

Split Closing Forum

September 22, 2004
Nashville, Tennessee

1994 MTTAA Guidelines Revisited

Ten years ago the Middle Tennessee Title Agents Association (MTTAA) held open discussion forums to establish guidelines of practice to be used in conjunction with split closings. A split closing is any real estate buy/sell transaction where the parties can not agree on a single firm or company to handle both sides of the closing. The 1994 forums resulted in a set of guidelines which have since been followed by a large majority of the settlement agents in middle Tennessee. In an effort to update and expand the MTTAA guidelines another open forum was held this year. With nearly one hundred closing attorneys and agents in attendance, representing over 60 different area closing offices, there was considerable discussion during the session. While there was no official voting, the following standards of practice for a split closing reflect the general consensus of those in attendance. Everyone agreed that settlement agents must first look to the actual wording of the contract to determine their respective roles. However, by far the most typical split closing is one in which the seller is paying for an owner's title policy for the buyer. But because the contract calls for simultaneous issue and the lender requires insured protection coverage from the title underwriter on the issuing agent, the loan closer is actually issuing both owner's and lender's policies. These provisions apply to such a typical transaction.

Sale Closer's Responsibilities:

- a. Payoffs – Obtain and provide to the loan closer written payoffs for all outstanding liens. If the account is a HELOC, obtain from the seller at closing a letter requesting the lender to close the account and release the deed of trust which secures it. Consult with the loan closer to determine his/her underwriter's requirements for dealing with a paid, but unreleased, deed of trust, if one exists.
- b. Homeowners' Association Fees – Obtain and provide to the loan closer a written statement from the homeowners' association or management company setting out the amount of the HOA dues, the frequency with which they are paid, the current status of the account, whether property insurance is included in the HOA fee, the amount of any transfer fee, and any other amounts due, such as special assessments and delinquent dues.
- c. Termite Inspection Report – Obtain from seller or seller's agent a clear termite inspection report, with graph, and provide same to the loan closer as soon as possible.
- d. Homebuyer's Warranty – If the seller has contracted to provide a warranty, obtain it from seller's agent and provide same to the loan closer prior to or at closing.

- e. Certificate of Existence and/or Good Standing – If the seller is a corporation, a limited partnership or a limited liability company, obtain evidence of existence and good standing and provide same to the loan closer prior to closing. A printout from the Secretary of State’s website evidencing an active entity should be sufficient. Alternatively, confirm that loan closer does not require written evidence of existence and standing. Also, obtain and provide authorizing resolutions if required by issuing agent and/or title underwriter.
- f. Title Search – RESPA and state law requires that there be a basis (search and liability) for the agent issuing title insurance to split the premium with another closer. If the seller is paying for the owner’s title policy, and the loan closer is issuing the insurance, the sale closer must provide the loan closer with title information addressed to the loan closer, which evidences the status of title either in the form of a title opinion letter from an attorney or law firm, or a title report from a lay corporation or individual. Utilization of Schedules A and B of a generic form commitment, without a designated underwriter and without a commitment jacket but with a “certification of title” by which the sale closer certifies that the contents therein are an accurate representation of matters found in the public records, would constitute an acceptable title report, (A copy of a proposed “certification of title” is attached hereto). If the seller is not paying for the owner’s title policy, the sale closer should not expect a split of the title premium. However, if the seller is paying a portion of the buyer’s closing costs, including the title premium, most attendees agreed that there should be a split of the premium if the sale closer has provided an acceptable title report.
- g. Prior Owner’s Title Insurance Policy – Provide a copy of the seller’s owner’s title policy to the loan closer as soon as possible before closing, if the seller is requesting reissue credit. For purposes of reissue credit, most underwriters require that the prior owner’s policy be no older than 10 years. The decision to give reissue credit on a prior policy which is presented for the first time at, after or immediately before closing will be made on a case by case basis by the loan closer.
- h. Fees and Other Charges – Communicate to the loan closer all closing and attorneys fees, and all charges for express mail, termite inspection, homebuyer’s warranty, HOA, etc., to enable the loan closer to prepare an accurate HUD-1. Sale closer should not commit to the cost of title insurance to seller or seller’s agent without first communicating with loan closer.
- i. Scheduling the Closing – Coordinate with the loan closer in scheduling the time and place of the sale portion of the closing, keeping in mind that the lender may furnish documents which the seller must execute.
- j. Deed – Prepare and obtain proper execution and acknowledgment by seller. The proposed deed should be faxed to the loan closer prior to closing to ensure that the name and vesting of the grantee(s) is correct and that the legal description matches that shown on the title search. Request instruction from the loan closer if title is to be held other than as a tenancy by the entirety or a tenancy in common.
- k. 1099-S – Obtain and report to the IRS a 1099-S, or obtain a “certification of no information reporting,” as applicable, and provide the loan closer with a copy of same at closing to confirm sale closer’s undertaking of reporting obligation.
- l. Photo Identification – Obtain a copy of a photo identification for each seller and provide the loan closer with a copy of same at closing.

- m. Miscellaneous Documents – Have the seller execute documents which the lender requires to fund the buyer’s loan and, and as an accommodation, any other documents which the loan closer provides which are not inconsistent with the seller’s contractual obligations such as mechanics’ and materialmen’s affidavits. Co-operate with loan closer in execution and delivery of Pre-Closing Supplement Property Disclosure form, if applicable.
- n. Delivery of Documents – Deliver to the loan closer documents necessary to complete the closing, at which time the loan closer will disburse all funds. Documents delivered to the loan closer prior to disbursement are deemed to be held in trust, pending receipt of funding and disbursement.

Loan Closer’s Responsibilities:

- a. HUD-1 – Prepare the HUD-1 settlement statement reflecting all fees and charges related to the transaction and fax to the sale closer as soon as possible. If the seller is paying a portion of the buyer’s closing costs, provide the sale closer with a tape or other notation showing which charges comprise the total amount.
- b. Lender Documents – Prepare and/or provide to the sale closer all loan-related documents which must be executed by the seller, as well as a mechanic’s and materialmen’s lien affidavit and any other documents necessary to complete the transaction and enable the loan closer to issue the title insurance policies.
- c. Charge for “enhanced” owner’s policy – If the owner’s policy which is being provided at closing is an “enhanced” policy, with a premium greater than that of a “standard” ALTA policy, charge the additional premium to the buyer unless the seller has specifically contracted to pay it.
- d. Scheduling the Closing – Advise the sale closer of the status of the buyer’s loan/closing package so that he/she may schedule the sale closing accordingly. As soon as possible before closing, furnish the sale closer all lender documents to be executed by the seller. Keep sale closer advised of changes in the closing dates and times.
- e. Title Split – If the title premium is to be split between the closers (see Sale Closer’s Responsibilities, item f. above), the consensus of the group was to divide equally the net premium (all-inclusive rate less the remittance to the underwriter – often calculated at 30% of the “risk rate” regardless of each closer’s particular commission split). In areas of middle Tennessee where the “all-inclusive” rate is not customarily used, the loan closer may charge only the “risk rate” and the sale closer only his/her search fee, in which case there would be no split of premium. The consensus of the group was that (whenever there are separate line charges for risk rate title insurance premium and for title search fees) the loan closer would charge and retain 100% of the risk rate premium and the sale closer would charge and be paid 100% of his/her search fee.
- f. 1099-S – Confirm that the sale closer has obtained the appropriate form and will report same to the IRS unless the transaction is exempt.
- g. Miscellaneous Documents – Have the buyer execute any documents which the sale closer provides which are not inconsistent with the buyer’s contractual obligations such as escrow agreements, move-in agreements, etc. Co-operate with sale closer in execution and delivery of Pre-Closing Supplement Property Disclosure form, if applicable.

- h. Disbursements – Upon receipt of executed documents from the sale closer and funding from the lender, make all disbursements in accordance with the settlement statement. Documents delivered to the loan closer prior to disbursement are deemed to be held in trust, pending receipt of funding and disbursement. Payoffs should be mailed/overnighted/couriered in a timely fashion, especially payoffs for seller's mortgage(s), which should be delivered the first business day after disbursement.

Miscellaneous:

- a. Communication - Discuss with the other closer as soon as possible any problems or circumstances which must be resolved before closing. Remember that issues which involve the insurability of the title must meet the requirements of the underwriter whose policies are being issued. Communication and cooperation between the closers are essential.
- b. Cash Transactions – As a general rule, there is no split of the title premium in a cash transaction. The closer whose client/customer is providing the owner's policy will search the title and issue the insurance.
- c. Commercial Transactions – Typically, each party in a commercial transaction is represented by its own counsel, and most commercial contracts do not contemplate simultaneous issuance of the title policies. Thus, as a general rule, there is no split of the title premium in a commercial transaction. However, if the transaction is small, the closers/counsel may agree that the loan closer will issue both policies and will split the all-inclusive premium if the sale closer has provided an acceptable title report.
- d. Two comments worth noting:
 - a. The importance of making old title policies available to parties and other closers (for at least 10 years).
 - b. The necessity of ascertaining from the tax assessor's office the date of pick-up of new construction so that tax pro-rations are fair to both parties and reflect the contractual agreement.