



November 23, 2015

Ms. Patricia McClung  
Assistant Director of Mortgage Markets  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20522

Dear Tricia:

Thank you for taking the time to speak to ALTA members during your keynote at our Annual Convention in Boston. Our members appreciated hearing from you and learning more about consumer education, eClosings, and other issues the Bureau is focused on that will impact the title insurance and settlement industry. We also appreciate having your staff join our TRID Task Force meeting on October 9, allowing us to share some of the concerns our members have regarding how the Know Before You Owe rule is being implemented in the marketplace.

Now that lenders and settlement agents have had the opportunity to work with the Know Before You Owe regulation, they have expressed some confusion about how to interpret the rule that may require further guidance and clarification from the Bureau. An example of this confusion stems from how to disclose an owner's title insurance policy when the Bureau's mandatory calculation method produces a negative figure as the disclosed amount for this policy. There is uncertainty about whether the rule permits disclosure of a negative number and how this disclosure will impact the consumer's ability to understand their financial responsibilities. Another point of confusion arises from how to interpret provisions of the rule pertaining to seller credits. Lenders and settlement agents do not have a clear understanding of how to disclose credits to the seller and whether those credits should be listed as individual line items on the Closing Disclosure, or whether they should be aggregated and disclosed under a general "seller credits" heading.

This confusion has also manifested in how some lenders are interpreting the rule's liability provisions. As the Task Force discussed with your staff, our members are concerned with some of the language included in new closing instructions that have been updated with the implementation of the Know Before You Owe regulation. It is in the consumer's best interest to ensure that accountability for compliance with consumer financial protection laws within the information on the documents rest with one party, who in this case the Bureau has determined is the lender. These closing instructions, however, attempt to shift liability to the settlement agents for all compliance issues, including the

lender's compliance with federal consumer laws. These instructions are in contrast to the clear public policy underpinning this rule, as well as language in the rule stating that lenders bear ultimate liability for errors on the Closing Disclosure form.<sup>1</sup> Attached are several excerpts of closing instructions that our members have received to provide an example.

We would appreciate the opportunity to meet with your team to discuss these concerns. ALTA looks forward to continuing to work with the Bureau to ensure that implementation progresses smoothly for consumers and our members.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle L. Korsmo". The signature is fluid and cursive, with the first name "Michelle" and last name "Korsmo" clearly distinguishable.

Michelle L. Korsmo  
Chief Executive Officer

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<sup>1</sup> "The creditor shall ensure that [the Closing Disclosure and any revisions] are provided in accordance with all requirements [pertaining to final disclosures for mortgage loans secured by real property]." 12 CFR § 1026.19(f)(1)(v).

## **APPENDIX: Examples of Closing Instructions**

### ***Example 1:***

“As a settlement officer, you are the Lender’s Agent for the purpose of assuring that *there has been compliance with conditions and requirements of Regulation Z, TILA, RESPA and all state and local laws* of the appropriate jurisdictions” (emphasis added).

### ***Example 2:***

“The Closing Disclosure which *I have prepared* is a true and accurate account of all receipts and disbursements of funds required to settle this transaction from the noted sources including the funds (i) to be paid out by me as Settlement Agents or (ii) *as paid by others outside of this settlement* and duly marked as “paid outside of closing” on the Closing Disclosure. All such receipts and disbursements are as set forth in the purchase agreement (if applicable) and/or the closing instructions from the Lender” (emphasis added).

(This instruction is especially concerning as the settlement agent will not prepare the Closing Disclosure for this lender. Additionally, this instruction requires the settlement agent to identify all items paid outside of closing, which information may not be available to the settlement agent.)

### ***Example 3:***

“Closing Agent shall fully indemnify and hold harmless (collectively "indemnify" and "indemnification") [Lender] and its directors, officers, employees, agents, partners, stockholders, representatives and affiliates (collectively, "Indemnified Parties") from and against all causes of action, claims, demands, orders, suits, damages, liabilities, losses, settlements, judgments, costs and expenses (including but not limited to reasonable attorney's fees and costs in responding to civil investigative demands or other inquiries by administrative agencies), whether or not involving civil litigation by a consumer or an enforcement action by a federal or state regulatory agency (to the extent permitted by such enforcement action), as well as voluntary reimbursements to consumers provided by [Lender] based on the good faith belief that a particular transaction might lead to the institution of any such action, suit or other proceeding hereinabove listed, or a third party claim, which arise out of or relate to any failure to comply with these Closing Disclosure Instructions or the master Closing Instructions provided to Closing Agent by [Lender] that were in effect at the time of the closing, in each case whether or not caused by the negligence of the Closing Agent or any other Indemnified Party and whether or not the relevant Claim has merit. In connection with this indemnification, the Indemnified Parties are presumed to be entitled to indemnification, and presumed to have acted under good faith belief in the provision of voluntary reimbursements to consumers. The Closing Agent shall have the burden of proof to overcome the presumption. This indemnification shall be binding upon the Closing Agent and its successors and assigns and shall inure to the benefit of the Indemnified Parties and their estate, heirs, legal representatives and assigns.

“By signing below, I have read, understand, and agree to the above Closing Disclosure Instructions.”

***Example 4:***

“[Lender] will hold Settlement Agent liable for any losses resulting from Settlement Agent’s failure to follow these Closing Instructions. Settlement Agent shall immediately indemnify the Creditor, its officers, directors, employees, successors, or assigns (together the “Indemnified Parties”) and hold the Indemnified Parties harmless from and against all claims, demands, liabilities, losses, costs and damages (including court costs and attorneys’ fees) that Indemnified Parties may incur or suffer as a result of damages arising under or related to these Closing Instructions...”

***Example 5:***

“Indemnitor [closing agent] desires to act as the closing and settlement agent for the Transaction. Accordingly, in exchange for [Lender] permitting Indemnitor to act as closing and settlement agent for the Transaction, Indemnitor has agreed to indemnify and hold harmless [Lender] from and against certain claims arising from the acts, errors, omissions and/or failures of Indemnitor as they relate to the Transaction, and the rules promulgated under the Truth in Lending Act and the Real Estate Settlement Procedures Act.

“**NOW, THEREFORE**, in consideration of the mutual covenants and agreements contained herein, and other good and valuable consideration, Indemnitor agrees to indemnify, defend and hold harmless [Lender], including its respective directors, members, officers, employees, and agents from and against any and all claims, causes of action, losses, liabilities, costs, deficiencies, damages and expenses (including reasonable attorneys’ fees and expenses and court costs) or incurred by [Lender] resulting from, arising out of, or relating in any manner to Indemnitor’s acts, errors, omissions, negligence, failure to follow closing instructions provided to Indemnitor by [Lender], failure to properly prepare and/or deliver to the Customer legally required closing documents, or the failure of Indemnitor to properly deliver and disburse funds at the closing of the Transaction.”