AMERICAN LAND TITLE ASSOCIATION

October 18, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2016-0038 or RIN 3170-AA61

Dear Ms. Jackson:

The American Land Title Association (ALTA) appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) proposed amendments to its Know Before You Owe: Mortgage Disclosures rule (KBYO). On the whole, the proposal includes a number of technical corrections and clarifications that should help industry improve compliance. As discussed below, we support these proposals and urge the Bureau adopt them without any changes in a final rule. However, there are some minor pieces of the proposal that are not only insufficient, but provide less guidance to the marketplace.

The title and settlement industry has been one of the most affected segments of the market by KBYO. It has spent three years and millions of dollars to comply with this rule. One of the main lessons learned during the implementation process is that ample time needs to be given to software vendors to update their products.

Our past experience shows that the most crucial and time consuming aspect of implementation will not be software development but actually training. While most of the proposed changes appear technical, vendors will need more than the proposed four months to program, test, implement and train. Implementing other regulatory changes, including Home Mortgage Disclosure Act, Uniform Residential Loan Application and the new servicing rule, only exacerbate this need. This is why we recommend a minimum of 12 months of implementation time for any change requiring software development.

However, not all of the proposals require a system upgrade. Some of the most important changes (like fixing the "black hole") are process-oriented and can be quickly implemented by industry. We encourage the CFPB to adopt a two-tiered implementation approach. The Bureau should make effective upon finalization all proposals that do not require a software upgrade. For changes that require an upgrade, we urge the Bureau to work closely with vendors in setting an effective date. CFPB should also be flexible and reactive to the market to ensure that critical vendors are able to provide compliant products once the rule becomes effective.

Discussion of the Proposed Rule

ALTA believes that a majority of the proposed changes are critical and provide valuable clarity to the market. Below are three amendments that we believe are well drafted and should be adopted as written by the Bureau.

Adopt a Uniform Approach for Co-operatives

ALTA supports the proposal to include loans secured by shares of a co-operative unit. The failure to previously include co-op loans in the rule created unnecessary uncertainty for practitioners. This simple change should end the need for industry to conduct a complex legal analysis before understanding whether to provide customers with KBYO disclosures.

While buying into a co-operative has all the hallmarks of a traditional real estate purchase from the viewpoint of the consumer, it brings with it a number of key differences. Consumers buying into a co-op are not actually purchasing a physical apartment. Instead, they purchase shares in the cooperative corporation that owns the apartment. It is these shares (personal property) that secure the mortgage. Unlike a regular real estate purchase, the buyer will not receive a deed but instead a stock certificate, and in most cases a long term lease.

Without this amendment, practitioners would have to perform a complicated legal analysis to understand whether a co-op purchase is a transaction involving real property, and thus covered by KBYO. To make this determination, industry was required to look to state law. In many instances state law was not clear on this subject.

We recommend the Bureau finalize this amendment as drafted. It provides much needed clarity and simplification to KBYO and should ensure that all consumers buying a co-op are treated equitably. While this seems like a simple change, it will require some software programming. We urge the CFPB to work closely with software companies to understand their needs to determining an effective date.

Fix the Black Hole

In 2015, ALTA joined with the Mortgage Bankers Association to host a series of readiness forums across the country to help industry prepare for KBYO. A number of Bureau staff participated in these events, which successfully helped companies prepare for the change. During these events, one of the most prominent areas of disagreement among KBYO experts was whether companies could issue new Closing Disclosures to reset their good faith baseline when there was a delay to closing. We believe companies should be able to do this and are glad to see the Bureau clarify this point in the proposal.

Currently, KBYO states that once a lender issues the Closing Disclosure, they are prohibited from issuing any further Loan Estimates. Once the initial Closing Disclosure is sent, the rule proceeds to set out a complex set of timing requirements for issuing updated Closing Disclosures.

The complexity of these timing requirements led to confusion and disagreement in the industry. When a closing delay occurred, this confusion led some creditors to believe they could send the consumer an updated disclosure to reset tolerances while others believed they could not. The latter group of creditors faced the unenviable choice of having to absorb any cost increases or make the consumer reapply for the loan. This confusion resulted in similar consumers being treated differently.

Due to these unintended consequences, we support the Bureau's proposal. It clearly states that an updated Closing Disclosure can be used to reset good faith baselines after a valid changed circumstance in any situation in which a Closing Disclosure has already been issued. We believe it brings needed clarity and we urge the Bureau to finalize it as written. This is an example of a change that should not require a change in software programming. Thus, it should be a change that is made effective immediately upon finalization.

Clarify the Interplay Between Tolerance Categories

One of the hallmarks of KBYO is its incorporation of good faith in the rule's provisions. Under such provisions, creditors are expected to use the best information reasonably available to them to provide consumers with an effective estimate of their closing costs. Depending on the category of cost, consumers may or may not be charged a different amount than estimated at the close of the transaction.

Unfortunately, the interplay between different cost categories can cause confusion when conducting good faith analyses. This confusion makes it unclear whether consumers or creditors should be responsible for paying the increases in certain costs.

One example of this problem is with owner's title insurance. Owner's title insurance is a product that is not required by the creditor. Under §1026.19(e)(3)(iii), the estimate for owner's title insurance "is in good faith if it is consistent with the best information reasonably available to the creditor at the time it is disclosed, regardless of whether the amount paid by the consumer exceeds" the estimate. Thus, the amount actually charged can increase in any amount as long as the estimate was based on the best information available to the creditor.

In some transactions, title insurance may be provided by a company that is affiliated with the creditor. Under §1026.19(e)(3)(i), a charge by a company that is affiliated with the creditor is in, "good faith if the charge paid by or imposed on the consumer *does not exceed* the amount originally disclosed" (emphasis added). When it comes to owner's title insurance provided by an affiliate of the creditor, these two provisions of the rule are in conflict.

The proposal seeks to resolve this conflict by stating that "good faith is determined under § 1026.19(e)(3)(iii) for all five of the categories of charges listed therein, regardless of whether such charges are paid to affiliates of the creditor." We believe this proposal strikes an appropriate balance. Clarifying that tolerance is determined by the type of fee in these instances rather than the provider should aid compliance.

One portion of this proposal that we would recommend changing is the inclusion of the phrase, "so long as the charges are bona fide" at the end of proposed § 1026.19(e)(3)(iii). The proposal goes on to define "bona fide" to mean charges that are "lawful" and "actually performed."

We are concerned that industry will be confused by the reference to bona fide charges because it is a term of art used in analyzing claims under Section 8 of RESPA. In *Freeman v. Quicken Loans,* the Supreme Court held that RESPA did not prohibit the charging of a fee for a service that was not actually performed. This conclusion arose in the context of RESPA's Section 8(b) fee splitting prohibition. Due to this precedent, we are concerned that some industry members may be confused by the addition of the "bona fide" language.

The purpose of this addition by the Bureau is to clarify that only charges for services actually performed in a transaction are included in the good faith determination. We suggest that the Bureau say this directly. Our suggestion is to remove term "bona fide" and instead replace it with the phrase "for services actually performed." This would be clearer and prevent any potential confusion.

Insufficient Guidance on Sharing Disclosures With Real Estate Agents

As acknowledged in the proposal, one of the areas of the rule for which the Bureau receives the most questions is whether creditors can share the Closing Disclosure with the parties' real estate agents. This is also one of the biggest points of contention faced by ALTA members during a closing. Despite the prevalence of these questions, the Bureau's clarification is inadequate and will lead to more confusion between creditors, settlement agents and real estate agents.

As the CFPB stated in the proposal, real estate agents used to receive copies of the HUD-1 from settlement agents prior to KBYO. However, what the proposal fails to acknowledge is that KBYO drastically changed the real estate settlement process. Under KBYO, creditors are responsible and liable for preparing and providing the Closing Disclosure to consumers. While settlement agents provide creditors with data for completing the disclosure, they are only provided a copy of the disclosure by the creditor for use with the consumer at the settlement.

Creditors control the settlement agent's ability to share the Closing Disclosure through contractual agreement (i.e., closing instructions). These instructions lay out how settlement agents can use materials provided by the creditor. Sharing disclosures without explicit permission can subject the settlement agent to potential indemnity liability under the closing instructions. Unfortunately, the Bureau's proposal does not make mention of any potential contractual limitations. It also fails to guide real estate agents to turn to the creditor as the party that actually controls the decision to share the disclosures.

The proposal nicely summarizes the federal Gramm-Leach-Bliley Act (GLBA) but it fails to discuss any state law concerns. Most states have their own consumer privacy laws, some of which are more restrictive than the federal statute. A creditor who is considering whether to share consumer information with a real estate agent must analyze these laws before making a decision.

By failing to fully discuss the various limitations that should be considered when determining whether to share disclosure forms, the proposal brings more uncertainty to the marketplace on this topic. We urge the Bureau to correct this oversight in the final rule and provide complete guidance to the marketplace.

Prohibit Lenders from Forcing Their Liability onto Settlement Agents

ALTA members continue to report attempts by lenders to shift their liability for their compliance errors to settlement agents through closing instruction indemnity agreements. While Director Cordray has previously made clear in letters to Congress that lenders are primarily liable for any errors with the disclosures, we urge you make this prohibition part of the official commentary. Doing so will help ensure that the party that caused a mistake that affected a consumer is responsible for fixing that mistake.

As part of this prohibition, the Bureau should also explicitly lay out potential liability of settlement agents who provide information to lenders for the completion of the disclosures. The failure to provide this guidance makes settlement agents act more conservatively than necessary. The result is unnecessary conflict between lender and settlement agent as they finalize the Closing Disclosure, which can lead to delays for consumers. Providing more clarity would help ease this tension and make the process smoother for all parties.

Every day the industry improves its experience with TRID. With the changes recommended in this letter, the proposed rule can provide real assistance to industry. However, we believe that the Bureau can make additional changes to truly assist consumers. We have submitted a separate letter to the Bureau on the most important thing that the CFPB can do to improve the consumer experience with TRID, which is to allow industry to tell consumers the true cost of title insurance on the Closing Disclosure.

We look forward to continuing to work with the Bureau on these issues. 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 taking the opportunity to listen to our concerns.

Sincerely,

Michelle L. Korsmo
Chief Executive Officer