

TRID REQUIREMENTS FOR NON-PURCHASING/NON-BORROWING SPOUSES

NPS vs. NBS

1. **Non-purchasing spouse (NPS)** – In a purchase transaction, a spouse who is not on the sales contract and will not vest in title. An NPS may still be a borrower on the mortgage loan in some cases, even though not vesting in title. In Texas, it is common for an NPS to sign the deed of trust on a purchase transaction even though not formally vesting in title.
2. **Non-borrowing/Non-qualifying spouse (NBS or NQS)** – In either a purchase or a refinance transaction, a spouse who is not a borrower on the loan and will not sign the promissory note. The terms “non-borrowing spouse” and “non-qualifying spouse” mean the same thing.

An NBS may still be a purchasing spouse (i.e. the NBS may still vest in title, even though not a borrower on the loan). For a refinance transaction in Texas, the NBS must sign the security instrument to perfect the lien, regardless of whether the NBS is formally vested in title. Likewise, in Texas the NBS on a rescindable transaction should be given the right of rescission, regardless of whether their ownership interest in the property is vested or inchoate (homestead, community property, etc.)_See Gancedo v Del Carpio (Fla Dist Ct 4th Dist 2009)¹

The terms Non-Purchasing Spouse (NPS) and Non-Borrowing Spouse (NBS) are often used interchangeably in the mortgage industry, despite the fact that they are not the same thing. For example, an NBS on a refinance loan will often be referred to incorrectly as an NPS, even though there is no purchase occurring.

TRID Disclosure Requirements (When Must an NPS and/or NBS Receive the LE/CD)

As for who must receive the CD and LE, the legal answer depends on whether or not the transaction is rescindable. There are several different sections of the regulation that come into play (not just the TRID sections 19, 37, and 38).

First, Reg. Z, Section 1026.19(e) & (f) state that the disclosures must be provided to each “consumer” on the loan.

So what is a “consumer”?

Reg. Z, Section 1026.2(a)(11)

(11) Consumer means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§[1026.15](#) and [1026.23](#), the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

Source: <http://www.bankersonline.com/reg/12-1026/12-1026-002.html>

¹ Wife of mortgagor who signed note and gave a mortgage on residential property titled solely in his name had an “ownership interest” in the subject property and, thus, was a “consumer” entitled to disclosures under the federal Truth in Lending Act (TILA) and the extended cancellation period for TILA nondisclosure, though wife was not a signatory to the note at issue and the loan was made solely to mortgagor, where mortgagor and wife were married at the time of the subject mortgage loan, such that wife had homestead rights in the property. West’s F.S.A. Const. Art. 10, § 4(c); Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.; 12 C.F.R. §§ 226.2(a)(11), 226.23(a), 226.32.

In other words, for a purchase or other non-rescindable transaction, the consumer is the borrower(s) and does not include a non-borrowing spouse or non-borrowing owner. For a refinance or other rescindable transaction, however, the consumer is the borrower(s) and any person who has the right to rescind the transaction because the lien will attach to their principal dwelling. This includes non-borrowing spouses and any other owner of the property.

Now that we've defined "consumer", we next look at Reg. Z, Section 17 regarding how to treat multiple consumers.

Reg. Z, Section 1026.17(d)

*(d) Multiple creditors; multiple consumers. If a transaction involves more than one creditor, only one set of disclosures shall be given and the creditors shall agree among themselves which creditor must comply with the requirements that this part imposes on any or all of them. If there is more than one consumer, the disclosures may be made to **any** consumer who is primarily liable on the obligation. If the transaction is rescindable under §1026.23, however, the disclosures shall be made to **each** consumer who has the right to rescind.*

Source: <http://www.bankersonline.com/regs/12-1026/12-1026-017.html#17d>

Official Staff Commentary

*2. Multiple consumers. When two consumers are joint obligors with primary liability on an obligation, the disclosures may be given to either one of them. If one consumer is merely a surety or guarantor, the disclosures must be given to the principal debtor. In rescindable transactions, however, separate disclosures must be given to each consumer who has the right to rescind under § 1026.23, although the disclosures required under § 1026.19(b) need only be provided to the consumer who expresses an interest in a variable-rate loan program. **When two consumers are joint obligors with primary liability on an obligation, the early disclosures required by § 1026.19(a), (e), or (g), as applicable, may be provided to any one of them. In rescindable transactions, the disclosures required by § 1026.19(f) must be given separately to each consumer who has the right to rescind under § 1026.23. In transactions that are not rescindable, the disclosures required by § 1026.19(f) may be provided to any consumer with primary liability on the obligation. See §§ 1026.2(a)(11), 1026.17(b), 1026.19(a), 1026.19(f), and 1026.23(b).***

Applying this to delivery of the disclosures:

1. On a **non-rescindable** transaction with multiple "consumers", the LE can be delivered to any one or more of the consumers with receipt acknowledged by same. The CD may be delivered to any of the consumers who has primary liability on the obligation with receipt acknowledged by same. Once you have delivered the CD and received an acknowledgment of receipt from any consumer with primary liability on the obligation, you have complied with the delivery requirements of the rule.
2. On a **rescindable** transaction with multiple "consumers", the LE may be provided to any one or more of the consumers and acknowledged by same. The CD, however, must be delivered to each consumer who has the right to rescind (both borrowers and non-borrowers). It follows that acknowledgment of receipt of the CD must be obtained from each consumer who receives disclosures for purposes of counting business days until closing, etc.

Analysis—Who Should Be Listed as an “Applicant” on Page 1 of the LE, and as a “Borrower” on Page 1 of the CD

Reg. Z, Section 1026.37 requires that the name of each consumer applying for credit must be reflected at the top of page 1 of the Loan Estimate, under the heading “Applicants”.

Reg. Z, Section 1026.37(a)(5)

For each transaction subject to § 1026.19(e), the creditor shall disclose the information in this section:

- (a) *General information.* (1) *Form title.* The title of the form, “Loan Estimate,” using that term.
- (2) *Form purpose.* The statement, “Save this Loan Estimate to compare with your Closing Disclosure.”
- (3) *Creditor.* The name and address of the creditor making the disclosures.
- (4) *Date issued.* The date the disclosures are mailed or delivered to the consumer by the creditor, labeled “Date Issued.”
- (5) *Applicants.* The name and mailing address of the consumer(s) applying for the credit, labeled “Applicants.”

Official Staff Commentary

37(a)(5) Applicants.

1. *Multiple consumers.* If there is more than one consumer applying for the credit, § 1026.37(a)(5) requires disclosure of the name and the mailing address of each consumer to whom the Loan Estimate will be delivered. If the names and mailing addresses of all consumers applying for the credit do not fit in the space allocated on the Loan Estimate, an additional page with that information may be appended to the end of the form. For additional information on permissible changes, see § 1026.37(o)(5) and its commentary.

Source: <https://www.bankersonline.com/regulations/12-1026-037#37a>

This appears as follows on page 1 of the LE:

Loan Estimate

DATE ISSUED 2/15/2013
APPLICANTS Michael Jones and Mary Stone
123 Anywhere Street

RATE LOCK NO x YES, until 4/16/2013 at 5:00 p.m. EDT

LOAN TERM 30 years
PURPOSE Purchase
PRODUCT Fixed Rate
LOAN TYPE x Conventional FHA VA
LOAN ID# 123456789

Reg. Z, Section 1026.38(a)(4)(i) requires that the name of each consumer on the loan be reflected at the top of page 1 of the Closing Disclosure, under the heading “Borrower”.

Reg. Z, Section 1026.38(a)(4)(i)

(4) *Transaction information.* Under the heading “Transaction Information”:

(i) *Borrower.* The consumer’s name and mailing address, labeled “Borrower.”

Official Staff Commentary

38(a)(4) Transaction information.

1. *Multiple borrowers and sellers.* The name and address of each consumer and seller in the transaction must be provided under the heading “Transaction Information.” If the form does not provide enough space to include the required information for each consumer and seller, an additional page may be used and appended to the end of the form provided that the creditor complies with the requirements of § 1026.38(t)(3). For additional guidance on disclosing multiple borrowers, see comment 37(a)(5)-1.

2. *No seller.* In transactions where there is no seller, such as in a refinancing or home equity loan, the disclosure under § 1026.38(a)(4)(ii) may be left blank. See also § 1026.38(t)(5)(vii)(A).

3. *Multiple creditors.* See comment 37(a)(3)-1 regarding identification requirements for multiple creditors.

Source: <https://www.bankersonline.com/regulations/12-1026-038#38a>

This appears as follows on page 1 of the CD:

Closing Disclosure

Transaction Information

Borrower	Michael Jones and Mary Stone 123 Anywhere Street Anytown, ST 12345
Seller	Steve Cole and Amy Doe 321 Somewhere Drive Anytown, ST 12345
Lender	Ficus Bank

The preamble to the TRID rule provides some insight into the Bureau’s thinking regarding the specific terminology used:

Preamble – starting on page 663

37(a)(5) Applicants

Appendix C to Regulation X requires disclosure of the name of the applicants for the mortgage loan transaction. Similarly, pursuant to TILA section 105(a), RESPA section 19(a), and Dodd-Frank Act section 1032(a), proposed § 1026.37(a)(5) would have required creditors to disclose the name and

mailing address of the applicants for the loan transaction. The Bureau stated in the proposal that it believed that by enabling consumers to confirm that the Loan Estimate is intended for them, this disclosure will promote the informed use of credit and more effective advance notice of settlement costs and will enable consumers to better understand the costs, benefits, and risks associated with mortgage transactions. Proposed comment 37(a)(5)-1 would have clarified that where there are multiple consumers, the names and addresses of all consumers for the mortgage loan must be disclosed on the form and that if the form cannot accommodate the names of all the consumers, the creditor may attach to the back of the form a separate page listing the remaining consumers.

Several national trade associations representing mortgage lenders requested clarification regarding the scope of the term “consumer” under proposed § 1026.37(a)(5). The commenters noted that the definition of consumer in a rescindable transaction includes non-applicant co-owners who have the right to cancel and recommended that individuals who are not applicants but who have the right to cancel need not be disclosed, because doing so would be onerous and not fit in the space provided in form H-24. Several national trade associations representing mortgage lenders also noted that where there are multiple consumers, proposed comment 37(a)(5)-1 would have explained that § 1026.37(a)(5) required disclosure of each consumer’s address, even though proposed comment 17(d)-2 would have stated that delivery of the disclosures may be made only to consumers with primary liability on the obligation. Those commenters suggested that only the addresses of consumers to whom the Loan Estimate will be delivered should be disclosed.

With respect to consumers in rescindable transactions, the Bureau understands that disclosing the names of non-applicant co-owners could be unnecessarily difficult, particularly because at the time the Loan Estimate is delivered, a title search likely will not have been completed and thus, the creditor would not know with certainty the names of non-applicant co-owners. Further, listing non-applicant co-owners with rights of rescission on the Loan Estimate has little benefit for those co-owners given that they will typically not receive a copy of the Loan Estimate. Accordingly, the Bureau is revising § 1026.37(a)(5) to require disclosure of the name and mailing address only of the consumer applying for the credit.

As discussed in the section-by-section analysis of § 1026.17(d), the Bureau is finalizing amendments to comment 17(d)-2 that clarify that § 1026.2(a)(11) provides a specific definition of “consumer” for purposes of rescission under §§ 1026.15 and 1026.23 that would include a non-applicant co-owner of a principal dwelling, and provides guidance regarding the provision of disclosures to such consumers. Regarding the proposal’s requirement to list each consumer’s

address, the Bureau believes that listing the addresses of consumers to whom the Loan Estimate is not delivered because they are not primarily liable is unnecessary, and is therefore revising comment 37(a)(5)-1 accordingly.

For the aforementioned reasons, the Bureau continues to believe that disclosure of the name and mailing address of the applicant will effectuate the purposes of TILA and RESPA and thus, is adopting § 1026.36(a)(5) as revised to require disclosure of the name and mailing address of the consumer applying for the credit, pursuant to the authority described in the proposal and above. The Bureau is adopting comment 37(a)(5)-1 with a revision to state that disclosure of a mailing address is required only for consumers to whom the Loan Estimate will be delivered.

Based on the preamble to Section 37(a)(5), it is clear that the Bureau is very intentional in its definitions of “Applicant” on the LE and “Borrower” on the CD. An “Applicant” for LE purposes is a consumer who is also applying for credit. Per the preamble, this definition does not include an individual who is not a credit applicant, but who nevertheless is considered a “consumer” under Reg. Z because they have the right of rescission.

Conversely, the definition of “Borrower” for CD purposes includes all consumers on the loan, and does not distinguish between consumers who are credit applicants and consumers who merely have the right of rescission. As such, it appears that all consumers, whether credit applicants or persons with the right of rescission on the transaction, fall into the definition of “Borrower” for CD purposes. This is supported by the fact that the CFPB drew an express distinction between these 2 types of “consumers” on the LE, but made no such distinction on the CD.

Conclusion – Who Must Be Shown as an Applicant on Page 1 of the LE

Page 1 of the LE should reflect all credit applicants (i.e. individuals who will be borrowers on the loan) as “Applicants”.

- An NBS should not appear as an “Applicant” on page 1 of the LE. An NPS who *is not* a borrower on the loan should not appear as an “Applicant”.
- An NPS who is a borrower on the loan should appear as an “Applicant”.

Conclusion – Who Must Be Shown as a Borrower on Page 1 of the CD

A “Borrower” for purposes of Page 1 of the CD is any “consumer” on the loan as defined by Regulation Z. This means that all borrowers and all individuals who have the right of rescission should be reflected as “Borrowers” on page

- Purchase transaction – NPS who is a borrower on the loan: should appear as a “Borrower” on page 1.
- Purchase transaction – NPS who is not a borrower on the loan and is not signing the security instrument: should not appear as a “Borrower” on page 1.
- Purchase transaction – NPS who is not a borrower on the loan and is signing the security instrument pro forma only: should not appear as a “Borrower” on page 1.

- Rescindable transaction – NBS who is vested in title: **should appear as a “Borrower” on page 1.**
- Rescindable transaction – NBS who is not vested in title, but has community property/homestead inchoate ownership rights and therefore does get ROR: **should appear as a “Borrower” on page 1.**
- Rescindable transaction – NBS who is not vested in title, and who does not community property/homestead inchoate ownership rights and therefore does not get ROR: **should not appear as a “Borrower” on page 1.**

Note that TRID requires a separate copy of the Closing Disclosure to be provided to each “consumer” on the loan. Accordingly, one copy of the CD should be provided to each consumer for signature. Each copy of the CD should reflect all consumers as “Borrowers” on page 1.

Investor Overlays

Notwithstanding our interpretation of TRID, Investor requirements for NPS or NBS appearing as an “Applicant/Borrower” on page 1 of the LE/CD, and requirements for NPS or NBS receiving a separate copy of the CD or signing the copy of the CD provided to the primary borrower may vary. For example, we recently received guidance from Chase that they wanted an NBS not to appear as a “Borrower” on page 1 of the CD, but did still want the NBS to sign the CD. We are still awaiting guidance from Wells Fargo. At this point, however, it appears investor overlays may not be consistent.

ACCORDINGLY, FOR SECONDARY MARKET LOANS IT IS IMPORTANT TO CONSIDER POTENTIAL INVESTOR OVERLAYS IN DECIDING HOW TO REFLECT AN NPS/NBS ON THE LE AND CD.