposes* vs. *formal signature/certification regulated by the U.S. False Claims Act* – the latter primarily required by loan type [FHA] or by the secondary mortgage market [Fannie and Freddie]. The confusion is exacerbated by "third form" [non-TRID] settlement statements, such as that created by ALTA, which include signature lines and the word "certify". *As noted hereinabove, the TRID Rule does not require signature or signature/certification.* It is up to each individual lender to dictate what type of signature or signature/certification is required – and this applies to *both* Closing Disclosures, where the lender utilizes bifurcated forms. One lender may provide a preprinted signature or formal signature/certification page – the latter same/similar to that used with HUD-1 settlement statements. Another lender may require that the settlement agent prepare the signature or signature/certification page. A third lender may not require signature or signature/certification at all. Regarding *formal signature/certification* – regulated under the U.S. False Claims Act – there is much confusion by lenders and settlement agents regarding the "third form" ALTA settlement statement – particularly so, because the LINK to the form [https://www.alta.org/cfpb/documents.cfm] includes "CFPB documents" causing some to believe it is a TRID Rule document or otherwise required by the CFPB. *It is NOT a TRID document nor is it required by the CFPB.* In an attempt to be helpful, ALTA created a "third form" to support proper escrow administration. In turn, many lenders assume it is a *required* form and have thus begun *requiring* it in their loan closing instructions. Others [lenders and settlement agents] believe the ALTA form *replaces* the 2-page Seller CD under the TRID Rule. *The ALTA form does not replace or control any TRID Rule document.* Finally, although the ALTA form includes signature lines and an acknowledgment area using the word *"certify"* -- that is NOT the same as *formal signature/certification* flowing from loan type [FHA] or by the secondary mortgage market [Fannie and Freddie] as may be required on one or both Closing Disclosures.

## Settlement Agent Treatment under the TRID Rule

*By now you might be wondering what the lengthy example hereinabove has to do with the TRID Rule.* It has *everything* to do with the TRID Rule because the Rule, which flows primarily from TILA, has become a "Lender-choice" Rule where – more so than ever before in the history of mortgage lending – *lenders* have been placed in a "one-up" position over *settlement agents*. In the past, lenders and title (settlement) agents – along with realtors – created a *'three-legged stool"* in purchase/sale/finance transactions. Each provided independent-but-related services to buyer/borrowers and sellers as their *collective customers*.

Yet, of the three, *title (settlement) agents* stood out from the crowd due to the fact that they were required to close in compliance with three main transaction-governing documents, owing coequal duty to all parties: (1) buyer/seller under the purchase/sale contract; (2) lender/borrower under the loan closing instructions; and (3) title insurer/named insureds under the title commitment.


Under the TRID Rule [*reinforced by CFPB Bulletin 2012-03*] mortgage lenders [creditors] have far greater power over title (settlement) agents [service providers] than ever before. *Whether such power is real [enforceable] or perceived [unenforceable] is yet to be seen – however, in the present moment "perception is everything."* When we look at lenders' loan closing instructions – including the two clauses cited earlier – it is apparent that while lenders may embrace the *"lender-choice"* leaning of the TRID Rule, many are seeking ways in which to transfer *"lender-liability"* to settlement agents.

To that end, it seems appropriate to highlight new or heightened areas of concern regarding lenders' loan closing instructions. As noted hereinabove, settlement agents have become accustomed to liability clauses requiring that they, as settlement agents, notify lenders should they spot any mistakes within lenders' loan closing instructions or loan documents. They are similarly accustomed to clauses requiring that they close in compliance with applicable *"federal, state, and local laws of appropriate jurisdictions."* As to the latter, in the past, most loan closing instructions stipulated closing in compliance with RESPA – however, today we see such liability clauses expanded to include *"assuring compliance with conditions and requirements of Regulation Z and TILA"* in addition to RESPA compliance.

*That's a problem – and should be an area of concern for most settlement agents – as settlement agents are not mortgage lenders and, as such, do not have specific training regarding Reg. Z and TILA.* Yet, as reviewed hereinabove, the TRID Rule – at page 1718 referencing §1026.19(f)(1)(i)-2(iii) and Settlement Agents – specifically cites that the *creditor remains responsible* for ensuring that the Closing Disclosure is provided in accordance with §1026.19(f) and as such, the *"creditor is expected to maintain communication with the settlement agent to ensure that the settlement agent is acting in place of creditor."* Therefore, it would *seem* to hold that – to the extent the TRID Rule holds lenders, as creditors, responsible and liable for TRID Rule compliance – lenders would not [or should not] be permitted to transfer lender-liability to settlement agents, irrespective of their renewed attempts to do so.

That said, we must not ignore the impact of the "TRID-adjacent" CFPB Bulletin 2012-03 which has garnered as much or more industry attention than the TRID Rule. Other than what we have already covered in this Letter regarding the Bulletin – *which you are encouraged to review if you have not already done so* – there is not sufficient time or space in this letter to fully detail the separate liability issues arising from the Bulletin. I would point out that, for the first time in 40 years of industry practice, I became so concerned about the future viability of title (settlement) agents that I spent an entire year carefully researching potential liability issues arising from the Bulletin, reviewing the Bureau's Supervision and Examination Manual for sections pertaining to mortgage lending, translating applicable examination checklists into title (settlement) agent terms, and using that as a basis for the 550-page *Federal Compliance Risk Management Manual* to help small and midsize title agencies, law firms, and settlement/ escrow companies gain a level of compliance designed to meet or exceed federal recommendations or requirements.


*To further encourage regulatory-education collaboration we offer copies of the Federal Compliance Risk Management Manual to Federal and State Regulators at no charge – just as we have done with the Integrative TILA-RESPA Final Rule Study Manual and the newly-revised Multi-State Study Manual for Closing Agents 2nd Edition. Please email KarenKoogler@KooglerGroup.com with a contact name and physical mailing address for UPS delivery, indicating which manual(s) you wish to receive. Allow 5-7 days for delivery. [Table of Contents appears on the following page]*

## Summary

*Believe me when I say that I am as excited as you to reach the point of summary.* When I first decided to write this letter, my intention was to address the topics of title insurance premium and Seller-credits. However, I quickly realized that this may be my final opportunity to alert the Bureau to other matters impacting lenders, title (settlement) agents, and consumer protection. *Again, it is genuinely my intention to help the CFPB help lenders and title (settlement) agents better understand and comply with the TRID Rule in an effort to foster true consumer protection.*

First and foremost, *focus must be on consumer protection arising from regulatory compliance*. Industry professionals have only two choices when it comes to federal and state laws, rules and regulations: (1) comply; or (2) comply while lobbying for change, if they believe laws, rules, or regulations are too restrictive. *Circumvention is never an option*. To that measure, I am fully on the Bureau's side when it comes to promoting industry compliance with CFPB Bulletin 2012-03 and the TRID Rule.

*At the same time, we must not turn a blind eye toward the fact that the TRID Rule coupled with CFPB Bulletin 2012-03 creates potential for "Big Lending" and "Big Title" to partner together, driving independent small and midsize providers out of business. Nothing could be worse for consumers than for business monopolies to stamp out freedom of choice.* I remain haunted by early commentary during workshops leading up to the Proposed TRID Rule in which the Bureau stated that some mortgage lenders might choose to take the settlement process in-house via *lender-owned*, *lender-affiliated,* or *lender-preferred-partner* providers.

> In 2013, at an NMLS Conference attended by lenders and mortgage loan originators, I was surprised to hear one Bureau spokesperson say, in an offhand remark, that it was easier for the Bureau to deal with one group [financial institutions] rather than many. After attending a second presentation, I approached the spokesperson regarding CFPB Bulletin 2012-03, addressing my concern that placing title (settlement) agents under the broad category of third party vendors and service providers might be an unintended consequence of otherwise well-intentioned action. *In response, I was told there are no unintended consequences as far as the Bureau was concerned.* That's was chilling to hear.

I am not convinced that the Bureau understands how the one-two punch of the TRID Rule and CFPB Bulletin 2012-03 impacts the nature of the relationship between mortgage lenders and title (settlement) agents. Prior to the Rule and Bulletin, realtors, lenders, and title (settlement) agents interacted as on-par equivalent providers – with each bringing their own level of expertise and professionalism to the table. As stated numerous times, title (settlement) agents stood at the *center* of purchase/sale/finance transactions, required to close in compliance with three transaction-governing documents – purchase/sale contract, loan closing instructions, and title commitment – and owing coequal duty to all parties. Few lenders, if any, questioned the *ability* of settlement agents to prepare the HUD-1 settlement statement, conduct closing, and administer escrow.

Today, the relationship between lenders and title (settlement) agents is growing more tenuous – as lenders look to agents for accurate information with which to populate the lender-prepared Closing Disclosure – not just title-related fees but, also, other third-party fees that, in the past, agents would "hunt and gather" in order to populate the HUD-1. Reportedly, some lenders are becoming impatient regarding *actual* title premium vs. *disclosed* title premium – as if title (settlement) agents are the cause of the confusion. *They are not.* Further, where agents attempt to communicate with lenders how to prepare the Closing Disclosure so that it is not only TRID Rule compliant but, also, compliant with State insurance regulations, some agents report that lenders insist on doing it *"their"* way, rather than in the manner set forth in the TRID Rule [*re* specific line item charges].

Not surprisingly few lenders care whether disclosures are compliant with State insurance regulations, since the Bureau, itself, accurately states in the TRID Rule that lenders *"are not subject to the legal requirements of State insurance laws."* However, this is disturbing to title (settlement) agents to whom – via enhanced loan closing instructions – some lenders attempt to transfer lender-liability for compliance with TILA and Reg. Z, even though agents are not creditors. *It is somewhat a double-standard that understandably does not sit well with title (settlement) agents.* I mention this to underscore that what was once a professional and respectful relationship between equals has, to some extent, deteriorated to one in which lenders issue orders which they expect title (settlement) agents to unquestioningly obey. *Blindly following lender "orders" further erodes consumer protection, as was proven in the VA IRRRL lawsuit.*

With so many lenders choosing to prepare and deliver the Closing Disclosure to borrowers and in light of the slowly deteriorating relationship between the two provider groups, it is only a matter of time before some lenders question whether a "third party" settlement agent is necessary. With one or more national title insurance companies, maintaining large direct operations footprints and/or vendor management services companies, waiting in the wings to support national lenders as *"preferred partners"* it is only natural to worry what may happen to remaining small and midsize title agencies, law firms, and settlement/escrow companies.

As an educator, I don't have a *"dog in the fight"* with respect to the TRID Rule and CFPB Bulletin. Our company is independently owned and does not accept sponsorship from any company, special interest group, or industry association. I generally make it a point *not* to interject myself into industry practices or the regulatory process, *unless* – as is the case with the TRID Rule, CFPB Bulletin 2012-03, and evolving industry practices – there is a risk that independent small and midsize businesses, along with consumers, may be harmed. *It is at that point I am compelled to stand up, step forward, and speak out on behalf of those without a voice. This includes consumers as well as independent small and midsize business owners.*

*A level industry playing field populated by businesses of all shapes and sizes – that which is in the best interests of consumers – can only be achieved via free market competition tempered by sound regulatory compliance that does not unfairly burden small and midsize business owners.* Today, many independently owned small and midsize businesses are struggling to survive the economic impact of the TRID Rule coupled with CFPB Bulletin 2012-03. Many will fall by the wayside within the next 1-3 years. Historically, smaller title agencies survived by investing profit from *"boom period"* refinance activity to sustain *"bust period"* slowdowns. With many lenders choosing to prepare and deliver borrower Closing Disclosures directly, it is only natural that they may, in the future, choose to close refinance transactions in-house rather than outsource the closing to title (settlement) agents. Should this occur, it is likely such lenders may "go direct" and order loan policies from title insurers – especially those with large direct operations footprints and/or national vendor management services companies. While consumers are unlikely to see any significant reduction in costs and fees, the *recipients* of future title and settlement income will *shift* from title (settlement) agents to lenders and title insurers. *Any significant "shift" in this direction will drive more small and midsize title agencies, law firms, and settlement/escrow companies out of business – as the cost of doing business continues to rise amid rapidly declining income.*

While I don't agree with the *entirety* of the TRID Rule, and struggle with the impact of the Rule and Bulletin on independent small and midsize businesses, I nonetheless *strongly promote compliance*. The Koogler Group provides free industry education for regulatory personnel, including industry investigators, and supports State prosecutors, the FBI, and other law enforcement in strengthening cases against alleged industry violators. I served as appointed compliance monitor on a federal-state settlement agreement involving a national service provider and will assist with same in the future. If history repeats itself, as it tends to do – the closer the "preferred-partner" relationship grows between national banks and national title insurance companies, the greater the likelihood of increased regulatory violations.

While I recognize that the Bureau's supervisory and enforcement authority focuses primarily on supervised banks and nonbanks – and that the TRID Rule governs the *loan side* of purchase/sale/finance transactions – the overall settlement services industry cannot effectively implement a narrowly-focused Rule in an environment where the majority of transactions are "larger" than the mortgage loan. As such, we are currently witnessing a level of *implementation fall-out* where *"Regulatory World Rules"* meet *"Real World Realities."* However, we *can* fix what ails us. We have an opportunity via *regulatory-education-industry collaboration* to work *together* to successfully implement the TRID Rule and come to terms with Bureau expectations *re* CFPB Bulletin 2012-03 and, in so doing, jointly ensure that consumers are well-protected.

*Please email KarenKoogler@KooglerGroup.com with questions or comments. For those wanting further information regarding educational programs and products, please visit our website: www.KooglerGroup.com.*

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### Multi-State Study Manual for Closing Agents 2nd Ed.

PART ONE – FEDERAL REGULATORY ISSUES
State Regulation of the Title Insurance Industry
Consumer Financial Protection Bureau
RESPA
Affiliated Business Arrangements
Insurer-Agent Remuneration Practices
TILA-RESPA Integrated Disclosures [TRID]
To Sign or Not to Sign [U.S. False Claims Act]
Gramm-Leach-Bliley Act
Federal ESIGN Act
Other Regulatory Issues

PART TWO – REAL PROPERTY BASICS
Sources of Title
Liens and Encumbrances

PART THREE – TRANSACTION GOVERNANCE
Mortgage Fraud and Fiduciary Duty
Industry Best Practices
Escrow Accountability
Risk Management
Unauthorized Practice of Laws
Closing Compliance Issues

PART FOUR – MAIN TRANSACTION-GOVERNING DOCUMENTS
Real Estate Contracts
Loan Closing Instructions
Title Insurance Commitment
Owner's Title Insurance Policy
Loan Title Insurance Policy

PART FIVE – CONTRACT TO CLOSING AND BEYOND
Opening the File
Processing the File
Closing the File
Post-Closing the File

### Integrative TILA-RESPA Final Rule Online Program

The full-day classroom Program was transitioned online in July 2015. Participants will receive a copy of the TRID Study Manual via UPS. The 300-page Study Manual accompanies the course, enabling students to personalize their learning experience. Once the course is completed, students will receive, via email, all *Education Matters: TRID E-News Bulletins* issued since June 2015 – and may email their TRID questions to KarenKoogler@KooglerGroup.com to ensure they remain up-to-date on TRID implementation.

### Integrative TILA-RESPA Final Rule Study Manual

- Introduction
- Final Rule Highlights
- Terms and Times
- Tolerances and Changed Circumstances
- To Sign or Not to Sign
- Federal ESIGN Act
- Loan Estimate Review
- Closing Disclosure Review
- Seller's Closing Disclosure Review
- Title Insurance Treatment under the Final Rule
- Settlement Agent Treatment under the Final Rule