CFPB’s New Rule and What It Means for Settlement Agents

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I. Why are changes being made?

The new regulations, as with most laws and regulations, come in response to abuses of the mortgage loan system. All of us witnessed the meltdown of the mortgage loan system over the past few years. Dodd-Frank\(^1\) was passed July 1, 2010 in part “to promote the financial stability of the United States by improving accountability and transparency in the financial system, . . . and to protect consumers from abusive financial services practices.”\(^2\) As part of its mandate the Consumer Financial Protection Bureau (CFPB) has examined the settlement service process regulated by the Real Estate Settlement Procedures Act (RESPA) in conjunction with other financial statutes and regulations as part of the overall financial reforms in the mortgage lending industry. The review resulted in the merger of the Truth in Lending Act disclosure form (Regulation Z) with RESPA’s HUD-1 Settlement Statement (Regulation X)\(^3\) for most residential transactions covered by RESPA.

The purposes of the regulatory changes can be summarized as:

1. **Protect nonpublic personal information** (NPI) of the consumer;
2. Make the cost of a mortgage loan **understandable** for the consumer by giving adequate, timely and meaningful/understandable **disclosures** as to both the cost of a particular mortgage loan, and the way nonpublic personal information will be protected; and
3. **Eliminate** surprises with regard to financing at the settlement table by providing the Closing Disclosure at least 3 days prior to consummation.

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II. Remember What Transactions RESPA Covers

A. What the Rule Covers
   1. Most 1-4 family closed-end consumer mortgages made for personal or family use.
   2. The CFPB eliminated the exemption in Regulation X for transactions of 25 acres or more, thus making such transactions subject to the Final Rule. However, such transactions may be exempt under other provisions excluding extensions of credit primarily for business, commercial, or agricultural purposes.
   3. A living trust for tax or estate tax purposes is considered an individual for inclusion as long as the loan is primarily for personal, family or household purposes.

B. What the Rule Does Not Cover
   1. Home equity lines of credit (HELOCs)
   2. Reverse mortgages
   3. Mortgages secured by a mobile home or by a dwelling that is not attached to real property
   4. Loans made by a creditor who makes five or fewer mortgages in a year
   5. Commercial transactions
   6. Loans made for agricultural purposes
   7. Cash transactions

C. What this Means for the Settlement Agent
   1. Use the Loan Estimate and Closing Disclosure Document for transactions covered by the new rules.
   2. Use the 2010 HUD-1 settlement statement for HELOCs and reverse mortgages.
   3. Use the pre 2010 HUD-1 settlement statement, or any other disclosure/disbursement form you choose for transactions not covered by RESPA and the new rules.

If a standard creditor (bank, credit union, mortgage broker, etc.) is involved the creditor will dictate the settlement form to be used.

III. Change in Terminology
By the implementation date of August 1, 2015 all involved with residential real estate transactions will need to be comfortable with the evolutionary terminology and forms. Much of the change in terminology makes it consistent with terms used in existing mortgage financing regulations. Settlement service providers need to be able to use the terms interchangeably.
Lender > Creditor
Borrower > Consumer
Closing/settlement\(^4\) > Consumer
Preliminary TIL & GFE > Loan Estimate
HUD-1/settlement statement & final TIL > Closing Disclosure

**IV. Loan Estimate**

**A. Pre-application activity**

*General rule:* a creditor may provide a consumer with a written estimate of terms or costs specific to that consumer before the consumer receives the loan estimate, so long as the loan estimate conspicuously states the following: “Your actual rate, payment, and costs could be higher. Get an official Loan Estimate before choosing a loan.”\(^6\)

**B. Loan application**

A loan application is now defined as “the submission of a consumer’s financial information for the purposes of obtaining an extension of credit.”\(^7\) A loan application consists of the following 6 pieces of information:

1. Name of consumer
2. Consumer’s income
3. Consumer’s social security number (used to obtain a credit report)
4. Property address
5. Estimate of the value of the property (but can’t require a copy of the contract in a purchase transaction, or a property address)
6. Loan amount requested

An application submitted electronically is considered to be a written loan application. A written record of an oral application also qualifies.

These six elements of a loan application have been in effect for years. What has changed is that additional requirements cannot be made *before* a Loan Estimate is provided. The element of “other information deemed necessary by the loan originator” was eliminated because the CFPB believed that creditors could use this catch all to delay loan estimates to borrowers, thus inhibiting borrowers from negotiating loan terms and shopping around. The CFPB also perceived this vague requirement made it unclear to consumers as to when a consumer would be

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\(^6\) 12 CFR § 1026.19(e)(2)(ii).

\(^7\) 12 CFR § 1026.2(3)(i). The definition of application refers to the “submission” of the six items of information that make up the definition, and as such, merely maintaining such information from a previous transaction or business relationship would not constitute an application for purposes of the definition if the consumer has not submitted any information or indicated that he or she wishes such information maintained by the creditor to be used for an application. Final Rule p. 141.
entitled to a loan estimate. The CFPB noted that if creditors wanted additional information in the application process, the new definition of “application” did not prohibit them from collect it.\(^8\)

After August 1, 2015 prior to the consumer receiving the Loan Estimate and indicating an intent to proceed with the loan, the creditor **may not** charge any fee other than “a bona fide and reasonable fee for obtaining the consumer’s credit report.”\(^9\) Currently lenders often require $450 +/- for credit report and appraisal at the time the application is submitted. A check or credit charge is delivered to the lender prior to the lender processing the application, and held, unprocessed, until the borrower agrees to proceed. This practice is prohibited in the new rules, allowing the consumer to actively do comparison shopping without having $450+/- tied up at multiple locations during the decision making process. The chilling effect on the consumer engaging in comparison shopping for the best terms for their loan is negated by denying the creditor the right to make the charge up front. The new fee will range from less than $10 to maybe $50, depending on the creditor.

C.Delivery

1. General Rule: a creditor must deliver or place in the mail the “early disclosures” no more than 3 business days after receiving a loan application, but no less than 7 business days before consummation.

2.“Early Disclosures” include the following:
   1) Loan Estimate
      Written List of Providers - The creditor must still provide a list of settlement service providers if the creditor allows the consumer to shop for this service. The list may still consist of a single entity or person. The creditor may have an affiliated business arrangement with the listed entity or entities. The list must contain current, accurate contact information, and not include entities that are out of business, or not available in the area. The list must also clearly state that the consumer may choose a different service provider. Even though the creditor may “impose reasonable requirements regarding the qualifications of the provider,” it may include a disclaimer which states that inclusion on the list is not a recommendation by the creditor and not a guarantee of the qualifications of those on the list.

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\(^8\) *See generally* Final Rule pp. 120-142.
\(^9\) § 1026.19(e)(2)(i)(B)
3. Mortgage brokers: if the application is received by a mortgage broker, either the creditor or the mortgage broker may supply the Loan Estimate, but the creditor remains ultimately liable.

4. “Delivery” can be accomplished:
   1. In person
   2. Placed in the mail
   3. By electronic means—but if by electronic means, note the following:
      a. In order for the creditor to communicate with the consumer electronically, the consumer must agree to accept electronic communication PRIOR TO receiving any information in that format from the creditor. Financial privacy statutes\(^\text{10}\) require that creditors and service providers (including settlement agents) make sure that nonpublic personal information be kept secure. Steps need to be taken to ensure electronic communication meet privacy requirements. All electronic communication may end up having a login feature, similar to that currently used by lenders to provide settlement documents and instructions to settlement agents, or be sent by some other encrypted system.
         a. Electronic delivery is treated like mail (i.e., presumed received by the consumer within three days of sending the email)—unless, of course, the consumer acknowledges receipt. Then the creditor has proof of delivery. Creditors may decide to use a uniform time period rather than tracking the exact date of delivery in a case by case basis.

5. Three day rule and the “Business day” defined for Loan Estimate

   The term “business day” has multiple meanings, depending on what part of the process is involved. With the loan application the 3 days is measured by the days the creditor is “regularly open to do business with the public.” Sundays and federal holidays are not counted as business days. If the creditor is “open” on Saturdays, Saturdays are counted. If the creditor is not open on Saturdays, Saturdays are omitted from the three business day calculation. Bottom line, the creditor must mail the Loan Estimate “not later than the seventh business day before consummation.”\(^\text{11}\)
   1. For 3-day requirement to reply to a loan application: “a day on which the creditor’s offices are open to the public for carrying on substantially all of its business functions.”\(^\text{12}\)

   Unless the creditor has confirmed a response from the consumer, the consumer is deemed to have received the communication 3 business days after the communication is sent, the same as if delivery was made by USPS mail, regardless of whether the communication is USPS mail, email, overnight delivery, or any other means of communication other than face-to-face delivery.

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\(^\text{10}\) Gramm Leach Bliley, Title V, Subtitle A, Privacy, Disclosure of Nonpublic Personal Information
\(^\text{11}\) § 1026.19 (e)(iii)(B)
\(^\text{12}\) 12 CFR § 1026.2(a)(6).
2. For 7-day requirement from date of application to date of consummation, the quickest something can close: “all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).”
   a. Waiver/modification of the 7-day requirement: consumer can waive or modify this requirement by claiming a “bona fide personal financial emergency” in writing. “Printed forms for this purpose are prohibited.”
   b. The only example given of such an emergency only applies to refinances where the consumer must close to avoid foreclosure.
   c. If the seller is about to be foreclosed, the CFPB says that is not a bona fide personal financial emergency for the consumer. No waiver of the time periods.

6. In the case of multiple consumers, delivery need only be made to one of the primary obligors, unless the transaction is rescindable, i.e., a refinance, in which case the disclosures must be given to all the consumers.

D. Charging for title insurance – selling the Owner’s policy
The cost of title insurance for the loan policy will be disclosed based on the full premium rate for a loan policy, basic coverage

Owner’s title insurance is designated as “optional.” The term “optional” is required to show in the Loan Estimate and Closing Disclosure with the charge for owner’s title policy. The CFPB believes it to be the title agent’s job to sell the owners on purchasing an owner’s title insurance policy. A creditor must have one to be able to sell their loan on the secondary market. It is standard, prudent business practice. But the purchaser may choose to purchase one, or not. It is a business decision for the consumer. The cost of the owner’s coverage may not be disclosed in the Loan Estimate if the consumer does not ask for it to be included.

The easiest way for the purchaser to “request” an owner’s policy is to have it included in the real estate contract. If the purchaser has obtained a loan estimate prior to signing a contract, the inclusion of the owner’s title insurance premium will be a “change in circumstances” that will require a revised Loan Estimate. As of January, 2015 the NVAR form included language that for informational purposes only, and not in any way as a requirement that the consumer purchase owner’s title insurance, the creditor should include the cost of the enhanced owner’s title insurance premium in the Loan Estimate. If the consumer obtained a Loan Estimate prior to providing the loan officer with a copy of the contract, and did not otherwise request the cost of owner’s title insurance be included in the estimate, a revised loan estimate will be generated once the contract is provided to the creditor.

A good analogy to “explain” why an owner’s title policy is needed, without getting into details, is to ask the consumer whether they would be comfortable without casualty/fire insurance on

14 12 CFR § 1026.19(e)(1)(v).
their residence. If the settlement agent is not an attorney or a licensed title insurance agent, they may not discuss coverage afforded by an owner’s title policy, nor the benefits of the enhanced ALTA Homeowner’s Title Policy.

If owner’s title insurance is purchased, the manner of designating the charge must be disclosed to the consumer as detailed by the regulations, a manner in which many settlement agents in Virginia currently disclose the fee, but which the Virginia Bureau of Insurance does not believe reflects the way fees are charged. The CFPB dictates the following procedure to more accurately reflect the true cost of owner’s title insurance:

\[
\text{Full owner’s title insurance premium for the purchase price} + \text{Simultaneous issue fee} - \text{Full loan coverage title insurance premium} \\
\text{The difference is the amount to be disclosed as premium for the owner’s coverage.}
\]

E. Review the Loan Estimate Form (Appendix A)
Since consumers are being encouraged to compare the Loan Estimate to the Closing Disclosure during the review period between receiving the Closing Disclosure and signing the loan documents, settlement agents need to be familiar with the basic format of the Loan Estimate.

V. Closing Disclosure

A. What is the Closing Disclosure?
The Closing Disclosure is a 5-page document for the consumer/purchaser/borrower which combines all the elements required by Truth-in-Lending (TILA Reg. Z) and Real Estate Settlement Procedures Act (RESPA Reg. X) required to be disclosed at settlement. Unlike the HUD-1, the Closing Disclosure is not a balance sheet, nor a disbursement record. Software service providers/settlement agents will produce another document that will be a balance sheet/disbursement record which parties will sign to help comply with Virginia law requiring the settlement agent disburse according to the written instructions of the parties.\(^\text{15}\)

The Closing Disclosure must accurately show both the actual terms of the loan and the actual costs associated with the consummation process. If the settlement agent or creditor does not have full information, the Closing Disclosure must be completed with estimates that have been completed with due diligence. The creditor and settlement agent are obligated to cooperate, as they do now, to provide information to each other.

Estimates might be used when a new year’s real estate tax assessment is published, but the tax rate has not been set. If the parties have a contract term that survives closing related to this matter the number used in the Closing Disclosure, based on prior year’s tax rate, will be an estimate. Estimates might also be used if a problem arises at the walk through, in which the seller needs to pay to have something repaired, and the amount charged is an estimate. As this affects the seller’s final figures, rather than the purchaser’s, it may not be significant to the CFPB.

\(^{15}\text{Va. Code § 55-525.24 }\) https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+55-525.24
CD, Page 1:
Page 1 of the Closing Disclosure gives general information. The “Closing Information” section includes the date the disclosure is provided to the consumer. With current rules, it is anticipated this will be dated three days prior to consummation. In the attached example it is the same date as closing, presumably due to a change that occurred during the review period. The corrected Closing Disclosure is now dated the same date as closing. The closing date will be the same date as consummation. The disbursement date in a refinance would be after the 3 day rescission period had passed. In a purchase, the disbursement date in Virginia should be the same date as settlement, even though state law allows two business days for disbursement.

The “Closing Information” section also includes the name of the Settlement Agent, which should be the company or law office performing closing services. If the lender is providing the Closing Disclosure, make sure they have the accurate name of your business. The “sales price” is the actual consideration in a purchase transaction, but will be the appraised value on a refinance.

In some instances you may have multiple, non-related sellers or purchasers, i.e., more parties than fit at the top of page one. In those cases you must add additional pages to show the proper parties. Any page you add must contain all the information disclosed on the first page of the Closing Disclosure.

The “Loan Information” section at the top makes logical sense. The MIC # is the “mortgage insurance case number,” if mortgage insurance is applicable.

The first page next shows “Loan Terms” which information should be identical to the Loan Estimate. The format is identical and the numbers show the final amount for the loan rate, interest rate and monthly payment. If any of the sections show the amount can change during the life of the loan, a short explanation must be given as to why.

“Projected Payments” breaks down payments beyond simple PITI (principal, interest, taxes and homeowner’s insurance). First the principal, interest and mortgage insurance payment is shown. Then other monthly payments, such as monthly real estate taxes, homeowner’s insurance and housing association dues, which may or may not be included in a monthly escrow payment, are shown. Since mortgage insurance eventually ceases, under current regulations, to be necessary, the chart shows how payments are impacted when that charge ceases. If construction is involved, the change in payments would be shown when the loan converts from interest only to include principal and escrow payments.

“Costs at Closing” includes any lender credits and an explanation of the credits.

CD, page 2:
Specific charges shown on the second page of the Closing Disclosure are now listed in alphabetical order in each category, with no standard categories named in each section other than creditor points in the first section, and the fact that anything dealing with title or settlement fees be preceded with the term “title –”. There are 5 columns, rather than 2, and the term “poc” is eliminated, with items paid outside of closing in the column stating they were paid before closing.
To make the forms unique, the amounts in each section roll up, and are totaled at the top of the section, rather than at the bottom, until you get to Section J at the bottom of the page.

**Section A, Origination Charges**, will always include a line titled “points,” shown as a percentage of the loan amount. If no points are charged the percentage is zero and the amount in the column is zero. The amounts in this section include all fees required by the lender for which the consumer may not shop, such as application fees and mortgage underwriting fees. There is zero variance allowed with these fees.

**Section B, Services the Borrower Did Not Shop For**, includes fees currently shown in the 700 series of the HUD-1, such as appraisal fee, flood certification and life of the loan tax service fee. In addition, affiliated provider services and fees charged by those on a list provided by the lender will appear in this section. These fees are in the 10% variance category.

**Section C, Services the Borrower Did Shop For**, includes all title and settlement fees, except for the cost of owner’s title coverage. As mentioned before, all title and settlement fees are prefixed by the term “Title –”. In addition, survey cost, pest inspection fees, etc. will be included in this section. The variance between the actual fees and the fees estimate in the Loan Estimate are not limited since the consumer chooses their own provider.

The cost of title insurance for the loan policy will be disclosed based on the full premium rate for a loan policy, basic coverage. A creditor must have a title policy to be able to sell their loan on the secondary market. It is standard, prudent business practice. But the purchaser may choose to purchase one, or not. (See H, below) It is a business decision for the consumer. The cost of the owner’s coverage may not be disclosed in the Loan Estimate if the owner does not request it, either in a purchase contract or individually.

If owner’s title insurance is purchased, the manner of designating the charge must be disclosed to the consumer as detailed by the regulations, a manner in which many settlement agents in Virginia currently disclose the fee, but which the Virginia Bureau of Insurance does not believe reflects the way fees are charged. The CFPB dictates the following procedure to more accurately reflect the true cost of owner’s title insurance:

\[
\text{Full owner’s title insurance premium for the purchase price} \\
\text{plus Simultaneous issue fee} \\
\text{minus Full loan coverage title insurance premium} \\
\text{The difference is the amount to be disclosed as premium for the owner’s coverage.}
\]

Sections A + B + C = D, with a subtotal in the middle of the page for these expenses.

“Other Costs” consists of five sections. **Sections E -Taxes and Other Government Fees, F -Prepaids, and G -Initial Escrow Payment at Closing** are self explanatory. In Section E the name of the entity assessing the tax is named even if the payee is different (Assessor vs. Treasurer). Section F only allows three additional items to be added. Section G has retained the “aggregate
adjustment”, as none of the statutes covering settlements were changed, just the format. The Aggregate Adjustment\textsuperscript{16} figure was added to settlement statements in 1995, as a means of limiting the amount of funds lenders held in escrow accounts and to eliminate credit life insurance abuses.

Section H, Other Costs, includes everything else, including items not addressed in the Loan Estimate that will increase the cost of the settlement, such as the home inspection, a home warranty, HOA fees, and invoices for services. The real estate commission is included in this section. CFPB has mandated the commission must be shown in its gross amount, not reduced by the deposit held by the real estate agent. Remember the Closing Disclosure is not a disbursement document, but an explanation of fees, an organized disclosure statement.

Owner’s title insurance is also covered in this section. (See Section C, above, for lender’s coverage disclosure.) No longer is it a matter of just discussing whether a client wants a standard or enhanced owner’s policy, but is a matter of explaining title insurance so it makes sense to the consumer. A reasonable analogy to “explain” why an owner’s title policy is needed, without getting into details, is to ask the consumer whether they would be comfortable without casualty/fire insurance on their residence. That, coupled with the fact that it is a single premium for owner’s coverage, helps “sell” the coverage without getting into detailed discussions of how title insurance really covers human error issues.

The CFPB has mandated that owner’s title insurance is to be designated as “optional” if the consumer pays for the owner’s coverage, as is the custom and tradition in Virginia. The term “optional” is required to show in the Loan Estimate and Closing Disclosure with the charge for owner’s title policy. The CFPB believes it to be the title agent’s job to sell the owners on purchasing an owner’s title insurance policy.

To address the “optional” nature of an owner’s title policy, a clause addressing the issue of owner’s title insurance coverage may be included in standard real estate contracts. As of January, 2015 the NVAR form included language that for informational purposes only, and not in any way as a requirement that the consumer purchase owner’s title insurance, the creditor should include the cost of the enhanced owner’s title insurance premium in the Loan Estimate. The VAR contract form should have similar language by summer, 2015. If the consumer obtained a Loan Estimate prior to providing the loan officer with a copy of the contract, and did not otherwise request the cost of owner’s title insurance be included in the estimate, a revised loan estimate will be generated once the contract is provided to the creditor.

Another possible solution is to negotiate in the contract to have the seller pay for the owner’s title insurance. The consumer would just pay for the loan coverage. Many states follow this model with the seller proving title to the real estate is insurable.

Section I, Total Other Costs, subtotals items E-J. Section J, Total Closing Costs, shows the total amount the borrower has paid in closing costs including variance adjustments and other lender credits.

\textsuperscript{16} http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/res/resp0509
CD, page 3:
“Calculating Cash to Close,” at the top of the page, compares the amount shown on the Loan Estimate with the amount actually charged on the Closing Disclosure with a brief explanation of what has changed.

“Summaries of Transactions” covers the bottom two-thirds of the page and is very similar to the familiar, current HUD-1. Each subsection and section continues to total upward. Section N covers seller paid fees, including seller credits and payoff of existing deeds of trust.

CD, page 4:
This page covers the majority of the disclosures required by statute under TILA and RESPA. As mentioned previously, CFPB has changed the format of disclosures, not the nature of disclosures mandated by statute. Page 4 succinctly covers assumption & demand; late fee & negative amortization; partial payments & security interests; and the escrow account. None of these are new disclosures, but they are all in one place, instead of in multiple documents.

CD, page 5:
No closing would be complete without information about the Annual Percentage Rate (APR) and cost of the loan being provided. What’s changed is the manner of disclosure. Included with prior information is the “total interest percentage,” letting consumers know how much of their payment over the life of the loan is interest. It’s a very understandable number and somewhat of a shock to some consumers. In the attached example, over the life of the loan, assuming no prepayments and no sale, almost 70% of the payments made go to interest payments.

A new addition to the Closing Disclosure is the contact information, which details the professional parties to the transaction, name, contact information and license number. Unused columns may be deleted. Whether this occurs or not will depend on the software provider you use.

B. Seller’s Side – Bifurcated Seller form, or not?
The CFPB is not concerned with seller issues. The entire focus of RESPA and TILA is a purchaser who is borrowing funds for the purchase of a 1-4 family residence, from a federally related lender, i.e., a bank or savings and loan, or similar institution overseen by a federal agency. In a sale transaction sellers may receive a copy of the Closing Disclosure provided to the purchaser, and/or a separate Closing Disclosure with just the seller fees. The settlement agent will provide the seller with the seller’s side closing disclosure. The settlement agent, in theory, decides whether or not to provide copies of the bifurcated form to the other party to the transaction. In practice, matters of the security of nonpublic personal information (NPI), the terms of the contract (provide all information to both sides?), and the instructions of the creditor will all be part of the decision as to what information is provided to the parties to the transaction.

C. Who prepares and delivers the Closing Disclosure?
The Final Revised Rule allows either the creditor or the settlement agent to prepare the Closing Disclosure and provide it to the consumer within the time constraints outlined in the Rule. CFPB says it is a matter to be coordinated between creditor and the settlement agent. Creditors
may continue to rely on settlement agents for information. Creditors can designate how much responsibility they want the settlement agent to have, but the creditor remains ultimately liable. If the settlement agent prepares and delivers the Closing Disclosure then they are responsible for all relevant provisions, including providing corrections and re-disclosure if needed.

The creditor and settlement agent may not duplicate their efforts, i.e., both of them may not send the Closing Disclosure to the consumer three days prior to consummation. Only one may do so. The creditor will determine who will provide the Closing Disclosure. Wells Fargo in September, 2014 and Bank of America in December, 2014 stated in published information that they would provide the Closing Disclosure to their customers. Creditors are ultimately liable for any problems with the numbers, or the timing of delivery, so Wells Fargo and Bank of America, at least as of the fall of 2014, chose to take control. Other lenders may, or may not, do so. It is an individual decision.

People in the settlement industry anticipate preparing a preliminary or draft Closing Disclosure and sending it to the creditor, much as they do now. The creditor will add their fees and send the Closing Disclosure to the consumer at the proper time. The consumer should address questions about the numbers to the creditor rather than the settlement agent or the real estate agent. One Realtor® informed the author that she would call the lender every hour, if necessary, to make sure her clients had proper attention paid to them. Watching the process evolve will be interesting.

D. How is the Closing Disclosure delivered?

In order for the creditor to communicate with the consumer electronically, the consumer must agree to accept electronic communication PRIOR TO receiving any information in that format from the creditor. Financial privacy statutes require that creditors and service providers (including settlement agents) make sure that nonpublic personal information is kept secure. Steps need to be taken to ensure electronic communication meet privacy requirements. All electronic communication should be sent by some encrypted system and may end up having a login feature, similar to that currently used by lenders to provide settlement documents and instructions to settlement agents. Creditors may require that your computer software be compatible with theirs before they provide documents containing NPI.

Due to vetting regulations issued by the CFPB in April, 2012 creditors may require settlement agents also make sure consumers want to communicate electronically before doing so.

E. When is the Closing Disclosure delivered?

The infamous “3 day prior to settlement” rule

Three days prior to consummation the consumer must be provided with a copy of the Closing Disclosure. The consumer is encouraged to compare this document with the Loan Estimate received at the beginning of the mortgage process. The waiting period can be waived only for a bona fide personal financial emergency, such as a refinance needed to prevent foreclosure. The

17 Wells Fargo Settlement Agent Communication, September 14, 2014
18 Bank of America Letter to Settlement Agents, December 18, 2014
19 Gramm Leach Bliley, Title V, Subtitle A, Privacy, Disclosure of Nonpublic Personal Information
http://www.banking.senate.gov/conf/finl5.pdf
consumer must apply for the waiver in his own words, i.e., the creditor cannot provide a standardized form for completion. Without a waiver, the soonest consummation may occur is seven business days after application is made. Remember that unless a document is delivered by hand to the consumer, it must be put in the channel of communication at least 3 business days prior to the delivery date. In other words, the Closing Disclosure would need to be sent to the consumer a minimum of 6 business days prior to consummation (7 calendar days), so it could spend 3 days in transit and the consumer would still have 3 full days to review the document. As a practical matter a standard 3 days for delivery and 3 days for review, plus Sunday, is anticipated. Therefore, closing will not generally occur sooner than 7 calendar days after the Closing Disclosure is sent to the consumer.

If the consumer has questions, they will be encouraged to contact their creditor for answers. The creditor controls the money.

Another thing to note, the three day disclosure for the Closing Disclosure is not measured the same way the three day waiting period for a refinance transaction is measured. Consummation may occur on the third day, but the right of rescission doesn’t end until midnight of the third day, so the fourth business day after settlement is the soonest documents can be recorded and disbursed.

If a preliminary disclosure has to be revised, it must be delivered prior to the Closing Disclosure being delivered. The Loan Estimate must be received at least 4 business days prior to consummation.

**F. What changes will trigger another 3 day waiting period?**

The only matters that trigger re-disclosure with an additional three day review period are

1. inaccurate APR,
2. a change in the loan product, or
3. a prepayment penalty added.

**G. What about walk-through problems?**

How to handle walk-through items is a chronic problem that may become more of an issue rather than less. A credit from the seller due to a matter discovered at the walk-through will not require, in and of itself, an additional 3 day waiting period, but other mortgage underwriting guidelines may prohibit inclusion of such a charge on the Closing Disclosure.

In the past settlement agents frequently told Realtors® to handle the issues outside of closing since creditors would not agree to any credit showing on the HUD-1. Currently when signing a HUD-1 all parties sign a statement that is an accurate statement of receipts and disbursement. At the bottom of the page it states “WARNING: It is a crime to knowingly make false statements in the United States on this or any other similar form. Penalties upon conviction include fine and imprisonment. For Details see: Title 18 U.S. Code Section 1001 and Section 1010.” Title 18 USC 1001 “fraud and false statements” generally cite penalties of a fine up to $10,000.00 and up
to 5 years in prison, or both. Title 18 USC 1010 relates specifically to HUD and cites penalties of a fine up to $5,000.00 and up to 2 years in prison. Suggesting that parties handle this outside of closing is not appropriate. The penalties would still apply.

Federal mortgage underwriting guidelines prohibit escrows or credits to the purchaser from the seller, due to abuses in the past. The goal is to make sure the purchaser is actually contributing all the funds the HUD-1 states is being contributed by the purchaser, to avoid any instance where the seller is paying more for the purchaser to buy the real estate, to prevent fraud.

Issues must be worked out before closing. Negotiating at the last minute when the purchaser and or seller has a moving van in the driveway may no longer be possible. Possible (long term) solution: write your elected federal officials to complain about the unreasonable nature of the mortgage underwriting regulations that prohibit purchasers from getting the full value of their bargain because of a problem with the seller at settlement.

**H. Who signs the Closing Disclosures?**
Signature lines exist for the consumer to acknowledge receipt of the form. No federal regulation or statute requires consumers or sellers to sign a settlement statement, or a Closing Disclosure. The creditor may make the requirement, but not the regulatory process.

The Virginia Code requires settlement agents to disburse according to written instructions from the parties. A disbursement statement, showing receipts and disbursements, will meet that requirement and will most likely become a separate document to be signed at settlement, as noted above.

**I. What about post closing corrections?**
Post closing corrections to the Closing Disclosure will be made by whoever prepared and delivered the Closing Disclosure to the consumer. Creditors have up to 60 days to make adjustments and refund over-charged amounts, which makes it imperative that title policies be promptly generated.

**J. Refinance Transactions**
A separate Closing Disclosure form is used for refinance transactions. It remains a 5 page document but all columns related to the seller are omitted.

**VI. Impact on the Residential Real Estate Practice**
In addition to the changes in the forms, timing and who provides information to the consumer, creditors have also begun to hire “vetting services.” In order to provide closing services for their loans, the independent vetting service must inspect your settlement operation to determine that you meet the creditor’s standards.

**VII. Conclusion**
The changes coming August 1, 2015 are the most significant changes for residential real estate settlement practice in 40 years, since the inception of RESPA in 1974. Anyone in practice
for the last decade knows the reason for the changes. Whether or not CFPB will meet their goal of having a better informed consumer, who engages in comparison shopping for all aspects of their residential transaction, is questionable. Recent surveys show less than 40% of consumers do any type of comparison shopping for mortgage loans or settlement related services. Many consumers do not want to take the time to determine the best price for loans and services related to purchasing or refinancing a residence. It takes time for change to occur.