

Mortgage Disclosures:

*How Do We Cut Red Tape for
Consumers and Small Businesses?*

House Financial Services Committee
Subcommittee on Insurance, Housing and Community Opportunity

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Testimony of Christopher Abbinante, President


AMERICAN

LAND TITLE

ASSOCIATION



Chairwoman Biggert, Ranking Member Gutierrez and members of the subcommittee, my name is Christopher Abbinante, and I am the President of the American Land Title Association. I have been in the title insurance industry for over 35 years, most recently serving as the President of Eastern Operations for Fidelity National Title Group, the nation's largest title insurance company through its title insurance underwriters - Fidelity National Title, Chicago Title, Commonwealth Land Title and Alamo Title.

ALTA, founded in 1907, is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. ALTA's 4,000 member companies operate in every county in the country, where we search, review and insure land titles to protect consumers and mortgage lenders who invest in real estate. ALTA members serve as independent, third-party facilitators of real estate transactions. ALTA members include title insurers, title agents, independent abstracters, title searchers, settlement agents and attorneys, ranging from small, one-county operations, to large, national title insurers.

On behalf of ALTA, I appreciate the opportunity to appear before you today to discuss the Consumer Financial Protection Bureau's RESPA-TILA Integration Rulemaking. We firmly believe that getting this rule right is more important than getting it done fast. To that end, my testimony will focus on what we believe getting this rule right means by laying out our principles for success.

The Federal Mortgage Disclosure Regime

In 1968, Congress passed the Truth in Lending Act (TILA) to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.¹" Six years later, Congress enacted the Real Estate Settlement Procedures Act (RESPA) with a similar purpose, "to insure that consumers throughout the Nation are provided with *greater and more timely information on the nature and costs of the settlement process* and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country²" (emphasis added).

For more than 35 years, RESPA and TILA have required lenders and settlement agents to provide consumers with similar but substantively different disclosures at the beginning and end of their mortgage and real estate transactions. While the disclosures provide some overlapping information, at their core, they are documenting two separate transactions: the mortgage loan and the real estate purchase.

¹ 15 U.S.C. §1601.

² 12 U.S.C. §2601.

Within three days of applying for a mortgage, consumers receive two disclosures: 1) a two-page estimate of their mortgage loan terms as required by TILA (called a Truth in Lending Disclosure or “TIL”) and 2) a three-page estimate of the closing costs as required by RESPA (called the Good Faith Estimate or “GFE”). These documents are designed to give consumers estimates of their mortgage and closing costs that they can then use to shop for mortgage and settlement service providers. To attempt to facilitate shopping, on the current Good Faith Estimate, HUD included a “shopping chart” to help assist consumers in comparing mortgage offers.

After the consumer picks a lender and loan product, is approved by the lender and completes their negotiations with the seller of the real estate, all the parties come to the closing table. Closing – or settlement as it is known in some parts of the country — is a term used to designate the point in time at which the contemplated transaction is concluded. It is also the point in time when the consumer receives: 1) a two-page final disclosure of their actual loan terms as required by TILA (called the final TIL) and 2) a three-page accounting of their final closing costs as required by RESPA (called the Uniform Settlement Statement or HUD-1). While these are the main disclosures given to consumers, other federal, state and local laws require that consumers be provided a myriad of additional disclosures at closing.

Over the years, industry, consumers and regulators have recognized this duplication as inefficient for industry and confusing for consumers. To that end, numerous attempts have been made to harmonize and streamline the required disclosures. These attempts have repeatedly failed because the Federal Reserve Board and Department of Housing and Urban Development (the agencies charged with implementing TILA and RESPA respectively) determined that because of the statutory conflicts between the acts, “meaningful change could come only through legislation.”

Dodd-Frank’s Mandate

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), created the Consumer Financial Protection Bureau as an independent agency with regulatory authority over RESPA, TILA and other consumer financial statutes. Within one year of beginning operations (July 21, 2011), the CFPB is required under Dodd-Frank to:

propose for public comment rules and model disclosures that combine the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974, into a single, integrated disclosure for mortgage loan transactions covered by those laws, unless the Bureau determines that any proposal issued by the Board

of Governors and the Secretary of Housing and Urban Development carries out the same purpose³.

Notably, Dodd-Frank was silent on those areas where TILA and RESPA statutes conflict. Examples of these statutory conflicts include: 1) whether the disclosures are standard or model forms, 2) whether the final disclosure is provided at closing or three-days before closing, and 3) whether the final disclosure is provided to consumers by the person conducting the settlement or the creditor.

The ‘Know Before You Owe’ Project

In May 2011, the CFPB began developing new combined mortgage disclosures through its “Know Before You Owe” mortgage disclosures project. Using a nine round iterative process, the CFPB has developed two new disclosures:

- 1) A Loan Estimate which would be provided three business days after the consumer submits a loan application and would replace the initial TIL and the GFE; and
- 2) A Settlement Disclosure which would be provided at or before closing and would replace the final TIL and HUD-1.

Throughout this process, the CFPB has invited industry and consumer comments on each draft of the new disclosure forms and conducted limited consumer testing in various cities across the country. ALTA submitted comments to the CFPB during each round of the iterative process.

In February 2012, the CFPB provided the industry with its first and only glimpse of the rules and instructions that will accompany the disclosure forms by publishing an Outline of Proposals in advance of a Small Business Panel meeting (held March 6, 2012) required under the Small Business Regulatory Enforcement Fairness Act (SBREFA). Unlike the forms, the CFPB did not offer the same opportunities for public feedback on the rules.

³ 12 USC § 5532. See also Dodd-Frank Act, Sec. 1098 and 1100A amending Section 4 of RESPA and Section 105(b) of TILA to read, “The Bureau shall publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this section and section 2604 of this title, in conjunction with the disclosure requirements of the Truth in Lending Act [15 U.S.C. 1601 et seq.] that, taken together, may apply to a transaction that is subject to both or either provisions of law. The purpose of such model disclosure shall be to facilitate compliance with the disclosure requirements of this chapter and the Truth in Lending Act, and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures.”

Principles for Successful Mortgage Disclosures

We appreciate the difficulties the CFPB faces in achieving Congress' mandate to integrate the disclosure without clear direction on how statutory conflicts should be resolved. If done carefully, this project can meet the CFPB's dual goals of helping improve consumers understanding of their mortgage transaction and facilitating industry compliance with TILA and RESPA.

However, as I stated above, getting the rule right is more important than getting it done fast. To assist CFPB, Congress and other policymakers in this rulemaking process, ALTA has devised six principles that outline what it means to get this rule right. Following these principles will ensure that the CFPB avoids unintended consequences for consumers, industry and the entire real estate market.

Prevent disruptive and costly delays to closing for consumer

The CFPB's proposed requirement that the consumer receive their final settlement disclosure form three days in advance of closing will result in delays and added costs for industry and consumers.

In many cases, the buyer and seller renegotiate their contract up until the last minute before closing. These changes can impact a variety of costs that are disclosed on the settlement statement, including bills for repairs, payoffs for the borrower's other debts and prorations for charges like taxes and home heating oil. As these changes occur in each transaction, the form will constantly need to be updated and will need to go back to the lender for "final approval". If in addition, these changes also trigger a three-day waiting period, this will most certainly add costs to the consumer and cause delays to the settlement/closing. Consequences will likely include lost rate locks and disruption to the transaction.

The three day rule will also increase costs for settlement agents. Providing the final settlement disclosure form to the consumer three days in advance of closing will require the settlement agent to spend valuable time reviewing the disclosure with the consumer three days before closing and then again at closing. This duplication of effort will impact small businesses' productivity and profitability.

Provide Industry with Clear Guidance

To achieve its goal of facilitating industry compliance with RESPA and TILA, CFPB must provide industry clear and definitive guidance. Bright line guidance is essential for the industry, both from a technical and operational standpoint. Clear guidance also helps ensure that consumers get consistent answers to their questions.

Without clear and definitive guidance, it is very difficult and costly for industry to comply with the regulation.

For this project, the most important thing is that we know exactly what cost items will be required to go in which location on the forms. This is the only way that the settlement industry can ensure we are developing compliant software that ensures settlement agents can be compliant. Something as simple as where a title insurance premium needs to show on the form can cause a huge issue if it falls into a “gray” area in the final rule.

During the 2010 RESPA changes, HUD issued over 400 FAQ’s throughout the process. This caused issues for a number of different reasons.

First, once an FAQ was issued, software coding would be completed based on the latest guidelines. This product would be tested, sent as an update to clients and training would be provided. However, each time a new or contradictory FAQ was issued, the industry would have to start from scratch and begin coding and testing again. This was an extremely costly to the industry.

Second, regulatory uncertainty adds unnecessary costs for settlement agents, lenders and consumers. The multiple FAQ’s led to “gray” areas in the law that lent itself to non-standard interpretations throughout the industry. Settlement agents, lenders, title companies, underwriters and software vendors each had their own interpretations of the RESPA Final Rule. This uncertainty forces settlement agents to spend at least 30 minutes of time in each transaction to work with lenders to ensure proper compliance. When this time is spread across the roughly 6.5 million transactions that will occur in this year’s rather weak housing market, it amounts to over 3 million hours of lost productivity for both lenders and settlement agents.

We urge the CFPB to produce clear and definitive guidance for the industry to rely on when promulgating its rule.

Promote Fair Competition

Under the current RESPA regulation, CFPB holds lenders liable for some costs that increase more than a certain amount at closing. This is called tolerance⁴. The

⁴ HUD’s 2010 RESPA rule established a system of “tolerances” or limits on the amount actual settlement charges can vary at closing from the amounts stated on the GFE. The rule established three categories of settlement charges, each with different tolerance. If, at settlement, the final settlement charges exceed the estimated charges on the GFE by more than the permitted tolerances, the consumer is entitled to the benefit of the estimated charges. In many cases this requires the lender to cure the tolerance violation by reimbursing to the borrower the amount by which the tolerance was exceeded, at settlement or within 30 calendar days after settlement.

CFPB is considering increasing this liability on lenders. This increased liability will likely lead to unintended consequences for lenders, settlement agents and consumers.

This increased liability will most likely force lenders to limit the number of settlement agents that they conduct business with for fear that it will be necessary to limit their liability for tolerance violations. To a degree, this contraction has already occurred due to the introduction of the tolerance regime and provider lists in the 2010 HUD RESPA Rule. Not only will small businesses that provide these services during the closing process be hurt by this inability to compete, including settlement agents, but consumers will be harmed as well from less consumer choice and competition that will ultimately lead to higher costs.

Settlement agents need to continue to have a part in real estate settlements as an independent, third party to the transaction. We urge the CFPB to work with us to ensure that settlement agents still provide the settlement statement and conduct the closing. A independent third party conducting the settlement is absolutely necessary to protect consumers.

Avoid Unnecessarily High Costs for Small Business

The industry estimates that the proposals and forms under consideration by the CFPB will be very costly for industry and consumers. When the industry went through the most recent round of RESPA changes in 2010, our vendor partners reported that the comparatively smaller changes by HUD's rule cost each software company approximately \$800,000 – \$1 million to implement. Based on a conservative estimate, this round of changes is expected to cost closer to \$2 to \$2.5 million per software company.

During the 2010 reform, most of our software vendors did not pass on the costs of these changes to their title agent clients. It is expected that because of the high cost associated with this new effort and the relative proximity to the last reform, many of our vendors (the smaller ones in particular) will likely have to pass on the costs to their clients. We estimate that **these costs will include \$800 per employee in upfront implementation and training costs and a 20% increase in yearly software maintenance fees.** Over 60% of settlement agents are small businesses that gross less than \$500,000 in revenue per year with 5 or fewer employees that will have trouble absorbing these increased regulatory costs⁵.

More troublesome, because of the complexity of this new form, **it is estimated that closing staff at small settlement providers will be able to close two fewer**

⁵ "2010 Abstracter and Title Agent Operations Survey" American Land Title Association (June, 2011).

transactions a day⁶. This represents a 25% reduction in productivity for most settlement agents.

This increased expense and decreased revenue comes at the exact wrong time for our fragile real estate market and the economy. However, with some simple changes to the rule and forms, we believe that these costs can be substantially reduced.

It is important to remember that even the slightest changes can be very costly for industry to implement. Something as seemingly insignificant as changing the line numbers on the proposed forms from the current line numbers on the HUD-1 will be an enormous software coding effort for vendors. The change affects not only the proposed form but also many other closing documents that are produced by the software.

In addition, changes that might be perceived as industry-friendly can actually be very costly and problematic for industry. While some might think that industry would prefer a model disclosure form (as required by TILA), in fact, a single, promulgated disclosure form (as required by RESPA) would be significantly less costly to implement. If the CFPB adopts the model form approach, software companies will need to produce custom disclosure forms that meet the approval of the hundreds or thousands of mortgage lenders rather than one standard form for all transactions. This lack of standardization could lead to a duplication of effort that dramatically increases the costs estimated above and produces confusion for consumers.

It is worth noting that in March the CFPB convened a Small Business Review Panel under SBREFA in order to determine the potential impact of the proposal on small business and identify any less costly alternatives. The SBREFA panel was required to issue a report in May. The contents of this report will be released in July 2012 and will be essential for ensuring that the new disclosures do not overly burden small business.

Test the Disclosures on Actual Closings Instead of Isolated Interviews with Consumers

While these disclosures represent only a small fraction of the documents presented at closing, they represent one of the best opportunities to improve the closing process for consumers. Each one of these documents must be reviewed with the consumer before they sign them at closing. This can be a time consuming process and usually ends with the consumer having a sore wrist and confused mind.

⁶ We are estimating an additional 15 minutes per closing. With an estimate of 8 closings per day per closer, this extra time will reduce productivity by 2 closings per day per closer.

This whirlwind of documents may also have a negative impact on consumers. We frequently hear stories of consumers who, when facing a stack of documents they need to sign so that they can move into their new home, simply give up and sign without taking the time to read and understand the contracts and their obligations. Better efforts should be made to ensure that government disclosures actually help consumers rather than hinder their understanding of the transaction.

To achieve this, qualitative testing of disclosures should take place in the context of the greater transaction. During the last round of RESPA Reform in 2002-2009, consumer testing took place in a vacuum where the testing of the GFE and HUD-1 were conducted individually instead of as part of an actual loan and real estate transaction. While the new forms passed that testing, many ALTA members today find that consumers are having a more difficult time, rather than a less difficult time, understanding their costs. The same does not need to happen this time around.

Encourage Consumers to Make Informed Decisions

At a minimum, federally-mandated mortgage disclosures should not prejudice consumers against protecting their financial investment. Rather, federally-mandated disclosures should encourage consumers to investigate whether a service is in their best interest.

The choice of words used to refer to certain services can greatly influence consumers' likelihood of considering those services and acting in their best financial interests. Owners Title Insurance serves as a good example. Some versions of the Loan Estimate use the term "not required" to disclose to consumers the closing costs that are not mandated by the lender, but are available to the consumer, including Owners Title Insurance. However, by calling a service "not-required," these proposals contain a less than encouraging implication that the service is of less value to consumers. This message prejudices consumers against considering these services, even when these services are often in consumers' best interests and protection. A consumer without an owners' title insurance policy is out of luck when their ownership interest is challenged, while their lender is off the hook and indemnified of any cost. This is tragic, and it can be prevented.

ALTA strongly encourages policymakers to avoid using the term "not required" in these disclosures, and instead use terms like "recommended" or "advisable". These terms encourage consumers to investigate services like owner's title and make an informed decision. This concept was recognized by HUD in the current Settlement Cost Booklet where the guide encourages consumers to investigate these services, including an Owners Title Insurance policy, indicating: "If you want to protect yourself from claims by others against your new home, you will need an owner's policy."

Conclusion

Following these principles will ensure that the CFPB avoids unintended consequences for consumers, industry and the entire real estate market. We believe that the best way to ensure all these principles are met is for the CFPB to clearly delineate the rights, responsibilities and liabilities of lenders and settlement agents for the preparation and delivery of the settlement disclosure to the consumer. Lenders should continue to have responsibility and liability for preparing the part of the disclosure related to the loan costs, while settlement agents should continue to have responsibility and liability for preparing the part of the disclosure related to the settlement costs. This can be done in a number of ways, and we urge CFPB to work with industry on this issue.

ALTA appreciates the opportunity to discuss our principles for improving federally mandated mortgage disclosures. We strongly believe that getting this right is more important than getting it done fast. ALTA is eager to serve as a resource to the Subcommittee and other stakeholders, and I am happy to answer any questions. Thank you.