



August 2, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington D.C. 20552

Re: Docket Number CFPB-2024-0021
Request for Information Regarding Fees Imposed in Residential Mortgage Transactions

Director Chopra:

When Americans buy their home, they deserve to know that they truly own it and are not at risk of losing what is typically the largest and most important investment they will ever make. Title insurance provides this peace of mind.

It does this while also being one of the least expensive services available to consumers in a real estate transaction. In fact, while the request for information (RFI) notes that the price of homes and total closing costs have gone up in recent years, the cost of coverage for title insurance is actually down approximately 5% in the past five years on a current dollar basis and 36% on a constant dollar basis.¹

Promoting greater housing opportunity and affordability is a shared goal of the Bureau and the American Land Title Association (ALTA).² However, we are concerned that the use of rhetoric like “junk fees”³ will encourage consumers to forgo critical protections such as title insurance. Services that are legal, disclosed, and regulated cannot be “junk fees.”

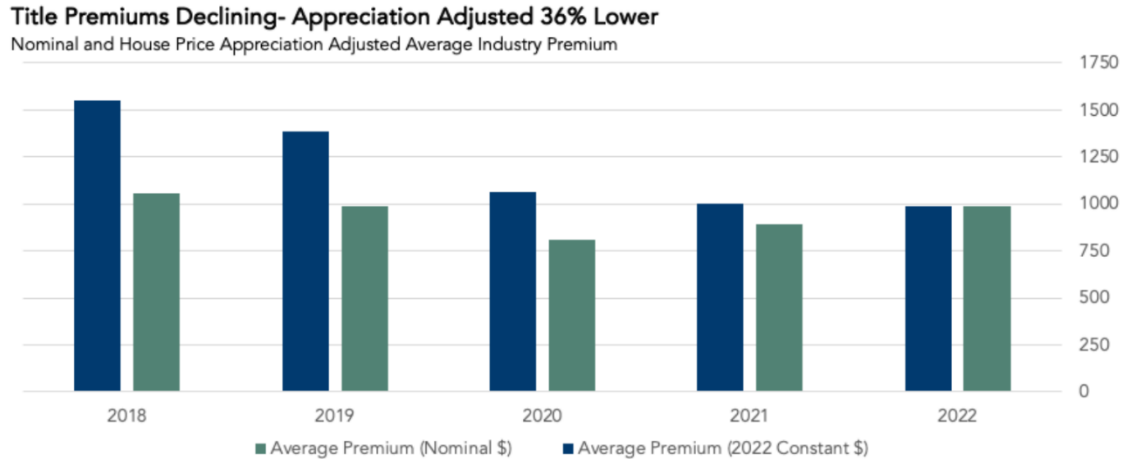
Given these concerns, this letter provides background information about title services and an analytical framework for understanding the cost and coverage of title insurance. Additionally, we

¹ Based on ALTA analysis of National Association of Insurance Commissioners (NAIC) annual financial statements filed with state insurance commissioners. Available at <https://www.alta.org/business-operations/research-initiatives-and-resources/industry-financial-data/>. See also, First American, The Value of Title Insurance 8 (June 2024), <https://apps.mba.org/pdf/Title%20Insurance%20Stats%20First%20American.pdf>.

² ALTA represents title insurers, title agents and attorneys that provide peace of mind to Americans by insuring their property rights and closing their real estate transactions. Our members range from small, one-county operations to large national title insurers in the United States. The mission of ALTA is to improve the skills and knowledge of providers in the real property transaction, effectively advocate member concerns, and standardize products for industry use.

³ See, e.g., <https://www.consumerfinance.gov/about-us/blog/junk-fees-are-driving-up-housing-costs-the-cfpb-wants-to-hear-from-you/>.

highlight several state insurance laws that the Bureau must review before considering any changes to underlying mortgage regulations. Lastly, this letter provides answers to questions 1, 2, 4, 5 and 8 of the RFI.



Title services benefit consumers beyond just the provision of insurance.

After a real estate closing, consumers need to know that they rightfully own the property they purchased. This is what makes title insurance so crucial and unique.

Title companies provide two major services to insure a consumer's property rights. First, title companies conduct title research. This encompasses three main components: 1) a search of title-related public records; 2) an examination of those records to determine their impact on the buyer's rights; and 3) curative work to satisfy other debts of the seller or rectify defects in title that need to be addressed prior to the buyer taking ownership, much of which cannot be identified in the public records. The goal is to ensure that the consumer takes title subject to only those rights of others disclosed before they purchase the home and are reasonable (such as a utility easement). This concept is called marketable title. Second, the title company⁴ will conduct the real estate closing or settlement. This involves the coordination of paying off all the debts discovered in the title search and curative phase, the execution of the legal (and other) documents and the secure transfer of funds.⁵ The goal of the closing process is to ensure the executed transaction documents comply with both federal mortgage law and state real estate law. Consumer choice and convenience drives

⁴ In some states, the real estate closing is done by a company separate from the title provider. This is typically either a separate escrow company (like in California) or an attorney. States that require an attorney to conduct the real estate closing because it is or may constitute the practice of law include several New England states, Delaware, Georgia, Illinois, New York, West Virginia, and North and South Carolina.

⁵ See [Appendix](#) for further detail highlighting the significant steps required of title professionals in the typical title process to close a residential purchase transaction (and similarly followed during refinancing as well).

the myriad of ancillary services at a closing, from using a mobile or electronic notary to hiring courier services to send documents.

A title insurance policy then backs all these services (the assurance of marketable title and handling of the real estate closing). The industry offers three core insurance products in a transaction: a loan policy protecting the lender's lien priority, an owner's policy protecting the buyer's property rights, and a closing protection letter insuring the transfer of funds and proper execution and recording of transaction documents at closing. A critical value of title insurance is to protect against defects that are not discernable in a public records search, such as fraud and forgery.

Title insurance is a risk elimination product. This is why the majority of what consumers pay is to cover upfront risk elimination expense. This is different from most other insurance products and is often the most misunderstood aspect.

In the average purchase transaction, the search, exam, curative and closing services take 22 hours of staff time to complete if no extraordinary defects or issues are found.⁶ However, in the 36% of transactions where extraordinary defects are found, the time it takes to complete the transaction doubles to 45 hours.⁷ According a recent economic analysis by the Treasury Department's Financial Crimes Enforcement Network (FinCEN), the fully loaded hourly wage for the title industry is \$70.33 for title agents and \$84.15 for title insurers.⁸

The service-heavy nature of title insurance also shows up in the cost of completing a transaction. For each dollar a consumer pays to a title company, 52 cents covers labor expenses, 17 cents covers purchasing title data from government entities and 13 cents covers office space.⁹ It is because of this high upfront expense that state insurance regulators focus less on the loss ratio for title insurance for pricing adequacy and more on the combined loss and expense ratio.¹⁰

⁶ ndp | analytics, ALTA Critical Issues Study, More than pushing a button: Estimating the time and complexity of clearing title (Apr. 2024), <https://www.alta.org/business-operations/research-initiatives-and-resources/critical-issue-studies/title-insurance-curative-work-study>.

⁷ *Id.*

⁸ Financial Crimes Enforcement Network, Anti-Money Laundering Regulations for Residential Real Estate Transfers, 89 FR 12424, at 12456 (proposed Feb. 16, 2024), <https://www.federalregister.gov/documents/2024/02/16/2024-02565/anti-money-laundering-regulations-for-residential-real-estate-transfers>.

⁹ Industry analysis of 2018-2022 NAIC Annual Financial Statements for the title insurance industry. Available at <https://www.alta.org/business-operations/research-initiatives-and-resources/industry-financial-data/>.

¹⁰ See, NAIC, U.S. Property & Casualty Insurance Industries – 2023 Full Year Results, at 13-16 (2024), <https://content.naic.org/sites/default/files/inline-files/2023%20Annual%20Property%20%26%20Casualty%20Insurance%20Industries%20Analysis%20Report.pdf>.

Cost breakdown of producing a title policy



For a homebuyer, the median all-in cost of title insurance and settlement services paid at closing is \$1,901 or 0.67% of the purchase price, according to Fannie Mae.¹¹

Title insurance is one of the most transparent markets for consumers.

It is hard to argue that consumers are not well informed about the price for closing costs and especially title insurance. Under the Bureau's TILA-RESPA Integrated Disclosure (TRID) rule, the cost of title insurance and related services is disclosed to consumers at the start of the loan underwriting process and prior to closing. According to the Bureau's own research about the TRID disclosures, "the evidence available for the assessment indicates that the TRID Rule improved consumers' ability to locate key information, compare terms and costs between initial disclosures and final disclosures, and compare terms and costs across mortgage offers."¹²

Along with providing price disclosures, TRID requires lenders to provide consumers with information to assist them in shopping for settlement services.¹³ Further, because title insurance is a comprehensively regulated product at the state level, insurers' rates are publicly available through state departments of insurance.¹⁴ Many insurers also have rate calculators on their websites.¹⁵ These calculators and other related materials are available to help customers understand different options found in their area and to simplify the process of shopping and price comparisons.

¹¹ Nuno Mota & Mark Palim, Fannie Mae, Barriers to Entry: Closing Costs for First-Time and Low-Income Homebuyers 11 (Dec. 2021), <https://www.fanniemae.com/media/42286/display>.

¹² Consumer Financial Protection Bureau (CFPB), *Consumer Financial Protection Bureau Releases Assessment of TRID Mortgage Loan Disclosure Rule* (Oct. 1, 2020), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-assessment-trid-mortgage-loan-disclosure-rule/>.

¹³ See 12 C.F.R. § 1026.19(e)(1)(vi) (providing, *inter alia*, that a creditor must identify settlement service providers for which a consumer is permitted to shop and a statement that the consumer may choose a provider not included in that list).

¹⁴ See NAIC's System for Electronic Rates and Forms Filing (SERFF), https://www.serff.com/serff_filing_access.htm.

¹⁵ See, e.g., <https://www.firstam.com/title/resources/calculators/title-fee-calculator.html>.

Finally, it is important for the Bureau to think about consumer shopping in the context of the entire real estate transaction. In a typical sale transaction, the buyer and the seller will often identify the title and/or settlement company in the purchase and sale contract (which will be prior to the lender accepting an application). This facilitates the flow of the transaction, especially when the consumers are searching for a faster closing period. Often consumers obtain the advice of their real estate agent, the lender, or a housing counselor to identify a title company. These recommendations factor in a host of traits including price, service, expertise, speed, and ease of transaction due to technology or office locations.

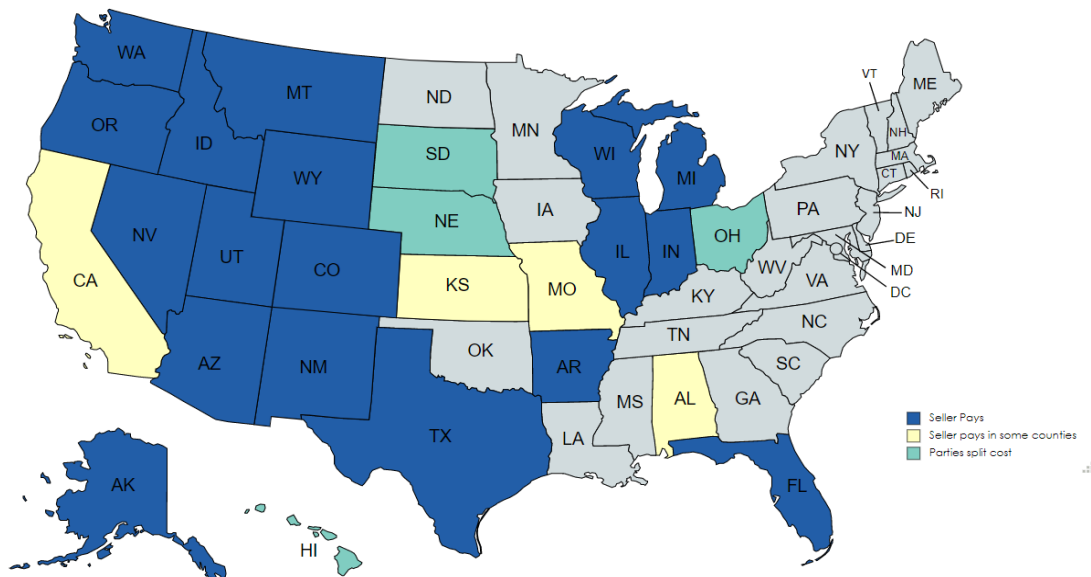
Below are our responses to various questions posed in the RFI.

1. Are there particular fees that are concerning or cause hardships for consumers?

If there are fees that are causing hardship to consumers when buying a home, title insurance is not one of them. For most homebuyers, title insurance and settlement are two of the least expensive components of the transaction.

Again, the median “all-in” cost of title insurance and settlement services is \$1,901 or 0.67% of the purchase price, according to Fannie Mae.¹⁶ This analysis likely overestimates these costs as it does not factor in how seller credits are often used to reduce the cost of services to consumers. This is especially critical for understanding title insurance because, in the majority of states across the country, the seller pays for the owner’s title insurance policy for the benefit of the buyer.

States where sellers pay for owner’s policy



¹⁶ Mota & Palim, *supra* note 11 at 11.

In these seller-pay states, the cost born by the buyer is substantially less than the Fannie Mae median because of simultaneous issue discounts offered by title companies. State rate filings provide a significant discount on a loan policy when the owner's policy is also purchased from the same provider.¹⁷

Additionally, the Fannie Mae analysis also counted other third-party fees as part of the title charge, even if they are not paid to the title company. The analysis examined fees that used the descriptor "Title –" since under TRID all title related fees are supposed to use that prefix. However, most lenders use that "Title –" prefix for any settlement related fee even if not paid to the title company such as fees for surveys, document couriers, notary services (both remote and in person), HOA estoppel or transfer fees, and more. This practice further inflates the apparent cost of title insurance and settlement services to the consumer and policymakers.

While it is important to look at costs in absolute dollars and in relation to purchase price/loan amount, another critical way to examine closing costs is on a life-of-loan basis. This allows for an apples-to-apples comparison of closing costs against other costs that consumers pay on a recurring and annual basis as part of owning and financing a home. The result is a deeper understanding of what drives housing sustainability.

When using this lens, it becomes more apparent that title insurance and settlement services are not the "second largest category"¹⁸ of costs but instead are amongst the lowest costs for consumers. A borrower's largest life-of-loan costs are property taxes, recording fees paid at closing, and fees paid to the mortgage-backed security (MBS) investor. By comparison title insurance premium and settlement costs are two of the least expensive costs, barely equating to 0.7% of the borrower's total life-of-loan costs combined.¹⁹

2. Are there any fees charged that are not or should not be necessary to close the loan?

If there is a service that is absolutely necessary for consumers, it is determining marketability of title and the safe and efficient settlement of the loan. Put another way, title insurance. Risks to property rights can be complex because "ownership" of real estate is a "bundle of rights" that can be divided in numerous ways, and over time. This "bundle" can vary significantly from state to state and even by locality owing to the tremendous complexity of the laws governing American property rights.

Prior owners of property may have created interests by contract, such as granting a mortgage or selling a mineral interest. Some may have consented to or suffered liens that attached to the real estate. This includes involuntary liens such as those for child support or unpaid construction (mechanics) liens. If left unaddressed or undiscovered, these interests and liens will affect the rights acquired by a new purchaser or lender.

¹⁷ Available in nearly all seller-pay states. Note this discount is not accurately presented to the consumer under the Bureau's TRID regulation. See https://files.consumerfinance.gov/f/documents/cfpb_tila-respa_title-insurance-disclosures-factsheet.pdf.

¹⁸ CFPB, Request for Information Regarding Fees Imposed in Residential Mortgage Transactions 89 Fed. Reg. 48400, 48401 (June 6, 2024).

¹⁹ Mark Fleming, First American, *Missing the Forest for the Fees – Borrower Life-of-Loan Costs*, (Dec. 2023), <https://www.firstam.com/value-of-title/costs-and-fees-of-homeownership/index.html>.

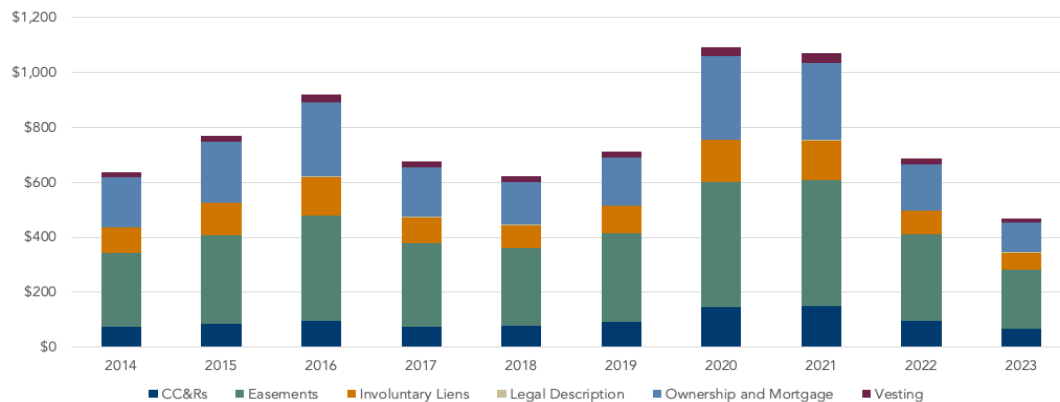
While a diligent search of public records can find many issues—assuming the records documenting these rights are properly indexed—many other “off-record” title defects can impose ownership risks on homeowners. Examples include forged deeds, incorrect legal descriptions, or lack of consent from undisclosed heirs. Because Americans’ homes are typically their most valuable assets, these risks can significantly impact the ability to build and maintain wealth.

As discussed above, the labor-intensive process to determine title insurability reduces ownership risk for buyers before closing. According to a recent study conducted by First American Financial, on an annual basis the curative work performed by title companies addresses approximately \$600 billion in risk to consumer property rights prior to closing.²⁰

First American examined title commitments where its staff provided the search and examination. Those commitments showed items that would need to be addressed prior to closing and then estimated the risk of those items by comparing them against the average cost of addressing similar claims. Using First American’s data going from the past decade, the title industry risk exposure ranged from **\$600 to \$900 billion a year**. During the COVID-19 pandemic, total industry risk exposure surpassed **\$1 trillion a year**, due to the surge in sales and mortgage refinancing. In 2023, the most recent year of available ALTA industry data, total industry risk exposure is estimated to have been almost **\$500 billion**.²¹

A Potential Tragedy of the Commons

What would happen if the title industry didn't do any curative work? Total Estimated Industry Exposure in \$Bn



Source: ALTA, First American, Sale and Refinance Transactions By Risk Type and Year (January 2014 - December 2023)

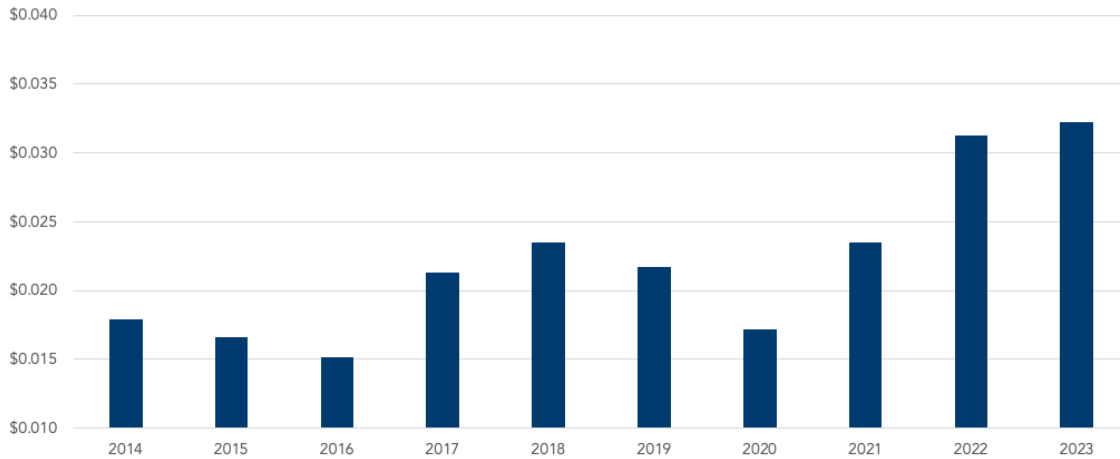
²⁰ See First American, *The Value of Title Insurance*, supra note 1, at 4. All figures and calculations below are based on data compiled and analyzed by First American. To identify the complete set of pre-curative risks First American used its own direct residential title commitments for sale transactions with or without loans or mortgage refinances between January 2014 and December 2023 that resulted in a policy (lender, owner, or both) written where policy liability amounts were between \$1,000 and \$15,000,000. These title commitments are the result of the search and examination process and have identified all the risks needing curation or insurance. For estimates of the losses, First American’s closed covered-risk claims related to search and examination from January 2008 to December 2023 were used to estimate, for each title risk type, the outlier-trimmed average net severity (including settlement, claim expenses and recovery costs). Finally, ALTA industry market share and industry direct premium written summary data from 2014 to 2023 were used to identify First American’s direct market share annually and to “gross up” industry estimates.

²¹ Both 2022 and 2023 risk exposure levels declined in large part due to the significant reduction in the number of sale transactions and mortgage refinances as mortgage rates increased from pandemic-era lows.

Moreover, when you compare the cost of eliminating or curing title risks against the total title premium charged by the industry, you see the relative cost of curation and insurance varies between two and three cents per dollar of premium collected per dollar of risk exposure.²² It also shows that title curation is the most cost-effective method of protecting property rights for consumers.

A Potential Tragedy of the Commons

The Cost of Curative. Premium Collected Per Total Estimated Industry Exposure \$



Source: ALTA, First American, Premium Per Risk Exposure \$, Sale and Refinance Transactions By Year (2014 - 2023)

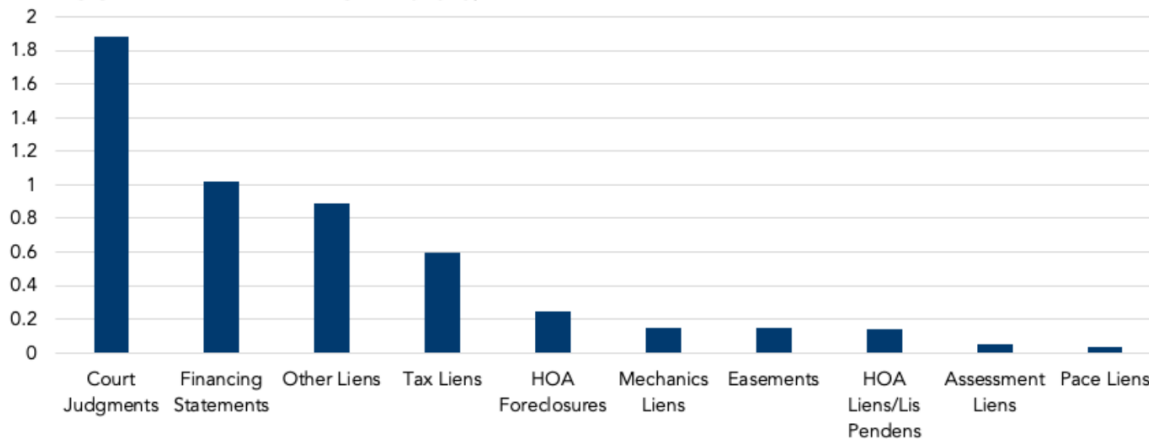
Another way to estimate the value of the curative work performed by title companies is to look at the number of documents recorded each year that require curation. Based on an analysis of First American's public records database, over the full year ending October 2023, approximately 5 million documents were recorded that require curation.²³ This is in addition to the collection of information about items that need to be paid at closing like obtaining a mortgage release or tax bill. This analysis found almost 1.9 million court judgments or orders; 1 million financing statements; nearly 900,000 local, city, utility, and other government related liens; 600,000 state and federal liens for unpaid taxes; over 200,000 HOA foreclosures; and 150,000 construction (mechanics') liens. All these liens and judgments require an examination to determine if they impede the transfer or encumbrance of real property and if any curation or correction is required in the public records.

²² Additionally, the relative cost can vary by the mixture of transaction types. When the mortgage market is heavily oriented toward refinance transactions rather than sales with mortgages, the average risk cost decreases because refinance transactions typically involve less title risk exposure compared to purchase (sales with mortgage) transactions. The mortgage market was refinance dominated for most of the last decade until the Federal Reserve started raising rates in early 2022.

²³ See First American, The Value of Title Insurance, *supra* note 1, at 2-3.

Past is Prologue- Public Recordings Encumbering Clear Title

Non-Mortgage Liens and Other Recording Activity by Type (Millions)



Source: First American, October 2022- October 2023

Industry research shows that in 2022, the title industry collected \$2.4 billion in overdue federal income taxes, \$600 million in overdue local property taxes, and \$55 million in overdue child support payments to clear the associated liens as part of its curative effort.²⁴

Even with all this curative work, title insurers still pay significant sums each year in claims for issues that were not or could not be identified in the search and exam process. In 2023, the industry paid out almost \$640 million in claims, up from \$596 million during 2022.²⁵

An important aspect of these claims payments is the cost of providing a legal defense for policyholders when their title is challenged. This defense cost is valuable since a significant portion of claims can be won in court ensuring the owner is not displaced from their home. The cost of paying and defending against a title claim can be extremely expensive.²⁶ A recent analysis by the actuarial firm Milliman found that the average cost of providing a legal defense is over \$8,000. This is spent even if the claim is ultimately found not to have merit. The average American simply cannot afford to fund such defense costs, since the Federal Reserve has recently shown in its 2023 household survey that 37% of Americans could not cover even a hypothetical \$400 emergency expense with cash or a cash equivalent.²⁷ Additionally, they likely won't have access to the

²⁴ Ernst & Young LLP, Economic Contribution of the U.S. Land Title Insurance and Settlement Services Industry in 2022, at I-II (Fig. 1) and 12 (Jan. 2024), <https://www.alta.org/file/2022-Economic-Contribution-Report>.

²⁵ ALTA, 2023 Year-End Industry Composite Financial Statement, <https://www.alta.org/business-operations/research-initiatives-and-resources/industry-financial-data/>.

²⁶ Milliman, Analysis of Claims and Claims-Related Losses in the Land Title Insurance Industry 6 (May 2024), <https://www.alta.org/media/pdf/240517-analysis-of-claims-and-claims-related-losses-in-the-land-title-insurance-industry.pdf>.

²⁷ Board of Governors of the Federal Reserve System, Economic Well-Being of U.S. Households in 2023, at 31–33 and tbls. 16–17 (May 2024), <https://www.federalreserve.gov/publications/files/2023-report-economic-well-being-us-households-202405.pdf> (finding many Americans “would be unable to pay the expense at all” since 18% could only cover a \$100 emergency expense and a further 14% only an expense of \$100 to \$499).

specialized bar or real estate litigation attorneys used by the title insurance industry. Without coverage from a title insurance policy, homeowners would be left to attempt to defend themselves, in hopes of not losing their home, at far greater expense than a one-time title premium at closing.

The costliest type of claim to address is fraud and forgery. Claims costs for fraud and forgery averaged over \$143,000 during the last decade, with average defense costs of over \$36,000 per claim.²⁸ Additionally, the number of fraud- and forgery-related claims has seen a large spike over the last several years, doubling as a percentage of claims in the category of basic risks in just the last two years. They ranged from 19% over the period from 2013-2020 and then jumped to 21% in 2021 and 44% in 2022.

5(a). How are fees currently set? Who profits from the various fees?

As with any insurance product, title companies file their rates in accordance with state insurance laws. State insurance regulators oversee and govern this process under the reverse preemption of the McCarron Ferguson Act.²⁹ While the CFPB does not have authority over the business of insurance³⁰ and thus cannot oversee the price of title insurance, state regulators utilize their extensive authority to ensure prices are fair for consumers.³¹

State insurance commissioners require insurers to provide actuarial data to justify their rates. In general, state insurance law requires insurers show that rates are not excessive, inadequate, unreasonable, or unfairly discriminatory.³² More than half of the states include just the cost of insurance in their filed rates while others include the title research and other closing costs. States often set rules and standards of practice that govern the provision of the service, such as requirements that a title search of certain historical length be conducted prior to issuing the policy.

In most states, title insurers must file their rates prior to usage, with regulators either reviewing those rates before or shortly after they go into use. Three states³³ set mandatory statewide premiums.

²⁸ Milliman, Analysis of Claims, *supra* note 26 at 6.

²⁹ See 15 U.S.C. § 1011 (“Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to [that] regulation...by the several States.”); 15 U.S.C. § 1012 (“The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business....No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance.”).

³⁰ 12 U.S.C. § 5517(f) (“The Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by a State insurance regulator.”).

³¹ See, e.g., NAIC, Title Insurers Model Act § 19.A. (Apr. 1996), <https://content.naic.org/sites/default/files/inline-files/MDL-628.pdf> (requiring prior approval of title insurance rates “in accordance with applicable statutes and regulations governing rate filings”).

³² NAIC Title Insurance (C) Task Force, Survey of State Insurance Laws Regarding Title Data and Title Matters 12 (Mar. 2019), https://content.naic.org/sites/default/files/inline-files/cmte_c_title_tf_survey_state_insurance_laws_march_2018.pdf.

³³ Florida, New Mexico, and Texas.

5(b). Who benefits from the service provided? What leverage or oversight do lenders have over third-party costs that are passed onto the consumer?

Without a doubt the primary beneficiary of the services provided by title companies is the consumer (both homebuyers and sellers). At the most basic level, consumers benefit because, without title insurance, they would not be able to obtain a mortgage loan and therefore would be unable to purchase the home.

At a more granular level, consumers benefit from all the risk reduction discussed above. They also benefit from the insurance since at least 30% of title defects cannot be found in a search of public records.³⁴

Consumers also benefit from having an experienced professional handle the closing. According to CertifID's 2024 State of Wire Fraud report,³⁵ nearly 1 in 4 consumers was targeted with suspicious or potentially fraudulent wire transfer instructions and 1 in 20 consumers was victimized into sending funds to the wrong person in the past year. Data from the Federal Bureau of Investigation (FBI) indicates that over \$446 million was lost to real estate wire fraud last year. Further, the risk that the seller is not who they purport to be (called seller impersonation fraud) is also rising. Recent ALTA data shows 28% of title companies discovered at least one of these frauds last year.³⁶ More consumers would likely fall victim to these crimes without the expertise of title professionals who understand the closing process and vigilantly watch for red flags to help identify fraud.

While it is reflexive to think that only lenders benefit from a loan policy of title insurance, in fact consumers benefit as well. Consumers benefit from a loan policy of title insurance because it reduces the financial risk that they face through the warranties they make to the lender, investors (such as Fannie Mae, Freddie Mac, and Ginnie Mae), and ultimately to the federal government. In every mortgage transaction, the consumer executes a deed of trust or mortgage, with standardized legal documents developed by Fannie Mae and Freddie Mac most often utilized. In these documents, the borrower makes several representations and warranties regarding the title to the property³⁷ in favor of the lender including the following:

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

4. Charges; Liens. Borrower must pay (a) all taxes, assessments, charges, fines, and impositions attributable to the Property which have priority or may attain priority over this Security Instrument, (b) leasehold payments or ground rents on the Property, if any, and (c)

³⁴ Milliman, Analysis of Claims, *supra* note 26, at 7.

³⁵ <https://www.certifid.com/state-of-wire-fraud>.

³⁶ ndp | analytics, ALTA Critical Issues Study, Seller Impersonation Fraud 1, 3–4 (July 2024), <https://www.alta.org/business-operations/research-initiatives-and-resources/critical-issue-studies/seller-impersonation-fraud-study>.

³⁷ See uniform security instruments provided at <https://singlefamily.fanniemae.com/fannie-mae-legal-documents> (warranties that the borrower “lawfully owns” the property and that it is “unencumbered” by off-record title defects; moreover, the borrower “agrees to defend the title to the Property” meaning that borrowers are obligated to provide the cost of defending against title claims covered by their representations and warranties).

Community Association Dues, Fees, and Assessments, if any. If any of these items are Escrow Items, Borrower will pay them in the manner provided in Section 3.

The Borrower must promptly discharge any lien that has priority or may attain priority over this Security Instrument unless Borrower: (aa) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing under such agreement; (bb) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which Lender determines, in its sole discretion, operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (cc) secures from the holder of the lien an agreement satisfactory to Lender that subordinates the lien to this Security Instrument (collectively, the “Required Actions”). If Lender determines that any part of the Property is subject to a lien that has priority or may attain priority over this Security Instrument and Borrower has not taken any of the Required Actions in regard to such lien, Lender may give Borrower a notice identifying the lien. Within 10 days after the date on which that notice is given, Borrower must satisfy the lien or take one or more of the Required Actions.

- Form 3009 DC Deed of Trust

A loan policy thus provides protection to both the lender and borrower in serving as an initial source of coverage and compensation in the event of a challenge to the borrower’s title or lender’s lien priority.

Additionally, lenders, investors, and the public benefit³⁸ from title insurance. Lenders and investors obtain insurance that makes their loans more salable on the secondary market. This credit enhancement makes mortgage loans less costly and more widely available to consumers, which is why it is considered by rating agencies as they value a pool of mortgages.³⁹ The public benefits from both the increased property values that flow from more certain property rights. They also benefit from the collection of debts, such as unpaid taxes as part of the curative process, as previously noted.

8. Would lenders be more effective at negotiating closing costs than consumers? Are there reports or evidence that are relevant to the topic?

³⁸ Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663 (2003).; idem, *Legal Protection of Property Rights in the Self-Regulating United States Local Recording System*, 9 ADAM MICKIEWICZ UNIV. L. REV. 9, 11–13 (2019), https://ppuam.amu.edu.pl/uploads/PPUAM%20vol.%209/01_Szypszak.pdf (“In essence, those acquiring property interests must protect themselves—it is a ‘user beware’ system. . . . Registers of deeds in the United States do not check to see whether someone recording a document has a legitimate interest in the rights it describes, or whether the conveyance complies with any applicable regulations. One reason why the American real estate conveyance system is so efficient is that the parties are free to structure and consummate their arrangements without the need for government review or approval.”).

³⁹ See, e.g., <https://www.spglobal.com/ratings/en/research/articles/240220-criteria-structured-finance-rmbs-u-s-single-family-rental-securitization-methodology-and-assumptions-12995787> (noting “appropriate mechanisms to enable the preservation of property and seniority of liens, such as property tax and insurance provisions”).

In a purchase transaction, lenders would be hard pressed to negotiate cost savings on title insurance. In the more than half of all states where the seller pays for the owners' policy, the best deal available is to obtain the loan policy from the same title company. Otherwise, the transaction would not qualify for the simultaneous issue discounts mentioned above. The consumer would then pay the full policy premium rate for both policies – which is far more expensive. Unfortunately, we see some consumers steered into this dynamic when lenders allow for the use of title insurance alternatives such as attorney opinion letters.⁴⁰ The use of these alternative products to cover the lender can lead to additional costs for consumers as it could necessitate the need for two separate closings – one for the sale transaction and one for the mortgage. Furthermore, if title fees were rolled into the amount financed, they would then be subject to interest charges, increasing the cost to consumers over time.

In refinance transactions, title companies also offer significantly reduced rates to consumers as there may be a less significant amount of search, exam, and curative work needed to complete the transaction due to a shorter time period since the last transaction and title review. These lower rates are also due to insurers working with lenders to improve integrations and centralization to reduce expenses, allowing them to actuarially justify lower rates.

Unlike most service providers, insurance rate regulation prevents insurers from offering volume discounts without a justified expense reduction. Thus, both consumers and lenders cannot easily obtain a discount without getting a new rate filed and approved by the state. This makes it unlikely that lenders will be able to negotiate lower rates without their making corresponding investments to reduce expenses for title companies.

The prohibitions against unfair discrimination in rates also constrain the ability to alter prices for some or a small number of lenders who can guarantee a high amount of volume. Insurers must charge the same rate based on the same risk, and it would be difficult to justify a lower rate solely on a factor unrelated to risk (such as volume).

Both federal and state laws limit the ability of title companies to offer discounts to lenders. Under the federal Real Estate Settlement Procedures Act (RESPA), “No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.”⁴¹ Under RESPA's implementing regulations the term “thing of value” is broadly interpreted to include “discounts.”⁴² Thus, providing a discount pursuant to a negotiated agreement to refer business to a specific title company would likely violate RESPA and hinder the ability of lenders to negotiate discounted prices.

Additionally, as the Bureau considers its authority, it's clear that RESPA cannot be read to allow rate setting or mandate particular methods for payment of services.⁴³ Before drafting RESPA, the Department of Housing and Urban Development and the Department of Veterans' Affairs studied

⁴⁰ See United Wholesale Mortgage, Title Review & Closing (TRAC) program, <https://www.uwm.com/manage-your-pipeline/pipeline-tools/trac>.

⁴¹ 12 U.S.C. § 2607(a).

⁴² 12 U.S.C. § 2602(2); 12 C.F.R. § 1024.14(d).

⁴³ See S. Rep. No. 93-866, at 2-3 (1974).

the possibility of setting rates for settlement services.⁴⁴ This approach was ultimately rejected.⁴⁵ Additionally, both before the enactment of RESPA and in subsequent amendments to it, Congress specifically considered and deliberately excluded a requirement to mandate that lenders pay for closing costs.⁴⁶ The fact that these provisions were explicitly not included in either the original enactment of RESPA or the 1975 amendments strongly suggests that the statute cannot be read to require such a scheme.

State law provides an additional layer of restriction to discounting title insurance pursuant to a referral agreement. Some states have their own versions of RESPA⁴⁷ and all states have variations of anti-inducement statutes for insurance.⁴⁸ For example Florida’s anti-inducement statute states, “No title insurer, or any member, employee, attorney, agent, or agency thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducement to title insurance, or after such insurance has been effected, any rebate or abatement of the premium or any other charge or fee, or provide any special favor or advantage, or any monetary consideration or inducement whatever.”⁴⁹ These state law restrictions mean that any attempt to amend the regulations implementing RESPA to allow lenders to negotiate volume discounts for title insurance will have a limited effect. State laws that give greater protection to consumers than RESPA are not inconsistent with it and are not preempted by RESPA.⁵⁰

4. Provide data or evidence on the degree to which consumers shop for closing costs across settlement providers.

TRID makes comparing costs relatively easy for consumers. However, price is not the only factor consumers use when selecting their title and settlement provider. Transaction efficiency, speed to closing, and local market knowledge are among several relevant considerations.

ALTA has developed a consumer education campaign to help homebuyers understand the closing process and the benefits of title insurance. Through our consumer education website (www.homeclosing101.org), we host a variety of resources to help consumers shop for title insurance, understand the steps in a closing, and review common terms and fees.

⁴⁴ U.S. Dep’t of Housing and Urban Dev. & Veterans’ Admin., Report on Mortgage Settlement Costs (Jan. 1972).

⁴⁵ S. Rep. No. 93-866, at 4-5 (1974).

⁴⁶ See S. 3232, 93d Cong., 2d Sess. (1974). At the time that Congress enacted RESPA in 1974 (and the further amendments in 1975), Senator William Proxmire introduced a bill that would have required all settlement services to be “paid” by lenders, prohibited origination fees and discount points, and required all lender compensation to be obtained through the interest rate charged on the loan. See also S. Rep. No. 93-866, at 23 (1974).

⁴⁷ See, e.g., Va. Code §§ 55-525.16 *et seq.*

⁴⁸ NAIC, Unfair Trade Practices Act (Spring 2021), https://content.naic.org/sites/default/files/inline-files/MDL-880_0.pdf.

⁴⁹ Fla. Stat. § 626.5941.

⁵⁰ 12 U.S.C. § 2616.

In addition, we worked closely with the NAIC's Title Insurance Task Force as it developed a consumer shopping tool.⁵¹ This effort brought regulators, industry, and consumer groups together to develop an aid for consumers.

While it's unclear how much of a benefit consumers would obtain through increased shopping, we are prepared to work with the CFPB to figure out how to promote more consumer shopping and aid consumers in that effort – similar to the work we did together during the development and implementation of the TILA-RESPA Integrated Disclosures (TRID).

Conclusion.

Consumer protection is at the heart of what we do, whether it is educating consumers about the latest fraud trends or helping answer questions as they complete one of the biggest purchases of their lives. We stand ready to work with the Bureau on thoughtful approaches to help consumers better understand real estate transactions. Ultimately, to be fruitful, any discussion about how to help consumers needs to be based on facts about title insurance.

Title insurance is the most effective tool for protecting homeowners' property rights. It is also one of the least expensive services consumers pay for in a real estate transaction. Title companies invest every day in improving the process of searching and examining title, fixing issues through curative work, and closing the transaction. This investment has made title insurance coverage one of the few housing-related costs that has declined over the past five years.

We look forward to working with the Bureau as it considers the questions put forward in this RFI given these facts and limitations placed on the CFPB by the state-based regulation of insurance. If you have any questions, please contact ALTA's General Counsel, Steve Gottheim, at sgottheim@alta.org.

Sincerely,

Chris Morton

Chris Morton
Senior Vice President of Public Affairs &
Chief Advocacy Officer

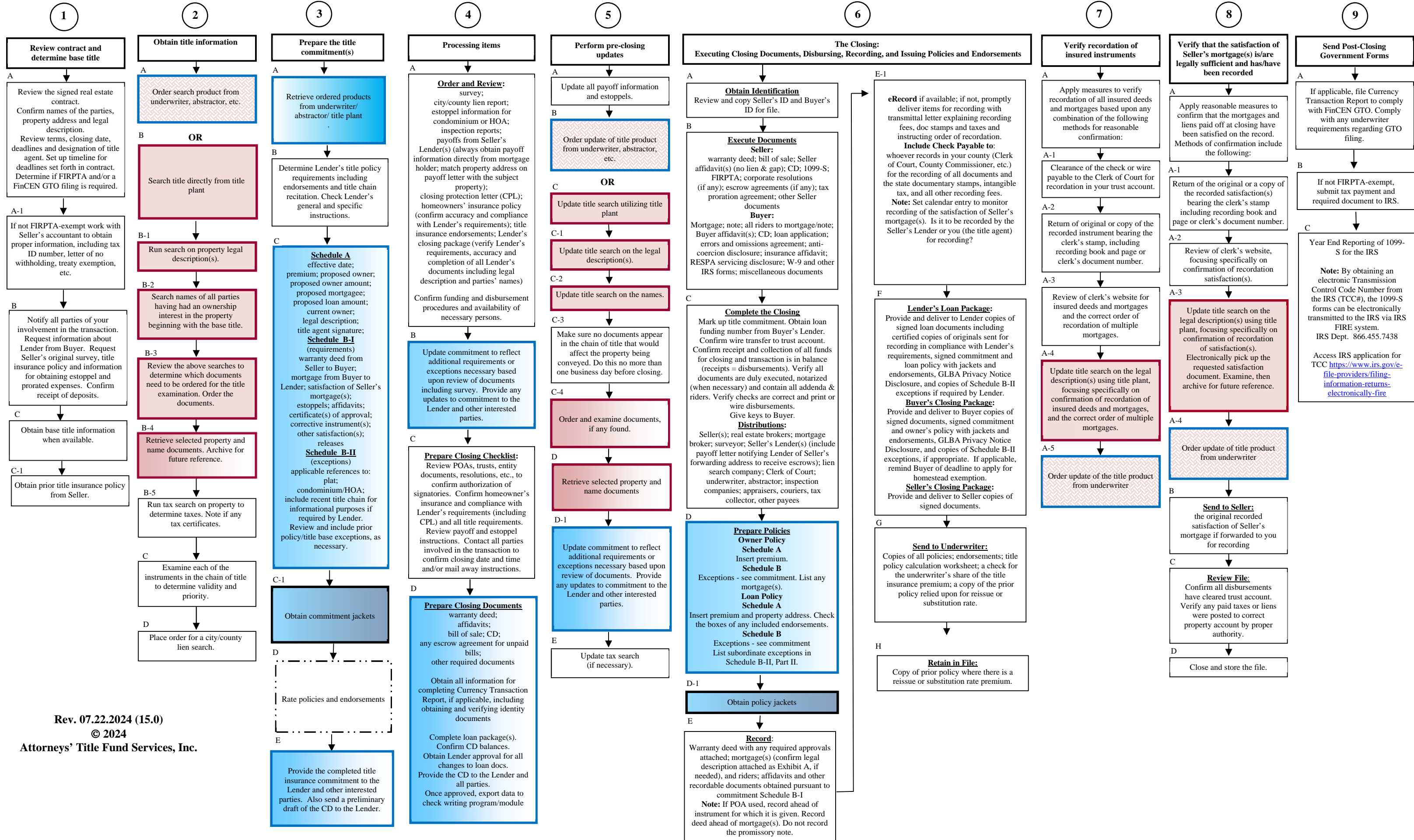
⁵¹

https://content.naic.org/sites/default/files/committee_related_documents/committees_c_title_tf_related_shopping_too_template.pdf

APPENDIX

CLOSING FLOWCHART "RESIDENTIAL SALE"

With Buyer obtaining a new mortgage



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