Regulatory Burdens to Obtaining Mortgage Credit

United States Senate Committee on Banking, Housing & Urban Affairs

Thursday, April 16, 2015
10:00 a.m.

American Land Title Association Statement for the Record

AMERICAN
LAND TITLE
ASSOCIATION

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Chairman Shelby and Ranking Member Brown, my name is Diane Evans and I serve as president of the American Land Title Association (ALTA). In my day job, I am vice president at Land Title Guaranty Company, a title insurance agency in Colorado. ALTA is the national trade association founded in 1907 that represents the abstract, real estate settlement and land title insurance industry. Our more than 5,500 member companies include abstracters, title agents, real estate attorneys and title insurers, ranging from small, one-person operations to large publicly traded companies. The majority of our members are small businesses and the average title agency earns $156,000 in gross annual revenue and employs three or fewer people. Our members employ more than 108,000 professionals and our members have offices in every county in the country. We search, review and insure land titles to financially protect a homebuyer's largest investment and the primary and secondary market mortgage lenders who invest in real estate.

Thank you for including this statement in the record for today's hearing on regulatory burdens to obtaining mortgage credit. As the Senate considers regulatory reform, it is useful to note that title insurance is regulated at the state level and our settlement business is regulated at the federal level. Historically, this dual regulatory structure has been rather complimentary; however, with ever increasing regulation, our members must comply with regulations that overlap and contradict one another. This creates a complex compliance environment and increased costs for our members' businesses, additional liability for our mortgage lender clients and confusion and frustration at the closing table for homebuyers.

One of the largest regulatory burdens that impacts consumer's ability to obtain mortgage credit is regulatory uncertainty. As mortgage lenders work to refine their risk management practices to avoid a regulatory misstep, homebuyers and settlement agents are often required to provide documents multiple times signed and dated by the homebuyer. As you can imagine, this process is extremely frustrating and confusing for consumers.

I would like to share an example of how this uncertainty impacts homebuyers and ALTA members:

> On March 31 a Baltimore couple, Brian and Emina, bought rowhouse in for $245,000. The couple closed on the home right before heading to a hospital for an induced labor for their first child, a boy. Their settlement agent, Nancy McNealy with Consumer Real Estate Title, Inc in Beltsville, Maryland, knew about the labor date and wanted to be sure that she got everything to the lender in a timely fashion so that Brian and Emina could close and then go to the hospital to give birth. The settlement agent was able to get all of the closing documents together in time. Then, after closing, the settlement agent received another email from the lender that said that copies of tax returns were needed to be signed in order for the lender to fund the mortgage. Throughout the process of obtaining the loan, the couple was frustrated because they continually had to resubmit and resign and re-date every line—every request was repetitive and last minute.

Nancy, the settlement agent in this story, has been in the business since 1979 and employs one other person. She says, "A good month for us is about 12 closings," and her gross revenue runs right around the $156,000 industry average. Most of Nancy's business is from returning clients with whom she has worked for nearly 30 years – she is actually on her 2nd generation of those clients. Nancy believes that small title companies are important to this industry because she has her client's needs in focus and are willing to spend more time and energy on them. Nancy is hands-on with every transaction and knows her customers personally since she lives in this community and sees them and their families at the grocery store. Nancy says, "My reputation is essential."

We urge the Senate to consider the following two issues as you seek to provide more certainty about regulations that impact mortgage credit. First, as our industry prepares to implement the Consumer Financial Protection Bureau's (CFPB or Bureau) TILA-RESPA Integrated Disclosures (TRID) regulation, there are commonsense modifications and clarifications that will reduce regulatory burdens imposed by the regulation. CFPB should develop and announce a plan to provide implementation support during a restrained enforcement period following the August 1 effective date of the regulation through the end of the year to reduce the impact of these regulatory burdens on consumers.

Second, the Senate should pass legislation to help improve the way that the Bureau works with small businesses while it protects consumers. Specifically, the Senate should introduce and pass legislation to create a permanent Small Business Advisory Board and an advisory opinion process at the CFPB.

Regulation of Title Insurance

ALTA members provide two primary services to homebuyers and financial institutions. The first service is the preparation and issuance of title insurance policies protecting both purchasers and mortgagor of real property. Insurance products, including title insurance, are regulated by the states and falls outside of federal regulation as part of the business of insurance. Additionally, title professionals act as third-party settlement agents in real estate and mortgage transactions. This service is subject to federal regulation pursuant to the Real Estate Settlement Procedures Act (RESPA), which is within the jurisdiction of the CFPB.

At the state level, title insurance regulation includes oversight of insurer and agent licensing, product regulation, financial regulation, market regulation and consumer protection. States oversee title insurance pricing through the promulgation of rates or reviewing and approving company rate filings. Most states approach rate regulation by prohibiting excessive, inadequate or unfairly discriminatory prices for title insurance.

At the federal level, when title professionals act as independent third-party settlement agents in real estate transactions, they are regulated by RESPA. This law was designed to protect homebuyers through defining and prohibiting kickbacks and increasing consumer understanding by requiring transparency about all of the costs of homeownership.

TILA-RESPA-Integrated-Disclosure Forms

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] RESPA was then enacted by Congress six years later.

For nearly 50 years, these laws required lenders and settlement agents to provide consumers with similar but different disclosures at the beginning and end of their mortgage and real estate transactions. However, these laws changed when Congress adopted Section 1032 of the Dodd-Frank Act, which required the CFPB 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." The Bureau started this rulemaking process in 2011, issuing a final rule in November 2013 and an implementation date of August 1, 2015, which is now just 107 days away.

This regulation is more than just two new disclosure forms. It represents a paradigm shift in the way real estate settlements occur in this country. Since finalizing this regulation, the title insurance and real estate settlement industry has focused on implementation of these new forms and regulations. Our industry and software developers have worked tirelessly since 2013 to update their software and business processes to comply with this regulation. These software programs are wrapping up their beta processes right now and are expected to deliver final software to customers between April and June of this year. All of our training and implementation will take place during what the National Association of Realtors has determined is the busiest time of the year for real estate closings.[2] Unfortunately, our industry's comprehensive preparation efforts may not ensure that real estate transactions will not be disrupted beginning August 1.

Nancy McNealy, the settlement agent from Beltsville, Maryland, who was mentioned in this introduction, says that "it is costing a small fortune for most title companies to re-tool to meet the new August requirements." Nancy needed to switch software providers in order to properly support the TILA/RESPA changes. With her new provider, the cost to retrieve old files and continue to access her old database is costing nearly $3,000.00. The cost of the new software and its installation on new computers is about an additional; $5,000.00. For Nancy, that $8,000 in expense for her roughly $156,000 in gross revenue represents a 5% increase in cost of doing business for one regulation in 2015 alone. These software updates ensure that Nancy's company is compliant with the regulation and can send information needed for the real estate transaction to mortgage lenders and other involved parties.

Need for Formal Hold Harmless Period from August 1 to December 31

We appreciate that the Bureau provided our industry with 21 months to reform our processes and train our staff to meet these new regulatory demands. However, we know from implementation of past regulations that there will be a learning curve and unforeseen issues once

[1] 15 U.S.C. §1601.

[2] Hale, Danielle. "Part 1: EHS in 2014 by the Numbers – Popular Closing Dates." *Economist Commentaries: National Association of Realtors*, 12 Jan. 2014. http://economistsoutlook.blogs.realtor.org/2015/01/12/part-1-ehs-in-2014-by-the-numbers-popular-closing-dates/ (last accessed 09 Apr. 2015).

the new forms are used in actual transactions. Therefore, we request that the Bureau publicly commit to making August 1 through December 31 of this year a hold harmless period for enforcement.

A hold harmless period will allow industry to adapt their business processes to comply with this regulation without the fear of potential enforcement actions and class action lawsuits. When faced with some uncertainty surrounding this rule it will make it easier for business to work in good faith to find a solution that works for the consumer instead of taking an overly restrictive approach to risk management. In the absence of a hold harmless period, it is likely that some mortgage lenders and settlement service providers will initiate restrictive risk management tactics. This might include limiting access to financing and settlement services in small communities, especially considering many of the unanswered questions that exist regarding compliance with this regulation. For example, it is currently unclear how to properly issue a new closing disclosure if the settlement is delayed due to an unforeseen event like the basement flooding the day before the closing. Without more clarity, the result is likely to leave homebuyers with less flexibility to obtain the deal they bargained for and potentially fewer companies to work with.

To be truly effective, a hold harmless period needs to be accompanied by a commitment from the CFPB to work with industry to gather data about implementation. The Bureau should also provide written guidance to address common industry implementation hurdles that emerge between now and the end of the year. The Bureau's Official Interpretations, compliance guides and webinars on the regulation have been very helpful to industry but they are not comprehensive. Written guidance is needed in many areas to clarify the regulation. We urge the Bureau to recognize the value to consumers of providing this written guidance.

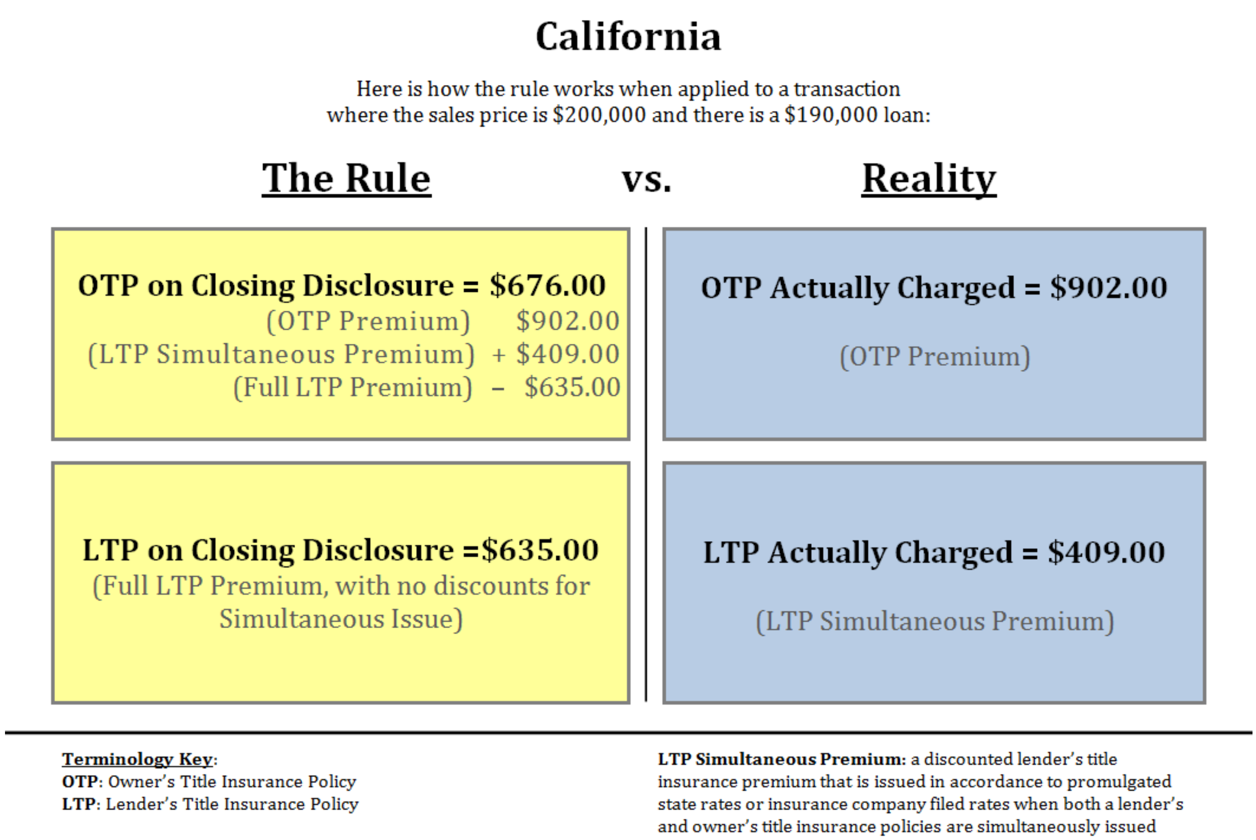
Fix Inaccurate Disclosure of Title Insurance Premiums

The new TRID forms prohibit our industry, by law, from disclosing the actual cost of title insurance policies the homebuyer will pay at closing. This is the only cost disclosed at closing that the CFPB prevents consumers from receiving their actual charge.

In the majority of states, when a homebuyer purchases a lender's title insurance policy concurrently with an owner's title insurance policy, the lender's policy is typically issued at a discounted rate (often called "simultaneous issue pricing"). This discount is offered because much of the title search, examination and underwriting that goes into preparing a lender's title insurance policy also supports the owner's policy.

However, in all transactions, TRID requires lenders and/or settlement agents to disclose on the Loan Estimate and Closing Disclosure the lender's title insurance premium at its full rate even though a discount exists that benefits the homebuyer. Conversely, TRID then requires the owner's title insurance premium to be inaccurately disclosed on the forms. As the example shows below, the result is that in most states, the Closing Disclosure will not provide consumers with accurate disclosures of their title insurance costs.

The Bureau could easily resolve this issue by requiring mortgage lenders and settlement



agents to disclose the actual title insurance premium rates required in the state in which the real property is located. We are not proposing to change the regulation's requirements surrounding the disclosure of title premiums on the Loan Estimate, which would require an amendment to the regulation. Rather, the Bureau can modify a section of the Official Interpretation:

Comment 38(g)(4)-2:

In a jurisdiction where simultaneous issuance title insurance rates are permitted, any owner's title insurance premium disclosed under **§ 1026.37(g)(4) or** § 1026.38(g)(4) is calculated by using the full owner's title insurance premium~~, adding any simultaneous issuance premium for issuance of lender's coverage,~~ and then deducting ~~the full premium for lender's coverage disclosed under § 1026.38(f)(2) or (f)(3)~~ **any policy cost differences due to the simultaneous purchase of a lender's title insurance policy**.

We appreciate that the Bureau is attempting to show consumers the marginal cost of purchasing on owner's title insurance policy; however, we are greatly concerned about the confusion this approach will cause consumers. In absence of a solution, the Bureau causes our industry to inaccurately disclose consumers' costs for title insurance. This exposes ALTA members to potential class action lawsuits and state market conduct examination errors—not to mention actively dissuades homebuyers from purchasing financial protection for their largest financial investment.

Accurately disclosing the price of title insurance policy premiums will also help the title industry comply with state regulations. Under state insurance laws, title insurance companies are only allowed to charge the policy premium rates promulgated or filed with the state. If the Bureau declines to fix this problem, our industry is likely to address this legal requirement to knowingly disclose incorrect title insurance premiums by providing a second disclosure to the homebuyer showing the actual premium cost. Our industry will need this additional disclosure to prove to state insurance regulators and potential class action plaintiffs that they were charged the correct policy rates under state insurance law. These additional disclosure forms will likely contribute to homebuyer confusion about the actual costs of their title insurance policies, closing costs and homeownership in general.

We urge the Bureau to address this issue immediately. ALTA believes that the best way to reduce homebuyer confusion regarding the disclosure of title fees under the Rule is to modify the Official Interpretations to allow industry to disclose the actual title insurance premiums on the Closing Disclosure.

Improve the way the Bureau protects consumers and works with businesses

Congress can reduce regulatory burdens to obtaining mortgage credit by improving how CFPB and regulated institutions work together to determine how to apply guidance to specific situations. While ALTA members are not directly supervised by the Bureau, we are indirectly regulated through the Bureau's oversight of both depository and non-depository mortgage lenders. Our industry is most acutely feeling the impact of CFPB Bulletin 2012-03 on service providers.[3] This bulletin restated longstanding guidance from other federal regulators about the expectation that lenders should oversee their business relationships with service providers in a manner that ensures compliance with federal consumer financial law.

While other federal regulators have promulgated voluminous and helpful guidance to both depository and non-depository mortgage lenders on how to manage the risks affiliated with third-party service providers, the CFPB's bulletin only provided lenders with two and a half pages of general guidance. This lack of guidance from the Bureau, compared to the sixteen pages of guidance in from the Office of the Comptroller of the Currency (OCC) and fourteen pages of guidance from the Federal Reserve Board in 2013, has left lenders unsure of what kind of risk management the CFPB would require of lenders and how the CFPB would enforce its expectations. Lenders are left without a clear path, and many are still feeling their way through the risk management process.

This lack of guidance has consequences for homebuyers. Recently, a Wisconsin title company talked to ALTA about their customers, Kenneth and Danielle, who were scheduled to buy a $260,000 home in the Village of Caledonia, Wisconsin, on March 15. Two days before the

[3] http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf

scheduled closing, the title company's closing officer received an email from a loan processor at the mortgage company. The email directed the closing officer to the website of an unknown company requesting more information before the title company could continue conducting real estate settlements for this particular mortgage lender. The website asked the closing officer to provide personal information including her Social Security Number, authorization for a credit check, name of her personal banking institution, her personal bank account number and an authorization for her bank to speak with them. A letter accompanied this request from the mortgage lender that read:

"[Our company] has been hired to conduct vendor management services on behalf of the mortgage lender for whom you are handling funds and documents. All mortgage lenders and banks are required by regulation to conduct comprehensive checks and ongoing risk monitoring of settlement agents for consumer protection and data privacy and security purposes. We thank you for assisting lenders in meeting their legal requirements to protect consumers."

When the title company contacted the mortgage lender to say that the information requested was well beyond what would be required by title insurance and settlement industry best practices, our ALTA member reported, "the mortgage lender stated that use of this vetting company was required, and our title company declined to go forward. We assume that the mortgage lender then placed their title and closing order with a different company and we know that the homebuyer's closing was delayed for several days."

Kenneth and Danielle's closing was scheduled to occur on March 15th but was delayed until 5:00 p.m. on March 19. This delay did not protect Kenneth and Danielle from financial harm. Rather, the delay was simply because a mortgage lender hired a third-party vendor, who is unregulated, to request the Social Security Number and personal bank account information of another third-party vendor [the title company], who is regulated and licensed by states department of insurance. The unregulated vendor wanted authorization to check a regulated and licensed vendor's personal credit, the name and account number of her personal banking institution, and an authorization for her bank to speak with them. This is not commonsense consumer protection – this is a regulatory burden for Kenneth and Danielle to obtain mortgage credit.

A second example is from October of 2014 when a Missouri title company received a title order from a homebuyer, John, who was refinancing his home in Chesterfield, Missouri. In order to proceed, the mortgage lender required the staff of the state-regulated and state-licensed vendor, the title company, to provide the same non-public personal information to another vendor who is not regulated, in order to process the title order. It wasn't until the Missouri title company said that they, "would resign from the transaction and contact the borrower to let them know why before [the mortgage lender] agreed to remove the requirement and allow the title company to handle the transaction."

These two examples of consumers being affected by regulatory burdens to obtain mortgage credit was not the fault of either mortgage lender. These examples show that many lenders are still operating blindly with regard to their risk management process because of a lack of guidance from the CFPB.

In the absence of this guidance, and to assist our business partners' understanding of our industry, ALTA took the lead and developed a tool in 2012 to help the industry illustrate to homebuyers and lenders the industry's professionalism and best practice standard to help ensure a positive and compliant real estate settlement experience.

Today, ALTA's Title Insurance & Settlement Company Best Practices are becoming an industry standard of prudent business practices that lenders and settlement agents are adopting as the backbone of their service provider oversight program. These Best Practices are designed to meet market demands while being flexible enough to be adopted by all companies in the title and settlement industry, regardless of business size.

The Best Practices includes the following seven pillars:

1. Establish and maintain current license(s) as required to conduct the business of title insurance and settlement services
2. Adopt and maintain appropriate written procedures and controls for Escrow Trust Accounts allowing for electronic verification of reconciliation
3. Adopt and maintain a written privacy and information security program to protect Non-public Personal Information as required by local, state and federal law
4. Adopt standard real estate settlement procedures and policies that help ensure compliance with Federal and State Consumer Financial Laws as applicable to the settlement process
5. Adopt and maintain written procedures related to title policy production, delivery, reporting and premium remittance
6. Maintain appropriate professional liability insurance and fidelity coverage
7. Adopt and maintain written procedures for resolving consumer complaints

ALTA's Best Practices have gained the support of both large mortgage lenders (like Wells Fargo and SunTrust Bank) as well as community lenders (such as BancorpSouth Bank and FirstMerit Bank).

Regulatory Reform Proposals that Improve How the Bureau Interacts with and Regulates the Title Industry

While ALTA's Best Practices provide much needed guidance to the market, more should be done by the Bureau to fill this void. More certainty form the Bureau would help business understand their regulatory obligations so that they do not feel a need to take an overly cautious approach that limits consumer choice or access to credit. This is why ALTA supports three bipartisan legislative proposals to improve not only the way the CFPB receives feedback from industry about its regulatory proposals, but also the way the CFPB provides industry with much needed guidance about its expectations regarding compliance with federal consumer financial protection law.

First, we urge the Senate to introduce and pass companion legislation to H.R. 1195 as soon as possible. This bipartisan legislation introduced in the House by Rep. Robert Pittenger and Rep. Denny Heck would establish a small business advisory board at CFPB, similar to those established for outreach to community banks and credit unions. This advisory board would give small businesses, like Nancy McNealy's in Beltsville, Maryland, a seat at the table when the Bureau is considers additional regulations that may negatively affect her business and customers. Advisory boards provide clear, formal and open channels of communication between Bureau staff and industry. Since the Bureau only supervises depository institutions with more than $10 billion in assets, the CFPB created an advisory board for community banks and credit unions to promote regular contact with these institutions. Creating a similar advisory organization for nonbanks will allow these smaller institutions to report, advise or consult with the Bureau on a regular basis.

Second, the Senate should introduce and pass legislation that directs the CFPB to establish procedures for issuing advisory opinions to the financial service providers it regulates. The best ways to protect consumers and produce good outcomes for their financial decisions are to discourage bad acts through enforcement while at the same time to also encourage good behavior. Today, the Bureau takes its enforcement role seriously, but we encourage it to take their ability to promote good practices seriously too. An advisory opinion provides certainty to those complying with federal consumer financial law in real-life situations.

Close to 20 other federal agencies issue advisory opinions. This type of guidance, issued in response to a specific request, would improve certainty about whether a proposed design, operation or maintenance of consumer financial product would be prohibited under federal consumer law.

These advisory opinions should be made available to the public through the CFPB website. However, before publication of any advisory opinion, the CFPB should redact specific information about the requesting individuals or entities, and about any individuals or entities associated with the requestor, to the extent that is reasonable to prevent release of any confidential business information or trade secrets.

ALTA members support bipartisan advisory opinion legislative efforts that include specific timeline triggers for the CFPB to respond officially to an advisory opinion request. In addition, we support a fee structure that could be levied on the advisory opinion requestor in order to offset the additional staff the CFPB would need to complete accurate advisory opinions.

Finally, the Senate should consider actions to improve CFPB transparency in the processes used to create bulletins, guidance documents and enforcement actions. In all three instances, the CFPB does not encourage public feedback to these performed actions. Substantive or legislative rules issued by federal agencies, like the CFPB, must undergo a public notice and comment rulemaking under the Administrative Procedures Act (APA). Comments are published in a public forum to promote transparency of rulemakings. Regulations issued by the CFPB benefit from public input and feedback. Receiving public input also makes regulations more effective, resulting in fewer unintended consequences on small businesses and consumers.

Whether a comment is provided to the CFPB through a bulletin, a guidance document or an enforcement action, this feedback should be made available to the public. In many cases, soliciting transparent public comments on an issue promotes discussion that leads to better long-term policy outcomes. Members of the United States Senate employ these tactics when they receive and respond to constituent calls and letters each day.

As you continue to consider various regulatory reforms in the coming months, please remember the stories I have shared today from Maryland, Missouri and Wisconsin. Unfortunately, these complications are replicated in real estate transactions throughout the country as our members work to comply with new state and federal laws. Thank you for the opportunity to comment on regulatory burdens to obtaining mortgage credit. ALTA is eager to serve as a resource to this Committee.