Date: October 11, 2016

From: Karen E. Koogler, CEO
The Koogler Group, L.L.C.

To: CFPB Federal Register Comments [PDF Attachment]

Re: Docket No. CFPB-2016-0038 or RIN 3170-AA61
Sharing the Closing Disclosure: Privacy Issues and Provider Liability

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Thank you for the opportunity to provide comments on the TRID Notice of Proposed Rulemaking [NPRM].

Introduction

In reviewing the 1316 posted comments received as of October 9, 2016, the majority are form letters drafted by ALTA's Title Action Network [TAN] and forwarded to ALTA members for submission as commentary. Each of three versions of TAN-supplied form letters contain bracketed instructions for submitters to include their personal stories. Instead, many simply added their name and pressed "submit" – hence the submissions that include bracketed instructions.

Two of the ALTA-TAN form letters do not address issues currently open for commentary by the Bureau under its NPRM [*italicized text reflects title of TAN form letter*]:

- *Don't Let Lenders Off the Hook* – regarding settlement agents not being penalized for compliance errors made by lenders; and
- *Tell the CFPB to correct TRID* – regarding the CFPB missed opportunity to change the Closing Disclosure's calculation of title fees.

The Bureau has maintained the position – regarding commentary unrelated to prior Proposed Rules – that it will *"only consider and discuss relevant comments"* and *"will not take actions beyond the scope of the Proposed Rule"* regardless of the volume/scope of comments received from *"industry trade associations, creditors, technology vendors, and other industry representatives, as well as consumer advocacy groups and others."*

Therefore, it is to be expected that the Bureau will not consider and discuss the comments submitted by ALTA members regarding the aforementioned issues, as they are beyond the scope of the current Proposed Rule. However, I ask that the Bureau consider the *volume* of comments [albeit *form letters*] submitted by title insurance agents, title attorneys, and title insurers (underwriters) and consider whether it is willing to entertain *future* TRID Rule revisions re same.

To that end, a detailed letter will be sent to Director Cordray in early November, with copies to State Insurance Commissioners and interested members of Congress, regarding *creditor and settlement agent liability* and *disclosure of title insurance premium*. As a 40-year mortgage and title/settlement industry veteran who has authored 30 industry textbooks and developed and delivered more than 500 hours of educational programming relating to regulatory compliance, title agent prelicensing, closing agent certification, title examiner certification, job skills training, business basics, and professional ethics – in addition to providing free educational programs and products for state and federal regulators – I am uniquely qualified to assist industry professionals and regulators in arriving at workable solutions for issues that continue to confuse and/or concern mortgage lenders, title (settlement) agents, real estate professionals, consumers, and sellers. *For those who wish to review the forthcoming November 2016 letter or prior letters and commentary submitted to the CFPB and State Regulators, please visit www.KooglerGroup.com. Questions and comments may be submitted to KarenKoogler@KooglerGroup.com.*

Sharing the Closing Disclosure: Privacy Issues and Provider Liability

Continuing from above, only one ALTA-TAN form letter addresses issues currently open for commentary:

- *Sharing Isn't Always Caring* – regarding the complexities involved in sharing the CD in order to properly protect consumers' private data.

Among the 1316 posted comments were form letters submitted by real estate brokers and agents, at the direction of the National Association of Realtors [NAR]. In an announcement regarding a recently-released report titled *TRID: A year later,* the NAR stated that *"delays occurred more frequently in transactions where the Realtor reported trouble accessing the CD. According to the survey, 45.6 percent of Realtors had problems getting closing documents, down from 54.5 percent in Q4 2015."*

The NAR further stated that *"Realtors, especially those with greater transaction volumes, were more likely to request CDs from title agents, rather than from lenders, in Q3 2016."* From the liability perspective of title (settlement) agents this is alarming. It indicates that some settlement agents are providing copies of the Consumer's CD to real estate brokers and agents despite written prohibition against such release contained in lenders' loan closing instructions.

> Failing to comply with a lender's loan closing instructions – which, for many lenders, constitutes the *"contract [providing] clear expectations about compliance"* cited in CFPB Bulletin 2012-03 – may be grounds for the lender terminating its relationship with the title (settlement) agent.
>
> Such termination is in line with Bureau expectations of *"appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive, or abusive acts or practices"* and *"taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate."*

The NAR cited the CFPB's announcement released July 29, 2016 which states that *"the Bureau understands that it is usual, accepted, and appropriate for creditors and settlement agents to provide a closing disclosure to consumers, sellers, and their real estate brokers or other agents."* This statement is incorrect. In the past [pre-TRID Rule] it was *usual, accepted, and appropriate* for settlement agents to provide the HUD-1 settlement statement to all parties including lenders, mortgage brokers, real estate brokers/agents and buyer/borrowers, sellers, and their respective attorneys. However, it should not be said that sharing the Closing Disclosure is *usual, accepted, and appropriate*. If that were the case, we would not be discussing the matter, along with related consumer privacy issues and provider [lender and settlement agent] liability concerns at this time.

Sharing the CD is a far more complex issue than first meets the eye.
The purpose of this Commentary is to view it from all perspectives:
the CFPB, Consumer, Seller, Realtor, Creditor, and Settlement Agent.

The NAR concluded by stating that *"survey respondents noted no change in lenders' willingness to share the CD even after the CFPB's clarification on CD sharing. Legal requirements and consumer privacy were the most frequently cited reasons why sharing was refused."* This is as it should be.

The information, provided by the Bureau in its NPRM, regarding the 1999 Gramm-Leach-Bliley Act [GLBA] exceptions is nothing new. Providers – including but not limited to lenders and title (settlement) agents – must also take into account State law and private contract considerations.

CFPB Perspective

In the TRID Final Rule, the Bureau *"sought to balance privacy concerns and more restrictive State law requirements with the mandated combination of the existing TILA and RESPA disclosures."* **[FR Page 1064]**

The Bureau further stated that *"the Closing Disclosure may be provided to parties other than consumers, unlike the Loan Estimate"* while addressing the *privacy considerations* that might arise, pointing to *proposed* §1026.38(t)(5)(vi) which would have permitted the creditor or settlement agent to leave certain Consumer information blank on the CD provided to the Seller and vice versa. Similarly, *proposed* §1026.38(t)(5)(vii) would have permitted the creditor or settlement agent to delete certain information regarding the Consumer's transaction from the disclosure provided to a Seller or third party [e.g., such as realtors]. **[FR Page 1194-1195]**

The Bureau *adopted* provisions as proposed, *renumbering* them as §1026.38(t)(5)(v) and (vi) which, respectively, permits creditors to disclose Consumer and Seller information on separate Closing Disclosures and permits a version of the CD that contains only information pertaining to the Seller. **[FR Page 1223]**

Next, in its July 29, 2016 announcement of the Notice of Proposed Rulemaking [NPRM] and specifically in relation to privacy and information sharing, the CFPB stated:

> **Privacy and sharing of information:** The rule requires creditors to provide certain mortgage disclosures to the consumer. The Bureau has received many questions about sharing the disclosures provided to consumers with third parties to the transaction, including the seller and real estate brokers. *The Bureau understands that it is usual, accepted, and appropriate for creditors and settlement agents to provide a closing disclosure to consumers, sellers, and their real estate brokers or other agents*. The Bureau is proposing additional commentary to clarify how a creditor may provide separate disclosure forms to the consumer and the seller.

As stated hereinabove, while it was *usual, accepted, and appropriate* for settlement agents to provide copies of the HUD-1 settlement statement to all parties, including realtors, it is *not* [yet] *usual, accepted, and appropriate* for creditors or settlement agents to provide copies of the Closing Disclosure to others. The purpose of this commentary is to arrive at a solution that provides all parties with what they need or want without creating undue liability for creditors and settlement agents – in short, to arrive at a solution that works for all, without harming any.

In the July 29, 2016 NPRM, the Bureau acknowledges receiving a number of requests for guidance concerning the sharing of disclosures with sellers and various other parties, including real estate agents, involved in the origination process in light of privacy concerns. To that end, the Bureau is proposing to incorporate and expand upon previous webinar guidance in the Official Interpretations (Comments) to the regulation to provide greater clarity. **[NPRM Page 4]**

The Bureau cites Comment 19(f)(4)(i)-1 which explains that the settlement agent complies with §1026.19(f)(4)(i) either by providing to the seller a copy of the CD provided to the Consumer, if it also contains the information under §1026.38 relating to the seller's transaction, ***or*** by providing the disclosures under §1026.38(t)(5)(v) or (vi), as applicable, as set forth in the Final Rule. **[NPRM Page 67]**

Currently, many, if not most, creditors prepare and deliver the Consumer [Borrower] CD directly, rather than outsource preparation to settlement agents. This is due, primarily, to creditor concern *re* liability flowing from TILA regarding the *timing* of such delivery [e.g., 3 business days prior to consummation].

It bears noting that the TILA-RESPA Integrated Disclosure ["TRID"] Final Rule, while integrating content of the Final TIL Statement with that of the HUD-1 Settlement Statement, pulls heavily from TILA regarding creditor liability, while only touching lightly on matters related to RESPA. As a result, TRID is primarily a "Creditor Choice" Rule, which has created significant and unique hurdles for settlement agents.

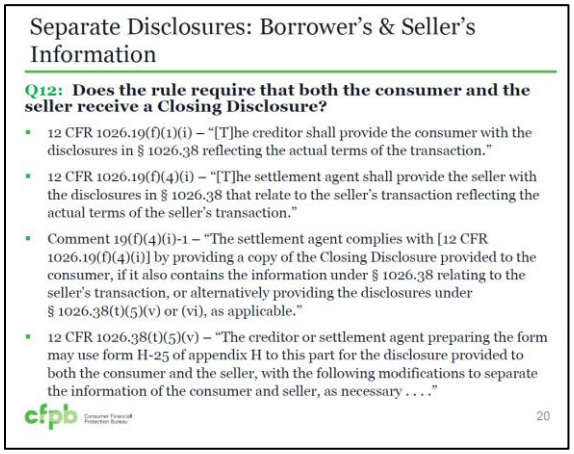
Of those creditors preparing and delivering the Consumer CD [Model Form H-25] as may be modified under §1026.38(t), most reportedly populate only the Borrower side – instructing settlement agents to prepare a separate [2-page] Seller CD [Blank Model Form H-25(I)], as permitted by §1026.38(t)(5)(vi).

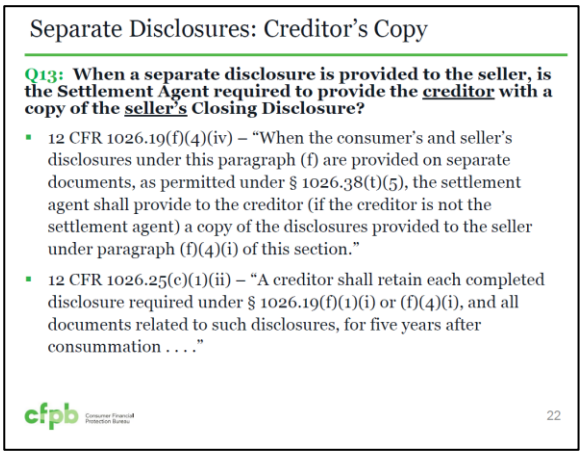
The Bureau, in its NPRM – citing that Regulation Z [TILA] does not contain any further explanation of parties to whom the Closing Disclosure may be provided, the extent to which the Consumer's information may be provided to the Seller or the Seller's agent, or the extent to which the Seller's information may be provided to the Consumer or Consumer's agent – proposes to *"add new commentary under §1026.38(t)(5)(v) to clarify that, at its discretion, the creditor may make modifications to the Closing Disclosure form to accommodate the provision of separate Closing Disclosure forms to the Consumer and Seller*." **[NPRM Page 145]**

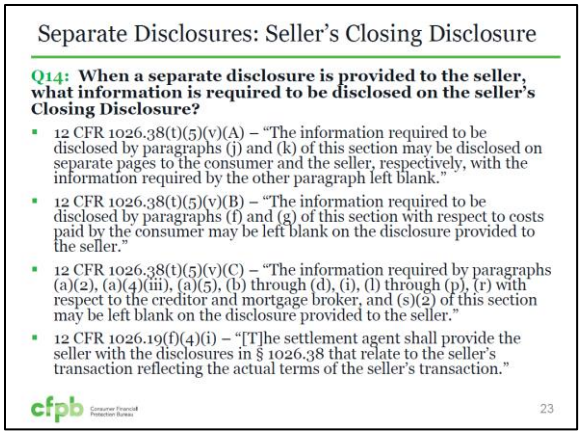
The Bureau goes on to state **[NPRM Pages 145-149]** that:

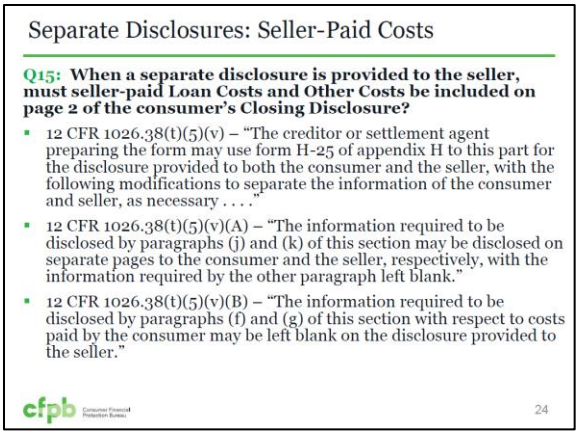
> The Bureau recognizes that consumer credit transactions secured by real property where the consumer is purchasing the property from a seller pose particular considerations related to the sharing of information. Creditors must collect and share information related to the seller's portion of the transaction to satisfy the requirements of government insurance programs, government-sponsored enterprises, and secondary market investors in the ordinary course of providing the financial service (the consumer credit transaction secured by real property).
>
> Additionally, many parties to the transaction rely on sharing information to complete the transaction, including real estate agents, loan officers, and settlement agents, among others. Prior to the effective date of the TILA-RESPA Rule, RESPA and Regulation X required the settlement agent to issue a HUD-1 form to borrowers, sellers, and their agents and provided that the borrower and seller can receive separate HUD-1 forms, with the terms of the buyer's transaction omitted from the seller's disclosure and vice versa. Revisions to RESPA in 1975 permitted separate disclosures to both borrowers and sellers. Regulation X explicitly required the settlement agent to provide to the lender a copy of the HUD-1 with the borrower's and seller's information, or a copy of each separate disclosure that is provided to the buyer and seller, as applicable.
>
> The Bureau has been asked repeatedly by creditors, settlement agents, and real estate agents about the sharing of the Closing Disclosure with third parties involved in the mortgage transaction. These inquiries have largely concerned which third parties may receive a copy of the Closing Disclosure but have also concerned whether a combined Closing Disclosure form must be provided to the consumer and seller or whether separate Closing Disclosure forms may be provided to the consumer and the seller. *The Bureau provided guidance on this topic in its webinar on April 12, 2016*.

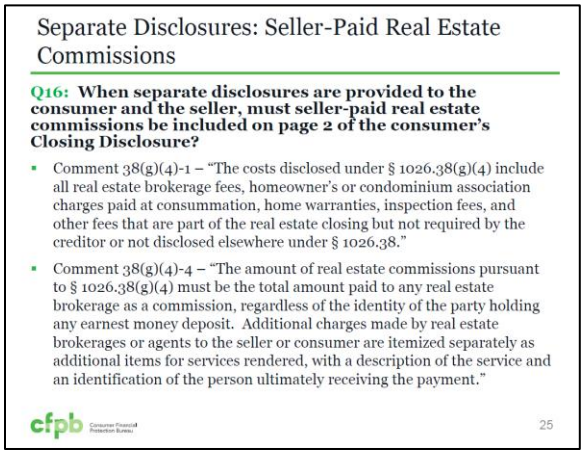
Slides from the April 12, 2016 webinar appear below:











The Rule states that the creditor is required to provide the Consumer the CD, but can outsource that task to the settlement agent. In turn, the settlement agent is required to provide the Seller with disclosure relating to the Seller's transaction – e.g., a copy of the Consumer's CD which may omit certain Consumer-specific information or a separate Seller-specific CD [Model Form H-25(I)]. When Consumer and Seller disclosures are on separate documents, the settlement agent must provide the creditor a copy of the Seller disclosure which the creditor must maintain for 5 years after consummation or include in the loan file if the mortgage is sold or transferred during that time period.

The Rule is clear as to what information [disclosures] may be omitted. The Bureau spokesperson states that *"Seller-paid loan costs and other costs are required to be disclosed on the Consumer's CD regardless of whether a separate CD is provided to the Seller."* While the summary of the Borrower's transaction, including loan costs and other costs paid by Borrower may be left blank on the Seller's CD, *"there is no parallel provision that permits omission of Seller-paid loan costs and other costs from page 2 of the Consumer's CD."* For example, when separate disclosures are provided to the Consumer and Seller, any Seller-paid real estate commission must be included on *both* Seller and Consumer CDs – as must any noncommission real estate brokerage or agent charges for services to the Seller or Consumer, which must be itemized separately with a description of the service and identification of the person ultimately receiving the payment. ■ **END WEBINAR INFORMATION**

Continuing from above **[NPRM Pages 145-149]** regarding separation of Consumer and Seller information, the Bureau expands its review to address privacy provisions of the Gramm-Leach-Bliley Act [GLBA] and its cited exceptions:

> The Gramm-Leach-Bliley Act (GLBA) was passed by Congress after both RESPA and TILA were enacted. Financial institutions involved in the residential real estate settlement process, among others, must comply with the GLBA's requirements relating to the sharing of consumer information as well as with similar State law requirements, where applicable. The GLBA's privacy provisions are implemented by the Bureau's Regulation P, 12 CFR part 1016, and by analogous regulations issued by the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the Federal Trade Commission. Regulation P generally provides that a financial institution (such as a creditor or settlement agent) may not disclose its customer's nonpublic personal information to a nonaffiliated third party without providing notice to the customer of such information sharing and an opportunity to opt-out of such sharing.

There are several exceptions to these notice and opt-out requirements, however.

For example, GLBA section 502(e)(8) provides an exception that applies if a financial institution shares its customer's non-public personal information to comply with Federal, State, or local laws, rules and other applicable legal requirements.

GLBA sections 502(e)(1) and 509(7)(A) provide another exception that applies if a financial institution's sharing of its customers' nonpublic personal information is required, or is a usual, appropriate, or acceptable method, to provide the customer or the customer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product.

The information below is reprinted from the Gramm-Leach-Bliley Act:

GLBA Section 502(e)(8)

e) GENERAL EXCEPTIONS. Subsections (a) and (b) shall not prohibit the disclosure of nonpublic personal information:

(8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

GLBA Section 502(e)(1)

e) GENERAL EXCEPTIONS. Subsections (a) and (b) shall not prohibit the disclosure of nonpublic personal information:

(1) as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer, or in connection with—

(A) servicing or processing a financial product or service requested or authorized by the consumer;

(B) maintaining or servicing the consumer's account with the financial institution, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity; or

(C) a proposed or actual securitization, secondary market sale (including sales of servicing rights), or similar transaction related to a transaction of the consumer;

GLBA Section 509(7)(A)

SEC. 509. DEFINITIONS. As used in this subtitle:

(7) NECESSARY TO EFFECT, ADMINISTER, OR ENFORCE. The term ''as necessary to effect, administer, or enforce the transaction'' means:

(A) the disclosure is required, or is a usual, appropriate, or acceptable method, to carry out the transaction or the product or service business of which the transaction is a part, and record or service or maintain the consumer's account in the ordinary course of providing the financial service or financial product, or to administer or service benefits or claims relating to the transaction or the product or service business of which it is a part, and includes:

(i) providing the consumer or the consumer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product; and

(ii) the accrual or recognition of incentives or bonuses associated with the transaction that are provided by the financial institution or any other party;

Interestingly, the Bureau did not cite GLBA Section 502(e)(2) [shown below] which is the *simplest and safest* route for all parties regarding sharing of Closing Disclosures which may contain nonpublic personal information:

GENERAL EXCEPTIONS: Subsections (a) and (b) shall not prohibit the disclosure of nonpublic personal information *with the consent or at the direction of the Consumer*.

Returning to the NPRM **[Pages 148-149]** regarding separation of Consumer and Seller information, the Bureau states:

> The Closing Disclosure, whether provided as a combined form containing consumer and seller information or separate forms reflecting each side of the real estate transaction conveying the real property from the seller to the consumer, is a record of the transaction (among other things), both for the consumer and creditor, of the transactions between the consumer, seller, and creditor, as required by both TILA and RESPA.
>
> Such records may be informative to real estate agents and others representing both consumers and creditors as part of both the consumer credit and real estate portions of residential real estate sales transactions, as they provide the consumer or the consumer's agent with a record of the transaction.

The Bureau cites its understanding of the real estate settlement process – that it is *usual, appropriate, and accepted* for creditors and settlement agents to provide combined or separate CDs as a confirmation, statement, or other record of the transaction, to consumers, sellers, and their agents, or information on the status or value of the financial service or financial product to their customers or their customers' agents or brokers.

As noted earlier, while it was *usual, accepted, and appropriate* for settlement agents to provide copies of the HUD-1 settlement statement to all parties, including realtors, it is NOT [yet] *usual, accepted, and appropriate* for creditors or settlement agents to provide copies of the Closing Disclosure to others. It bears repeating that sharing the CD is a more complex issue than first meets the eye. Each "side" has made its needs and wants clear. Now, we must seek a solution that addresses all parties' needs and wants, balancing same with careful consideration of creditor and settlement agent liability – *a solution that works for all, without harming any*.

The Bureau rounds out the NPRM **[Pages 148-149]** on this issue by stating:

> *§1026.38(t)(5)(v) Separation of consumer and seller information*
> The Bureau recognizes that incorporating the guidance provided in the April 12, 2016 webinar on how to separate Closing Disclosure forms for the consumer and the seller into Regulation Z commentary may provide additional certainty to creditors. Accordingly, *the Bureau is proposing to add comment 38(t)(5)(v)-1* to clarify that, at its discretion, the creditor may make modifications to the Closing Disclosure form to accommodate the provision of separate Closing Disclosure forms to the consumer and the seller and the three methods by which a creditor can separate such information.
>
> *The Bureau further proposes to add comments 38(t)(5)(v)-2 and -3* to provide examples where the creditor may choose to provide separate Closing Disclosure forms to the consumer and seller.
>
> *§1026.38(t)(5)(vi) Modified version of the form for a seller or third-party*
> *The Bureau proposes to add comment 38(t)(5)(vi)-1* to cross-reference comment 38(t)(5)(v)-1 for additional clarity on permissible form modifications in relation to the modified version of the Closing Disclosure for sellers or third parties.

If the Bureau moves forward with the NPRM commentary as proposed, the amended text of the TRID Final Rule would include Official Commentary as set forth on NPRM Pages 284-285 [see highlighted text boxes below].

§1026.38(t)(5)(v). ***Separation of consumer and seller information*.** The creditor or settlement agent preparing the form may use form H–25 of appendix H to this part for the disclosure provided to both the consumer and the seller, with the following modifications to separate the information of the consumer and seller, as necessary:

> A. The information required to be disclosed by paragraphs (j) and (k) of this section may be disclosed on separate pages to the consumer and the seller, respectively, with the information required by the other paragraph left blank. The information disclosed to the consumer pursuant to paragraph (j) of this section must be disclosed on the same page as the information required by paragraph (i) of this section.

B. The information required to be disclosed by paragraphs (f) and (g) of this section with respect to costs paid by the consumer may be left blank on the disclosure provided to the seller.

C. The information required by paragraphs (a)(2), (a)(4)(iii), (a)(5), (b) through (d), (i), (l) through (p), (r) with respect to the creditor and mortgage broker, and (s)(2) of this section may be left blank on the disclosure provided to the seller.

1. *Permissible form modifications to separate consumer and seller information*. The modifications to the form permitted by §1026.38(t)(5)(v) may be made by the creditor in any one of the following ways:

i. Leave the applicable disclosure blank concerning the seller or consumer on the form provided to the other party;

ii. Omit the table or label, as applicable, for the disclosure concerning the seller or consumer on the form provided to the other party; or

iii. Provide to the seller, or assist the settlement agent in providing to the seller, a modified version of the form under §1026.38(t)(5)(vi), as illustrated by form H-25(I) of appendix H to this part.

2. *Provision of separate disclosure to consumer*. If applicable State law prohibits sharing with the consumer the information disclosed under §1026.38(k), a creditor may provide a separate form to the consumer. A creditor may also provide a separate form to the consumer in any other situation where the creditor in its discretion chooses to do so, such as based on the seller's request. For the permissible form modifications to separate consumer and seller information, see comment 38(t)(5)(v)-1.

3. *Provision of separate disclosure to seller*. To separate the information of the consumer and seller under §1026.38(t)(5)(v), a creditor may provide (or assist the settlement agent in providing) a separate form to the seller where applicable State law prohibits sharing with the seller the information disclosed under §1026.38(a)(2), (a)(4)(iii), (a)(5), (b) through (d), (f), or (g), with respect to closing costs paid by the consumer, or §1026.38(i), (j), (l) through (p), or (r), with respect to closing costs paid by the creditor and mortgage broker. A creditor may also provide (or assist the settlement agent in providing) a separate form to the seller in any other situation where the creditor in its discretion chooses to do so, such as based on the consumer's request. For the permissible form modifications to separate consumer and seller information, see comment 38(t)(5)(v)-1.

§1026.38(t)(5)(vi). ***Modified version of the form for a seller or third-party*.** The information required by paragraphs (a)(2), (a)(4)(iii), (a)(5), (b) through (d), (f), and (g) with respect to costs paid by the consumer, (i), (j), (l) through (p), (q)(1), and (r) with respect to the creditor and mortgage broker, and (s) of this section may be deleted from the form provided to the seller or a third-party, as illustrated by form H–25(I) of appendix H to this part.

Paragraph 38(t)(5)(vi).

1. For permissible form modifications to separate consumer and seller information, see comment 38(t)(5)(v)-1.

NPRM Industry Comments re State Law and Private Contract Considerations

There were several comments noting that the CFPB did not address State law and private contract considerations in the TRID Rule nor in its NPRM. The TRID Rule does address inconsistencies between the Rule and State law in several places. As noted earlier, TRID provides that some State laws may prohibit provision of information about the Consumer to the Seller and about the Seller to the Consumer. **[FR Page 1854]**

The Bureau cites the need for commenters to identify particular State laws that may conflict, as without such information, the Bureau lacks a basis to make a conflict determination – and points to the section-by-section analysis of §1026.28 for a discussion of the State law exemption rules applicable to the integrated disclosure requirements of the Final Rule. **[page 242]**

TILA [Regulation Z] and RESPA [Regulation X] preempt State laws to the extent of their inconsistency with the statute and permits States, creditors, and other interested parties to request a determination by the Bureau regarding such inconsistency. As to the latter, the Bureau may not determine that any State law is inconsistent with any provision of RESPA if the Bureau determines that such law or regulation gives greater protection to the Consumer.

Generally, under TILA, a State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law. A State law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the Federal law, or if it requires the use of a term different from that required in the Federal law to describe the same item. A creditor, State, or other interested party may request the Bureau to determine whether a State law requirement is inconsistent. After the Bureau determines that a State law is inconsistent, a creditor may not make disclosures using the inconsistent term or form.

Finally, Section 6807 of the Gramm-Leach-Bliley Act [GLBA], regarding relation to State laws states:

> **(a) In general:** This subchapter and the amendments made by this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.
>
> **(b) Greater protection under State law:** For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter and the amendments made by this subchapter, as determined by the Bureau of Consumer Financial Protection, after consultation with the agency or authority with jurisdiction under section 6805(a) of this title of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party. **[15 U.S. Code § 6807]**

Consumer [Borrower] Perspective

For purposes of the Gramm-Leach-Bliley Act, a consumer is defined as *"an individual, or that individual's legal representative, who obtains or has obtained a financial product or service* [e.g. a mortgage] *from a financial institution that, is to be used primarily for personal, family, or household purposes."* **[15 U.S.C. §6801 et seq. GLBA Title V; CFPB Reg. (12 CFR) Part 1016 Privacy of Consumer Financial Information (Regulation P)]**

Under GLBA, financial institutions – which include mortgage lenders and title (settlement) agents, among others – are required to maintain administrative, technical [electronic], and physical safeguards to ensure the security and confidentiality of customer records and information; protect against any anticipated threats or hazards to the security or integrity of such records; and protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

Under the TRID Final Rule – which focuses primarily on the Consumer, the creditor, and the credit transaction – the Consumer is the Borrower. For purposes of discussion regarding sharing Closing Disclosures as part of a purchase-sale-finance transaction, focus is expanded to include both Seller and Buyer/Borrower.

In 2012, prior to the Bureau's release of the TRID Proposed Rule, many industry participants voiced concern regarding integrating the Final Truth-in-Lending Statement ["TIL"] with the HUD-1 Settlement Statement ["HUD-1"]. In turn the Bureau pointed to its directive under the 2010 Dodd-Frank Act to integrate TILA and RESPA forms. It made sense, even to industry participants, to integrate the "Early TIL" with the Good Faith Estimate ["GFE"] as both disclosures flowed from creditors [lenders].

Integrating the "Final TIL" with the HUD-1 settlement statement created a Closing Disclosure form containing specific loan terms much of which is considered nonpublic personal information [NPI] – e.g., that shown on CD pages 1, 4, and 5. Although some information [e.g., loan amount, interest rate, loan term, and principal and interest payments] are also shown on the mortgage which is recorded in the public records – thereby making the "nonpublic" *public* – the mortgage is not recorded until *after* closing. Therefore, at time of CD issuance, such information is *nonpublic*.

Sharing Closing Disclosures; Generally

Due to issues surrounding disclosure of NPI, creditors and settlement agents must continue to be cautious in sharing the Consumer's CD with the Sellers or others, including realtors. While the commentary set forth in the NPRM, which the Bureau proposes to add to the Final Rule, makes great strides in highlighting GLBA exceptions that would enable sharing the CD – the ***simplest*** solution would have been to maintain the status quo, pre-TRID, by preserving the Final TIL and HUD-1 settlement statement as separate disclosures. *However, it is extremely unlikely the Bureau would consider this a viable option at this point.*

Therefore, starting from where we stand today, it seems the ***simplest*** modification to the CD would be maintain Pages 1, 4, and 5 for TILA disclosures and general transaction information, while reserving Pages 2 and 3 solely for RESPA costs and fees disclosures. In so doing, Pages 2 and 3 could be fully populated and distributed to both parties as well as real estate professionals as was done in the past with the HUD-1 settlement statement.

However, since TRID is a "Creditor Choice" Rule, one thing has become clear since its inception – different lenders make different choices, making it almost impossible for settlement agents and realtors to find anything but shifting sand beneath their feet when it comes to preparing, delivering, and receiving Closing Disclosures. Therefore, any changes the CFPB might make to the Rule via its proposed added Commentary will not "solve the problem" as to how future CDs might be modified – as different lenders will interpret TRID and the NPRM added commentary in different ways. Even if all lenders interpret everything the same way, there are still State laws and private contract considerations to deal with – making each purchase-sale-finance transaction "unique like a snowflake."

As noted earlier, the ***simplest and safest*** way to handle CD sharing is to obtain written consent from the Consumer. Today, many realtors are either adding such consent to the real estate contract or obtaining separate written consent. However, as the NAR noted, during Q3 2016, most realtors were obtaining the CD from the settlement agent rather than the lenders. *This creates significant liability for settlement agents, which will be more fully discussed below.*

Rather than realtors obtaining written consent from the Buyer at point of contract, perhaps an alternative would be for lenders to obtain written consent from the Buyer at the point the Buyer becomes a Consumer [Borrower]. This could easily be obtained at or following receipt of the loan application. *Since it is lenders, via "Creditor Choice" decision-making, who prohibit the Consumer's CD from being shared – information appearing in the fine print of their loan closing instructions – and since the TRID Rule holds lenders responsible/liable for compliance-related issues – it makes sense for lenders to obtain written consent from the Buyer/Borrower rather than involve settlement agents and/or realtors. Once they have such written consent, they could then distribute the Consumer's CD to settlement agents and realtors on the same day they deliver it to the Consumer.*

Loan Applications and Nonpublic Personal Information [NPI]

While on the subject of protecting Consumers' NPI, I would be remiss if I did not address the ***real*** elephant in the room, which is the historical practice of lenders sending completed 1003 loan applications to settlement agents as part of their loan closing packages. While it is understandable that lenders want a *typed* loan application to preserve in their files, it would be prudent for either the lender or mortgage broker, as applicable, to provide same to the Consumer [Borrower] directly – rather than passing it through the hands of a third party.

A completed 1003 Loan Application provides
all the information needed to steal a Consumer's identity.

That is in no way saying that settlement agents cannot be trusted. The ***real*** threat comes via electronic transmission of the loan closing package. While other loan documents also contain NPI, none contain as much NPI as the loan application. Although not specifically citing the loan application, an Indiana notary public, acting in the capacity of a "signing agent" pled guilty to identity-theft related charges in June 2013 for selling borrowers' social security numbers

to an identity theft gang who, in turn, opened credit card accounts in the borrowers' names, racking up a reported $160,000 in charges. A year later, the Indiana Secretary of State's office was "still working" on revoking the notary's commission. Although rare, this was not an isolated event.

Today, *cybercrime* is a growing concern. On September 6, 2016, the Financial Crimes Enforcement Network [FinCEN] issued an advisory to help financial institutions guard against a growing number of e-mail fraud schemes in which criminals misappropriate funds by deceiving financial institutions and their customers into conducting wire transfers. Email Account Compromise [EAC] Schemes include criminals hacking into and using the email account of financial services professionals, realtors, buyers, sellers, attorneys, or others, sending fraudulent wire instructions regarding earnest money deposits, seller proceeds, loan disbursements, commissions, or other fees. **[https://www.fincen.gov/ sites/default/files/advisory/2016-09-09/FIN-2016-A003.pdf]**

Although the FinCEN report focuses on wire transfers – the fact that it is based on criminals hacking into emails, begs the question of how safe [or *unsafe*] it is for lenders to electronically transmit the 1003 loan application to a third party, rather than obtaining the Borrower's signature directly. Since settlement agents do not need loan application information to process and close the transaction, this would be a great time for all lenders to rethink this historical industry practice.

Seller Perspective

With so much focus on Consumers – "Buyer/Borrowers" in purchase-sale-finance transactions – some Sellers are reportedly requesting that *their* information not be shared with Buyer/Borrowers or others. However, Sellers are not *"Consumers"* as defined by GLBA or by TRID, in that they are not obtaining a financial product or service [mortgage] from a financial institution with respect to the purchase-sale transaction.

Some view loan payoff information as nonpublic personal information, while others point to payoffs of judgment liens or Seller proceeds as NPI. However, it is easier to argue that information contained on the Seller CD is *not* NPI than it is to make the same claim about the Consumer's CD. For example, if a mortgage or judgment lien is being paid off from Seller proceeds, with few exceptions, the mortgage and judgment lien are a matter of public record. Similarly, on a purchase-sale-finance transaction, the Buyer/Borrower is already privy to the sales price of the property, any Seller credits made on behalf of the Buyer/Borrower, and all Buyer/Seller prorations [e.g., for taxes, assessments]. Taken together – information appearing on the real estate contract plus payoff of mortgages and judgment liens appearing in the public records – little Seller information could be considered NPI other than, perhaps, any personal debts the Seller might want paid from proceeds. At the same time, the TRID Rule notes that Seller information relating to Seller credits and/or items prorated between the Consumer and Seller, constitutes information that the lender may need to consider in the loan approval process.

Setting all that aside, the *simplest and safest* way to handle Seller-CD sharing is to obtain written consent from the Seller – just as the *simplest and safest* way to handle Consumer-CD sharing is to obtain written consent from the Consumer [Borrower]. With such written consent in hand – copies maintained in both lender and settlement agent files – the issue of sharing Consumer information with the Seller, or Seller information with the Consumer, or Consumer or Seller information with realtors or others, becomes a non-issue for all concerned.

When requesting a Consumer's or Seller's specific written consent for CD sharing, consider including a reprint of GLBA exceptions showing that Act, on its own, permits such sharing – in the event they are unwilling to provide specific consent.

Realtor Perspective

The CFPB's *Know Before You Owe – Real Estate Professional's Guide* includes the following directive:

> ***Find out who provides the Closing Disclosure.***
> "Find out who will be preparing and providing the Closing Disclosure, when and how your client can expect to receive it, and how any last-minute changes are handled. Business practices can vary from lender to lender and state to state. Previously HUD-1 Settlement Statements were most often provided by a settlement agent, attorney, or closing company. This may not be the case for the Closing Disclosure. Lenders may choose to prepare and deliver the Closing Disclosure to your client directly. They may deliver it through the mail, in-person, or electronically (if your clients have given permission for electronic delivery). Find out if the lender or the closing company has a required timeframe for any change requests. Keep in mind that no matter who prepares or provides the Closing Disclosure, the lender is accountable for its accuracy and approves the final version."

The National Association of Realtors [NAR] sent a letter to CFPB Director Corday on June 7, 2016 which, among other issues and concerns, urged the Bureau to *"clarify that lenders can share the Closing Disclosure (CD) with third parties if the lender receives a consent from the consumer."* The letter included the following:

> **Sharing the Closing Disclosure with Third Parties**
>
> REALTORS® are trusted advisors who help consumers navigate the home purchase process. A recent ALTA survey reported that a third of consumers cite real estate agents as the most important source of information about real estate settlements. *Prior to implementation of the Know Before You Owe rule, real estate agents aided their clients by answering questions about the HUD-1 and reviewing terms agreed to in the sales contract including concessions, escrows, commissions and shares of prorated taxes. This form was routinely shared with agents in nearly all transactions*.
>
> Since the rule was implemented, 54.5 percent of real estate professionals who were surveyed now have problems getting access to the Closing Disclosure. Real estate professionals are even more likely to have issues getting access to the Closing Disclosure when settlement is delayed. When real estate professionals do get access to Closing Disclosures, 50 percent have reported finding missing concessions and incorrect names or addresses, incorrect fees, commissions, and taxes.
>
> While consumer financial privacy issues fall under Regulation P and did not change with Know Before You Owe, *NAR has heard that lenders feel the new rule exposes them to additional liability under the Truth and Lending Act (TILA) if they provide real estate professionals with copies of the Closing Disclosure*. This is an unintended consequence of the rule that needs clarification from the CFPB.
>
> *NAR urges the CFPB to include language in the proposed rule stating that it is just as acceptable now as it was before Know Before You Owe for a lender to share the CD with third parties if the lender receives a consent form from the consumer as allowed under Regulation P, Privacy of Consumer Financial Information - 12 CFR Part 216*. This will help lenders feel more comfortable sharing the CD with third parties when they have a consent form from a borrower. This will also help NAR communicate with industry partners that a consent form is permissible and encourage its use. If real estate agents are able to review the CD with the borrower, they will help the process by aiding the consumer and finding technical errors that are more easily fixed by the lender before the loan is closed.

Determining Who Represents Whom

When it comes to sharing the Consumer's [Borrower's] CD, it is important for lenders and settlement agents to determine who the real estate broker or agent represents. Most Sellers and Buyers view the real estate agent as the person who represents them in the sale or purchase of a home. In reality, a real estate salesperson – commonly referred to as a "real estate agent" – is the agent of the real estate broker. As such, real estate agents are generally permitted by State law to handle the real estate transaction up to a certain point – with final approval of the contract and financial terms controlled by the real estate broker via the "listing agreement" with the Seller or the "buyer agency agreement" with the Buyer. Brokers are legally responsible for the actions of their agents.

In the past, all agents involved in a real estate transaction legally represented the Seller – the "listing agent" acting as the direct agent of the Seller and the "selling agent" [a/k/a "cooperating agent"] acting as a sub-agent of the Seller. When the concept of "buyer's broker" and "transaction broker" first emerged in the early 90's, many "selling agents" were surprised to discover that prior to that time, no one had formally represented Buyers.

Today, "buyer's brokers" are quite common. There are a number of "buyer's agency agreements" that represent the nature of the relationship between brokers and Buyers – including nonexclusive not-for-compensation contracts and nonexclusive and exclusive right-to-represent contracts. Regardless of the type of agreement, in many if not most cases involving a buyer's broker, it is the Seller who pays the commission rather than the Buyer – e.g., the listing agent splits its commission received from the Seller with the buyer's broker.

For lenders and settlement agents, determining *who represents whom* – for purposes of sharing the Consumer's CD – is not as simple as determining who pays the commission. To add to the mix, most States permit "dual agency" relationships – where the broker represents *both* the Buyer and Seller – provided full disclosure is made with consent from both parties. Many states also recognize "transaction brokers" – those without traditional fiduciary duties of loyalty and obedience – where neither the Buyer or Seller is fully represented.

TRID-GLBA Considerations Regarding CD Distribution to Realtors

Historically, realtors needed the HUD-1 for proof of commission paid and received at settlement. The same holds true, today, regarding the Closing Disclosure. In most transactions [regardless of Buyer representation] commission is generally paid by the Seller and, as such, should appear in Section H ["Other"] under the "Other Costs" Table on CD Page 2. At the same time, many "Buyer's Brokers" – those directly representing the Consumer – consider it their duty to review the CD with the Buyer/Borrower, just as they once did with the HUD-1 Settlement Statement.

As noted above, lenders and settlement agents should determine, prior to CD sharing, *who represents whom*. Realtors representing Sellers *"should"* be entitled to a copy of the Seller's CD, while those representing Buyer/ Borrowers *"should"* be entitled to a copy of the Consumer's CD – at least from a *Federal* [TRID-GLBA] perspective. *State* law may be more prohibitive or restrictive. *It is the responsibility of the lender, as creditor under TRID, to determine the scope of specific State law regarding privacy provisions. Settlement agents are, in turn, required to close in compliance with the lender's loan closing instructions as well as other "transaction governing" documents such as the real estate contract and title insurance commitment.*

The *real estate contract* setting forth the terms of the purchase-sale agreement may also address CD sharing – if not specifically, then generically, via contract terms relating to *delivery of information*. Many if not most form contracts contain a provision that, where delivery is required [e.g., to the Buyer or Seller], delivery to the realtor, suffices – e.g., *"notice and delivery given by or to the attorney or broker [including such broker's real estate licensee] representing any party shall be as effective as if given by or to that party."* However, again, creditors and settlement agents are cautioned to first determine *who represents whom* in the purchase-sale-finance transaction.

Creditor Perspective

Because the TRID Rule is fundamentally crafted as a "Creditor Choice" Rule, it follows that it is also a "Creditor Liability" Rule. As such, it is understandable that lenders, awash in a sea of new and revised mortgage loan regulations – far more than any other settlement service providers – would be concerned about liability issues. It is also understandable that lenders would want to *"shift"* liability to others, wherever possible.

For purposes of this commentary, discussion is limited to sharing CDs and privacy issues and provider liability concerns re same. To that end – since much of the liability discussion involves *both* lenders and settlement agents – lets continue the discussion from a settlement agent perspective.

Settlement Agent Perspective

As noted above, because the TRID Rule is fundamentally crafted as a "Creditor Choice" Rule, it follows that it is also a "Creditor Liability" Rule. One of the issues that will be explored in greater detail in the November 2016 letter to Director Cordray [with copies to State Insurance Commissioners and select members of Congress] – subsequent to the October 2016 filing of this NPRM commentary – is the issue of creditor and settlement agent liability.

Director Cordray sent a letter to Senator Bob Corker on April 7, 2016, responding to a number of concerns regarding the Bureau's implementation of the TRID Rule outlined in Senator Corker's letter of March 11, 2016. Addressing industry concern regarding mounting evidence that many lenders are attempting to shift liability under TRID to settlement agents – e.g., via written loan closing instructions – Director Cordray stated:

> "You also ask what steps we are taking to prevent lenders from shifting liability to settlement agents. The Know Before You Owe [KBYO] mortgage disclosure rule places responsibility for the accuracy and delivery of the integrated disclosures on the creditor, but, as discussed in the preamble to the KBYO mortgage disclosure final rule, creditors and settlement agents are free, as they always have been, to decide how to divide responsibility and risk most efficiently and to implement those mutual decisions via contract. While creditors may enter into indemnification agreements and other risk-sharing arrangements with third parties, creditors cannot unilaterally shift their liability to third parties and, under the Truth in Lending Act, alone remain liable for errors on the KBYO mortgage disclosures."

Shown below is "liability language" reportedly appearing, in same-similar fashion, in the loan closing instructions issued by various lenders:

> "As Settlement Agent, you are the Creditor's Agent regarding the closing of mortgage loan transactions, for purposes of ensuring compliance with all conditions and requirements of Regulation Z, TILA, RESPA, GLBA, and all state and local jurisdictional laws. You hereby agree, by closing transactions on behalf of Creditor, to be bound by Creditor's Loan Closing Instructions ["Closing Instructions"] in all manner of your performance conducted prior to, during, and subsequent to consummation of transactions covered by such Closing Instructions. Creditor, or Creditor's successors or assigns, will hold you, as Settlement Agent, liable for any losses resulting from your failure to follow such Closing Instructions. As Settlement Agent, you hereby agree to indemnify the Creditor, its officers, directors, employees, successors, or assigns ['Indemnified Parties'] and hold such Indemnified Parties harmless from and against all claims, demands, liabilities, losses, costs and damages – including court costs and attorneys' fees – incurred or suffered by Indemnified Parties as a result of damages arising under or related to Closing Instructions and caused by your actions or inactions, as Settlement Agent. Such indemnification shall extend to the actions or inactions of your employees and/or independent contractors chosen by you, as Settlement Agent, that constitute a breach of Closing Instructions or negligent or willful misconduct. Failure of you, as Settlement Agent, to abide by the Closing Instructions will cause the Creditor to place you on probation or remove your company as a Creditor-approved vendor."

It bears noting that lenders and settlement agents are NOT– as noted in Director Cordray's response hereinabove – engaging in *"mutual decisions"* regarding *"how to divide responsibility and risk most efficiently"* with mortgage lenders. The TILA-heavy hand with which the TRID Rule was written has resulted in many lenders – especially large lenders – dictating lender-selected terms and conditions in a "take it or leave it" fashion to title (settlement) agents via ever-expanding liability-laden loan closing instructions. In addition, one or more national lenders are reportedly in the process of removing small title (settlement) agents from their approved closing lists who do not meet minimum annual closing volume requirements. This is a trend that is expected to continue in the years to come, potentially arriving at a time where – in accordance with CFPB predictions during early-year TRID workshops – some lenders take the settlement process in-house, via lender-owner, lender-affiliated, or lender-preferred-partner providers.

> *As discussed on page two, should a settlement agent provide copies of the Consumer's CD – even with written consent of the Consumer [Borrower] – to the Seller, realtors, or others, the settlement agent may still be viewed as violating the lender's loan closing instructions, where such instructions prohibit distribution and may be summarily removed from the lender's approved closing list.*

Summary and Conclusion

Thank you again for the opportunity to provide Commentary on the TRID Notice of Proposed Rulemaking regarding privacy issues and provider liability when sharing Closing Disclosures. In closing, I would like to reiterate that, as a leading industry educator, my students include not only title (settlement) agents and closing attorneys but, also, real estate brokers, real estate agents, mortgage brokers, and mortgage lending personnel. Immediately prior to finalizing this submission, I had an opportunity to spend 10 hours in class discussing TRID, GLBA, and RESPA – with students from all above-referenced categories – both from a regulatory-compliance ***and*** real-world perspective. In addition, I continue to answer dozens of questions per week on these and other regulatory compliance issues, submitted by current and former students who work throughout the country. I mention this only to emphasize that I do not enter into the Commentary limelight lightly but, rather, with the intent to gain perspective from all sides and arrive at a solution that works for all, without harming any.

For those who wish to learn more about the products and services The Koogler Group has to offer – or to review my Professional Biography – please visit our website at www.KooglerGroup.com.

As noted in the beginning of this commentary, a detailed letter will be forwarded to Director Cordray in early November, with copies to State Insurance Commissioners and interested members of Congress, regarding creditor and settlement agent liability and disclosure of title insurance premium. For those who wish to review the forthcoming November 2016 letter [when posted] or prior letters and commentary submitted to the CFPB, State Regulators, and others, please visit www.KooglerGroup.com.

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