

Legislative Proposals to Improve Transparency and Accountability at the CFPB

House Financial Services Committee
Subcommittee on Financial Institutions and Consumer Credit

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Testimony of Rob Chapman, President


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Chairman Capito, Ranking Member Meeks and members of the subcommittee, my name is Rob Chapman, and I am the President of the American Land Title Association. I am Executive Vice President and Chief Information Officer for Old Republic National Title Insurance Company, which provides title insurance policies and related real estate products and services for individuals, businesses, and government for more than a century. I joined the company eighteen years ago.

ALTA, founded in 1907, is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. ALTA's nearly 5,000 member companies operate in every county in the United States to search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers, and real estate 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 our members' experiences with the Consumer Financial Protection Bureau and offer bipartisan ideas to improve how the Bureau regulates providers of financial services. ALTA members are predominantly small businesses. We believe that many of the bipartisan ideas before the committee today have the potential to help improve the way that the Bureau protects consumers and works with businesses. There is no doubt that the CFPB has increased the complexity of regulatory oversight. This complexity begs for Congress to work in a bipartisan way to improve the way the Bureau operates. Before I offer our perspective on important suggestions to help businesses, large and small, as well as the consumers they serve, let me share our experience with the CFPB to this point.

CFPB oversight of real estate settlement services

ALTA members provide two primary services to consumers and financial institutions. First, the industry prepares and writes title insurance policies protecting both purchasers and mortgagees of real property. This service falls outside the Bureau's regulatory and supervisory authority as part of the business of insurance. Second, title professionals act as third-party settlement agents in real estate and mortgage transactions. This service is within the Bureau's authority pursuant to the Real Estate Settlement Procedures Act.

We have worked with the Bureau as it crafted new regulations and initiatives that impact the real estate settlement industry. Based on our experience, we have drawn many of the same conclusions as the September 2013 report issued by the Bipartisan Policy Center entitled, "The Consumer Financial Protection Bureau: Measuring the

Progress of a New Agency.”¹ The BPC’s Financial Regulatory Reform Initiative’s Consumer Protection Task Force report found:

Perhaps the most significant trend the Task Force discovered was that when the Bureau operated in a transparent, open, and iterative manner, repeatedly seeking input from all stakeholders throughout a process, the results were generally positive. However, when the Bureau made unilateral decisions, rolled out initiatives, rules, or processes as a result of a more closed, internal deliberation process, the results were far more likely to be problematic.

We have a good working relationship with the Bureau on a variety of issues, and ALTA members have experienced a positive interaction with the Bureau on matters that went through an iterative policy development process. However, we also feel the consequences of policy decisions that are the result of a closed process.

Third-party service provider bulletin

While ALTA members are not directly supervised by the Bureau, we are indirectly regulated through the Bureau’s oversight of both depository and nonbank mortgage lenders. Our industry is most acutely feeling the impact of CFPB Bulletin 2012-03 on service providers.² The bulletin reminded supervised banks and nonbanks that they are expected to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer financial law. Although the CFPB bulletin restated longstanding guidance from other federal regulators, the bulletin shook up the industry and as it reminded banks and nonbanks that the Bureau will hold them liable for the actions of their vendors. Some believed that this bulletin was issued in advance of potential supervisory and enforcement actions. In fact, later that year the bulletin was used to support enforcement action against credit card companies for actions of their third party vendors.

Unlike similar longstanding guidance from prudential regulators, including the Office of the Comptroller of the Currency (OCC) in 2001, the Federal Deposit Insurance Corporation (FDIC) in 2006, Mortgage Servicing Settlement and accompanying consent judgments in 2012 as well as subsequent guidance from the OCC and Federal Reserve Board in 2013, the Bureau’s bulletin provided little guidance to banks and nonbanks. The CFPB bulletin was two and a half pages long, compared to subsequent sixteen

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<http://bipartisanpolicy.org/sites/default/files/BPC%20Consumer%20Financial%20Protection%20Bureau%20Report.pdf>

² http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf

pages of guidance from the OCC and fourteen pages of guidance from the Federal Reserve Board in December 2013. This lack of guidance provides businesses with many open, unanswered questions about how to demonstrate compliance. This degree of uncertainty has driven disruptive, inconsistent, costly and inefficient changes in the business relationships and operations between mortgage lenders and ALTA members. We fear that this uncertainty will result in the unintended consequence of small businesses being pushed out of the market because they are not able to keep up with their larger competitors.

To help our members (both large and small) meet market demands and demonstrate that they have the appropriate skills and knowledge to manage the risk of a real estate transaction and protect consumers, ALTA created a best practices framework for title and settlement companies. In many cases this is as simple as formally adopting written procedures and controls that title companies already have in place. These practices include:

1. Establish and Maintain Current License(s) as Required
2. Written Procedures and Controls for Escrow Trust Accounts
3. Written Privacy and Information Security Program to Protect Non-Public Personal Information
4. Adopt Written Policies Ensuring Compliance with Federal and State Consumer Financial Laws
5. Adopt Written Procedures Related to 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

These are reasonable, prudent business practices that consumers should expect from their settlement services provider. We are pleased that they have been strongly supported in the market, including Wells Fargo's endorsement, which stated:

Wells Fargo supports ALTA's Best Practices, and considers them to be guidelines for sound business practices that should ideally already be in place for businesses providing title and closing services for our customers.

Unfortunately, because they are unclear of what is expected of them, mortgage originators have widely varied practices, policies and procedures in their vendor risk management. Also, there is additional uncertainty about the CFPB bulletin's application to our industry because consumers primarily chose the provider of real estate settlement services, unlike a traditional bank vendor. The result is that businesses are shooting in the dark as they attempt to invest in systems and processes to protect

consumers. Many of our members see different requirements, vetting procedures and are concerned that they will no longer be allowed to compete for business when a mortgage is financed by certain lenders.

A better outcome for providers and for consumers would have been a process where the CFPB consulted with the relevant parties to provide more guidance on the types of practices and procedures that the Bureau expects from real estate settlement providers. Had the Bureau consulted with mortgage originators and the real estate settlement industry, we would all have a better understanding of what is expected from the person conducting the settlement of real estate transactions, and the response to the CFPB bulletin would be less disruptive, more consistent and efficient. We are eager to work with the Bureau to make this policy work.

Integrated Mortgage Disclosures

If the Bureau's third-party service provider bulletin is an example of how a more open and transparent process would benefit everyone, the rulemaking for integrated mortgage disclosures under Section 1032 of the Dodd-Frank Act is a good example of how a more open and transparent process worked well. These disclosures and accompanying regulation were published in November 2013 and will be implemented on August 1, 2015, and will replace existing disclosures under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). We are grateful for the strong working relationships that were established on this rulemaking even before the Bureau formally opened in July 2011. While we have not agreed on every decision made by the Bureau, they have always been open and willing to listen to the concerns of our industry as they finalized these new rules.

In May 2011, the CFPB began developing new mortgage disclosures using a nine round iterative process. Throughout this process, the CFPB 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 and its members submitted comments to the CFPB during each round of the iterative process.

In addition, as part of the rulemaking process, the Bureau conducted a one-time Small Business Advocacy Review Panel (SBAR) pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). ALTA strongly supports the small business provisions in the Dodd-Frank Act, including the requirement that the Bureau conduct a small business review panel when a rule is expected to have a significant impact on a substantial number of small entities. This process is vital to ensuring that the Bureau's regulatory goals are met in a way that is not overly burdensome on small business. While our members found the process to be helpful, ALTA believes that targeted improvements can make the SBREFA process even more

effective to help the Bureau understand the impact a rule will have on small business and discover potentially less impactful alternatives.

First, the Bureau should give small entity representatives participating in the SBAR ample notice of the meeting so that they can make appropriate and cost effective travel arrangements. On February 21, 2012, the Bureau sent official invitations to small entity representatives for its March 6, 2012 SBAR panel on this rule. By providing only two weeks' notice, the Bureau made it unnecessarily costly for small entity representatives that do not live in the Washington, D.C., area to attend the panel meeting in person. For example, one ALTA member who attended the panel spent over \$1,400 to attend the meeting. This is a substantial sum for a small business owner. The Bureau should aim to give participants at least one month's notice so they can make the appropriate travel arrangements.

Second, the Bureau should work with industry trade associations to better prepare the small entity representatives for the SBAR meeting. One of the main goals of the SBAR panel is to uncover how costly a regulation will be to implement for small business and to identify less-costly alternatives. There are many factors that go into an effective cost estimate, including differences in business processes across the country and vendor practice. In addition, information about alternatives that can reduce costs for small businesses may not be known to a small business owner unless they have the assistance from their trade association or their vendors. Conducting outreach to trade associations before holding the panel (including inviting trade associations to observe the panel meeting in person) ensures that the SBAR gets the most accurate cost data available.

Third, the Bureau should make the SBAR panel report public once it is complete. By publicizing the report earlier in the regulatory process, the Bureau can provide crucial information to industry stakeholders. This will allow industry to develop more useful data for the Bureau to consider about the impact of their proposals on small business.

Fourth, in addition to the above process-oriented changes, the Bureau also should consider broadening the way it looks at the impact of a regulation on small business. The SBAR panel focused heavily on the direct costs of this rule on small business, such as software costs, productivity and training, but amortized these costs over time. Small businesses have to invest in these changes to their business processes and procedures upfront in one-time costs.

Fifth, the SBAR panel glanced over the parts of this rule that could have indirect but very serious costs on small business. These indirect costs can be extraordinary,

including potentially preventing small business from being able to compete in the future marketplace.

An example is the panel's review of the proposals related to who completes the Closing Disclosure. Under the rule, the Bureau makes the lender ultimately liable for the accuracy of the Closing Disclosure even if they partner with a settlement agent to complete the form. While the panel focused on the direct costs of their new form, the indirect costs (namely that lenders would be incentivized to limit the number of small entities with whom they work) will be much more devastating to small business. The Bureau should take greater care to determine whether a proposal will cause business-model shifts that could be harmful to small-business competitiveness.

Lastly, the SBAR is a one shot event that comes late in the regulatory process. The SBAR occurs after the Bureau has decided on the need for a regulation, conducted research to support the regulation, and developed the substantive pieces of the regulation and just prior to a regulation being formally proposed in the Federal Register. This is late in the game and precludes the Bureau from considering, researching and testing alternatives that will be less costly to small business before publishing their proposal. A more effective process would be to have the Bureau consult with small businesses throughout the entire regulatory process.

It is important for Bureau staff and leadership to meet their "constituency" by attending conferences, roundtables and other industry forums. When Bureau staff attends industry meetings and our biweekly information exchange on industry compliance with the mortgage disclosures rule it provides a valuable forum for Bureau staff to hear directly from the people they regulate. This allows staff to get important information about how their rules are working in real life and what issues need clarification.

Our experience identified targeted improvements to make the SBREFA process even more effective. The SBREFA process is critically important to improving the intent and effect of regulations and is a good example of a more open and transparent process. Other Bureau rulemakings did not use the SBREFA process, including the Qualified Mortgage/Ability-to-Repay rule. Using the SBREFA process in additional rulemaking would foster more collaboration between the Bureau and those institutions it regulates and produce better outcomes for consumers.

Pilot Program for Electronic Mortgage Closings

Another good example of how a more transparent and open process has resulted in a better outcome for business and consumers is in the bureau's recently released study entitled: "Mortgage Closings Today: A preliminary look at the role of technology in

improving the closing process for consumers.”³ The report identified four key pain points that consumers and ALTA members experience at closing: not enough time to review closing documents; an overwhelming stack of paperwork; documents that are hard to understand and full of legalese and technical jargon; and finally that errors in the documents can lead to delays to closing.

This research was the result of ample input from industry and included literature review, analysis of closing packages, review of consumer complaints, preliminary industry interviews, targeted interviews of consumers and industry professionals, a public comment period to respond to a published Request for Information and demonstrations and discussions with technology companies. This transparent, open process resulted in a highly credible report that has received praise from industry and consumers.

ALTA welcomes this type of engaging, open and transparent process by the Bureau. Additional research will be needed to ensure that consumers and industry benefit from e-Closing. Accompanying the report was the publication of a Broad Agency Announcement (BAA) to learn more and seek proposals for new ways in which the Bureau can foster innovative technology solutions in this mortgage closing process.

Technology could mean that consumers can be provided documents and information earlier in the process instead of everything happening at closing. We need to think through how documents are received, how those documents are signed and returned, and then, how those documents are archived and stored.

We know that e-Closing is not about making people buy a home from a computer. Instead of replacing the personal interaction of buying a home, technology should enhance the personal interaction that settlement professionals provide to homebuyers. Throughout the process consumers should know about the documents received, the status of their transaction, what has already happened and what needs to be done and what their rights and responsibilities are when they sign their mortgage contract.

The more that we can streamline, provide uniformity and eliminate duplication, the more positive the entire experience is going to be consumers and ALTA members alike. Our industry looks forward to working with the Bureau to help foster innovative solutions to improve consumers’ experience at closing. This research is being done because the CFPB is convening stakeholders together. The Bureau’s influence to convene parties together is important.

³ http://files.consumerfinance.gov/f/201404_cfpb_report_mortgage-closings-today.pdf

Recommendations for further action

Based on these experiences, ALTA members believe three bipartisan ideas will improve outcomes for consumers and how the CFPB affects my business and those that I represent:

First, Congress should pass H.R. 4383. This bipartisan legislation introduced by Rep. Robert Pittenger and Rep. Denny Heck would establish a small business advisory board at CFPB, similar to those already established for outreach to community banks and credit unions. Advisory boards provide clear, formal and open channels of communication between Bureau staff and industry.

The CFPB created an advisory board for community banks and credit unions because it does not have regular contact with these institutions since the Bureau only supervises depository institutions with more than \$10 billion in assets. 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, direct the CFPB to establish procedures for issuing advisory opinions to financial service providers that it regulates. The best way to protect consumers and produce good outcomes for them is to discourage bad acts through enforcement while at the same time also encourage good behaviors. Today, the Bureau takes its enforcement role seriously; we encourage them 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.

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 or service would be prohibited under federal consumer law. Similar to how other federal agencies operate, in each opinion, the CFPB would apply legal standards to a set of facts and since each opinion applies to specific individuals or entities in specific situations, no third parties are bound by, nor may they legally rely on, an advisory opinion.

These advisory opinions should be made available to the public through the CFPB website. However, before publication of an 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 it is reasonable to prevent release of any confidential business information or trade secrets.

Finally, the CFPB should improve the transparency of the process used to create bulletins and other guidance documents by encouraging public feedback to these 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. These regulations issued by the CFPB benefit from public input and feedback and produce more effective regulations that meet the intended policy outcomes with fewer unintended consequences for small businesses.

Even though policy statements, guidance, and bulletins are exempt from public notice and comment rulemaking since they are intended to restate existing law, these documents can have a profound impact on industry and compliance. CFPB policy statements, guidance and bulletins would benefit from public feedback.

Whether a comment is provided to the CFPB on a rulemaking or a bulletin or other guidance document, this feedback should be made available to the public. Every day Members of Congress welcome public comment on the legislative proposals the House and Senate consider to enhance their formulation of a position on an issue. In many cases, soliciting transparent public comments on an issue promotes discussion that leads to better long term policy outcomes.

By publishing public comments on their website when a Bulletin is issued, the CFPB will provide an avenue for small businesses and others to reduce unintended consequences and produce better policy outcomes for consumers and industry.

Thank you for inviting me to testify today. ALTA is eager to serve as a resource to the Subcommittee, and I am happy to answer any questions.