



October 10, 2018

Via www.regulations.gov

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Proposed Policy to Encourage Trial Disclosure Programs; Docket No. CFPB–2018–0023

Dear Sir or Madam:

The American Land Title Association (ALTA) generally supports the proposed *Policy to Encourage Trial Disclosure Programs*, published in the *Federal Register* by the Bureau of Consumer Financial Protection (Bureau) on September 10, 2018 (Proposal).¹ We encourage the Bureau to use this program to allow lenders and title companies to test the disclosure of the accurate cost of title insurance to consumers under its TILA-RESPA Integrated Mortgage Disclosure rule (TRID).²

Founded in 1907, ALTA is the national trade association representing 6,400 title insurance companies, title and settlement agents, independent abstracters, title searchers, and real estate attorneys. With offices throughout the United States, ALTA members conduct title searches, examinations, closings, and issue title insurance that helps protect the property rights of millions of American homebuyers every year.

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 fall 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 Act³ (RESPA), which is within the jurisdiction of the Bureau.

The Proposal would revise the existing *Policy To Encourage Trial Disclosure Programs* that

¹ 83 Fed. Reg. 45574 (Sept. 10, 2018); Docket No. CFPB–2018–0023.

² Published at 78 Fed. Reg. 79730 (Dec. 31, 2013), as amended by 80 Fed. Reg. 8767 (Feb. 19, 2015), 80 Fed. Reg. 43911 (Jul. 24, 2015), 81 Fed. Reg. 7032 (Feb. 10, 2016), 82 Fed. Reg. 37656 (Aug. 11, 2017), and 83 FR 19159 (May 2, 2018).

³ 12 U.S.C. § 2601 *et. seq.*

the Bureau issued in 2013 (the 2013 Policy).⁴ The 2013 Policy and the Bureau's *No-Action Letters Policy*⁵ are intended to satisfy the Bureau's statutory mandate to facilitate innovation and competition in the market for consumer financial products and services.⁶ However, prior to the Proposal, the Bureau has not adequately focused on using this authority and the 2013 Policy, as the Bureau noted in the preamble of the Proposal, "failed to effectively encourage trial disclosure programs."⁷

When finalized, we believe the Bureau should use the final policy to encourage the industry to test trial disclosures extensively, including those provided in connection with the origination and closing of residential mortgage loans. Importantly for consumers of title insurance policies in connection with mortgage loans, the policy should be used to test how providing consumers with accurate information about the actual cost of title insurance policies increases their satisfaction and understanding.⁸ This testing should be done in conjunction with State insurance regulators, for the reasons described below. Additionally, the policy should encourage lenders and title companies to utilize trial disclosures in connection with the use of electronic real estate and mortgage loan closings. This innovation in the mortgage market should be encouraged, because it may increase access to credit and reduce consumer costs.

Need for Increased Bureau Coordination with State Regulatory Authorities

Coordination with State regulatory authorities is vital. One of the chief issues with the Bureau's 2013 Policy is the continued legal exposure under State law. The Bureau can only waive compliance with Federal disclosure requirements. This is a particular issue with the TRID disclosures, as many State disclosure requirements for lenders and title companies cross-reference or overlap with the Federal requirements. Coordination with State regulators is crucial to address liability for specific State laws on disclosure content, timing, and/or delivery methods. Additionally, this will help avoid lingering questions regarding Federal preemption standards under applicable statutes, such as RESPA and the Truth in Lending Act⁹ (TILA), for trial disclosures. Without this coordination, the cost to design and implement a trial disclosure program would not be outweighed by the benefit of a compliance waiver for most companies.

The Proposal should spell out how the Bureau will work with State regulators. One

⁴ 78 Fed. Reg. 64389 (Oct. 29, 2013). ATLA notes that the 2013 Policy is, and the Proposal would be, issued under the Bureau's authority under section 1032(e) of the Dodd-Frank Act, codified at 12 U.S.C. § 5532(e), which provides that a company approved by the Bureau to conduct a trial disclosure program may be "deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law."

⁵ 81 Fed. Reg. 8686 (Feb. 22, 2016).

⁶ See 12 U.S.C. § 5511.

⁷ 83 Fed. Reg. at 45574.

⁸ In September 2016, ALTA issued a report on a survey it conducted in partnership with Survata, a national market research company, to collect data on consumer experiences related to their purchase of title insurance and the TRID disclosures. The survey found that 40% of consumers were confused by the new calculation of title insurance premiums under TRID. Only 27% of consumers felt more informed by seeing the Bureau's mandated calculation of title insurance premiums. Based on these survey results, ALTA believes a modification to the TRID-required calculation of title insurance premiums could be the basis of a successful trial disclosure program that improves consumer understanding.

⁹ 15 U.S.C. § 1601 *et. seq.*

problem with the 2013 Policy¹⁰ is that it created uncertainty how the Bureau would obtain State approval for a trial disclosure. A formal process to coordinate and enter agreements with State regulatory authorities would greatly increase the industry's ability to conduct a trial disclosure program. This coordination should include all of the State regulatory authorities that supervise entities that are subject to the Bureau's enumerated consumer laws, including State insurance and escrow regulators, or that otherwise enforce compliance with any applicable State disclosure laws (e.g., State attorneys general).

Streamline the Application and Approval Process

ALTA supports the Bureau's proposed streamlined application requirements, 60-day application turn-around time, and express statement that trade associations can obtain approval for trial disclosure programs. We encourage the Bureau to clarify how the trade association approval process could operate in practice.

The Proposal allows groups to apply for the program. This would include trade associations.¹¹ Under this authority, each company testing disclosures under the trial "must notify the Bureau that the company will utilize the disclosure under the terms permitted for the group."¹² ALTA has a long history of developing uniform disclosures and insurance forms for the industry. We would welcome a chance to work with a group of members to test out alternative title insurance disclosures on the TRID disclosures. We request that the Bureau clarify its requirements for trade associations to obtain approvals for trial disclosure programs on behalf of their membership, including the required form and timing of the notification for testing companies.

ALTA also encourages the Bureau to provide additional guidance in the policy regarding how the delivery of trial disclosure program data to the Bureau would not violate Federal or State privacy laws. In an era of increased focus on privacy requirements and new, more stringent privacy laws being enacted, we believe such guidance would further encourage participation in trial disclosure programs.

Support for Other Changes to the 2013 Policy

ALTA supports explicitly noting that increased cost-effectiveness or improved consumer understanding are singularly appropriate goals of a trial disclosure. The 2013 Policy contained many caveats that appeared to discourage a focus on cost-effectiveness as a disclosure improvement. ALTA believes increased cost-effectiveness can benefit consumers, as it may result in reduced costs to consumers, as well as the ability of the industry to devote more resources to innovation.

In addition, as noted above, many of ALTA's members are also subject to State law requirements that require separate or similar disclosures for the same transactions. ALTA suggests that the possible improvements to Federal disclosure requirements under the final policy should

¹⁰ 78 Fed. Reg. at 64391.

¹¹ 83 Fed. Reg. at 45576.

¹² *Id.*

expressly include a modification to the Federal disclosure requirements that better enables compliance with one or more State laws. ALTA also suggests that, in its coordination with States, the Bureau encourage States to agree under the Bureau's policy or in their own trial disclosure programs to allow the modification or elimination of State disclosure requirements that are duplicative to, or out-of-date with the Federal disclosures.

ALTA generally supports the forms of disclosure modifications outlined in the Proposal that may form the basis of a trial disclosure program.¹³ Many of ALTA's members are subject to disclosure requirements under RESPA and TILA, including the affiliated business arrangement disclosure,¹⁴ and the TRID disclosures. ALTA believes some aspects of the content of the Federal disclosures, the elimination of certain disclosures, or modified delivery mechanisms could form the basis of a successful trial disclosure program.

Need for Greater Clarity Regarding Compliance Waivers

ALTA encourages the Bureau to provide greater clarity regarding the legal authority and scope for the compliance waivers. This should include guidance regarding the applicability of the compliance waivers to other Federal and State regulators. The preamble of the Proposal states that other Federal and State regulators have "no predicate for an enforcement or supervisory action" that is based on a statutory or regulatory provision within the scope of a compliance waiver issued by the Bureau.¹⁵ ALTA believes that the inclusion of such language in the text of the final policy would further encourage the use of trial disclosure programs, because it would provide further protection to the industry.

Additionally, while section 1032(e) of the Dodd-Frank Act provides legal authority for the Bureau to provide compliance waivers, the Bureau should also cite other provisions of Federal statutes that provide safe harbors for official Bureau orders or interpretations when possible.

ALTA also supports the Proposal's addition of text to Section C that ensures the Bureau will not enforce or issue supervisory findings based on its authority to prevent and enforce against unfair, deceptive, or abusive acts or practices¹⁶ ("UDAAP") for activity conducted under a compliance waiver.¹⁷ ALTA believes such language would further encourage the industry to utilize trial disclosure programs. UDAAP represents a significant risk to the industry, as it has been the basis of many of the Bureau's enforcement actions. ALTA suggests that, because industry may remain concerned about enforcement by other regulators of similar Federal or State statutes that may be outside the scope of the enumerated consumer statutes subject to the compliance waiver,¹⁸ it would further encourage trial disclosure programs if the Bureau coordinated with other Federal and State regulatory authorities such that they would provide similar written

¹³ 83 Fed. Reg. at 45576.

¹⁴ See 12 C.F.R. § 1024.15.

¹⁵ 78 Fed. Reg. at 64391; 83 Fed. Reg. at 45576.

¹⁶ 12 U.S.C. §§ 5531, 5536.

¹⁷ 83 Fed. Reg. at 45577.

¹⁸ For example, section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or similar State statutes prohibiting unfair or deceptive acts or practices.

declarations regarding their discretion to enforce such similar statutes.

Lastly, the Bureau should finalize a policy that provides a compliance waiver as to all the necessary industry participants in a transaction in which a trial disclosure was utilized. As you know, the processing and closing of residential mortgage loan transactions typically involve multiple parties, including lenders, title insurance companies, real estate brokers and agents, escrow agents, and other settlement service providers. These parties may not be willing to participate in transactions in which another settlement service provider has obtained approval for a trial disclosure program from the Bureau, without the benefit of a compliance waiver.¹⁹ The use of a trial disclosure without a compliance waiver may result in noncompliance for the other settlement service provider. For example, if a settlement agent is required under State law to provide a Closing Disclosure to a borrower, but the lender in the transaction is conducting a trial disclosure program to provide a different form of disclosure to the borrower, it could result in noncompliance for the settlement agent. In addition, if the lender is utilizing a trial disclosure for the borrower, it may also frustrate the ability of a settlement agent to provide a Closing Disclosure to the seller as required under TRID. For this reason, ALTA encourages the Bureau to provide in the final policy that the compliance waiver will extend to other settlement service providers participating in a mortgage transaction in which an approved company or they utilize the trial disclosure approved by the Bureau. ALTA encourages the Bureau to coordinate with State regulators regarding this issue as well.

ALTA appreciates the opportunity to comment on the Proposal. Should you have any questions about this letter, please do not hesitate to contact Steve Gottheim, ALTA's senior counsel, at steve@alta.org or 202-261-2943. Thank you for providing this opportunity to share our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Justin B. Ailes", with a stylized flourish at the end.

Justin B. Ailes
Senior Vice President of Policy

¹⁹ For example, as noted above, title insurance companies and settlement agent are subject to the TRID rule, RESPA, and State laws and regulations, which may require the provision of certain disclosures.