


IMPROVING TRANSPARENCY AND ACCOUNTABILITY AT THE BUREAU OF CONSUMER FINANCIAL PROTECTION

House Committee on Financial Services
Subcommittee on Financial Institutions

Tuesday, June 6, 2018
2:00 p.m.

Written Testimony Submitted By Steven G. Day NTP, President


AMERICAN
LAND TITLE
ASSOCIATION



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TESTIMONY OF STEVEN G. DAY, NTP
PRESIDENT, AMERICAN LAND TITLE ASSOCIATION
ON
IMPROVING TRANSPARENCY AND ACCOUNTABILITY AT THE BUREAU OF
CONSUMER FINANCIAL PROTECTION
BEFORE
THE HOUSE FINANCIAL SERVICES COMMITTEE
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

WEDNESDAY, JUNE 6, 2018

WASHINGTON, D.C.

Chairman Luetkemeyer, Ranking Member Clay and members of the subcommittee, my name is Steven G. Day NTP. I am President of National Agency Operations for Fidelity National Title Group, a subsidiary of Fidelity National Financial.

I also have the privilege of serving as the President of the American Land Title Association (ALTA). ALTA is the national trade association representing more than 6,400 title insurance companies, title and settlement agents, independent abstracters, title searchers, and real estate attorneys. I am here today testifying on behalf of ALTA.

I have been in the title insurance and settlement business for nearly 37 years. I started my career as an attorney and title agent in a small town in Rhode Island. From there, I became a state underwriting counsel for Chicago Title in Providence, R.I. Over the years, I've held a

variety of positions, including state manager assisting our agents build their business in New York and New Jersey, and division manager overseeing our direct, agency, and commercial operations in the Northeast and Mid-Atlantic. In February, I assumed the role of president of agency operations.

Through these experiences, I have gained unique insight into how the small and micro businesses that make up the bulk of the title and settlement industry make decisions to help them not only comply with the law but also grow their company.

The title and settlement industry is primarily made up of small businesses that serve their local communities and operate in every county in the United States. The average title agency has fewer than five employees and revenue between \$250,000 and \$500,000 annually. Even with our large nationwide footprint, the bulk of Fidelity's business comes from these small- and mid-sized title agencies.

The Best Way to Improve Transparency at the Bureau is to Ensure it Provides Reliable Guidance to Businesses

As in every industry, change is happening in the title and settlement industry at an ever-increasing and unpredictable pace. As I travel the country talking with our small business members, I hear how changes in regulations and waves of innovation are threatening to disrupt businesses. Our members feel like they are in a holding pattern – testing the winds and biding their time to make just the right move.

Whether in business or in life, I've learned a simple truth, more information is never a bad thing when it comes to decision making. This is especially true when it comes to making decisions that can cost your business millions of dollars.

In his appearance before the committee in April, Acting Bureau Director Mick Mulvaney made four recommendations to Congress to improve accountability and transparency for the agency. These include:

1. “Fund the Bureau through Congressional appropriations;
2. Require legislative approval of major Bureau rules;
3. Ensure that the Director answers to the President in the exercise of executive authority; and
4. Create an independent Inspector General for the Bureau.”

These proposals are designed to provide Congress and the President with stronger oversight over the Bureau. These may be beneficial steps, but what would help the most is a Bureau that consistently provides the businesses it regulates with written, reliable guidance on how to comply with the law and protect consumers in real-world scenarios.

This is why the American Land Title Association believes the most important step Congress can take to improve the Bureau of Consumer Financial Protection is to pass H.R. 5534, the Give Useful Information to Define Effective Compliance (GUIDE Compliance) Act. Introduced by Reps. Sean Duffy (R-WI) and Ed Perlmutter (D-CO), the bill creates a process for the Bureau to issue formal and reliable written guidance on how to comply with its written regulations. In other words, the bill requires the Bureau to provide businesses with more information and examples of how to comply with regulations. Additionally, the bill requires the creation of a civil money penalty matrix similar to those used by all other federal financial regulators.

Consumers benefit when regulators discourage bad acts through enforcement while also encouraging good behavior through guidance. Today, the Bureau takes its enforcement role seriously; we encourage the Bureau to take its ability to promote good practices seriously, too.

In May, Acting Director Mulvaney spoke to our members at our ALTA Advocacy Summit. He mentioned his philosophy that the Bureau should tell companies the rules of the road and provide concrete guidance and examples prior to enforcement. We believe this should not just be Acting Director Mulvaney's philosophy but rather the approach of the Bureau itself. Congress can help ensure this through passage of the GUIDE Compliance Act.

What is Guidance?

According to the Government Accountability Office, the purpose of regulatory guidance is to, "clarify statutes or regulatory text and to inform the public about complex policy implementation topics¹." Under the Administrative Procedures Act², guidance differs from a rule. Rules are defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Such rules must go through a public, notice of proposed rulemaking (NPRM).

Guidance is considered a class of interpretive statements of policy. These statements advise the public of an agency's plans for exercising its authority. They also inform the public about how to comply with applicable law and regulations.

¹ <https://www.gao.gov/assets/670/669688.pdf>

² 5 USC §500 et. seq.

Guidance highlights how laws and regulations apply in real-life scenarios. It provides examples and explanations that help people and businesses make more informed decisions on how to comply with law in real life.

Guidance can come in the form of advisory opinions, bulletins, no-action letters, statements of policy and answers to frequently asked questions. They can apply widely and guide an entire industry. An example of this type of guidance would be bulletins published by the Office of the Comptroller of Currency. Guidance can also be narrow and specific to a single set of circumstances and apply only to the requesting person. An example of this would be private letter rulings from the Internal Revenue Service.

The GUIDE Compliance Act encourages the Bureau to publish more of these interpretative examples. Unlike with the Bureau's Bulletin on Indirect Auto Lending, guidance developed under the GUIDE Compliance Act is designed to interpret requirements of a regulation that was adopted as part of a formal Administrative Procedures Act (APA) process.

Guidance Provides Businesses and Regulators with Valuable Information to Make Better Decisions

It is in providing businesses with more information to use when making decisions that guidance proves its value. Clear, reliable guidance and examples are important for two reasons. First, clear reliable guidance makes it easier for businesses to comply with regulations. As opposed to regulations that tend to be written in more universal language, the best guidance provides businesses with clear examples of acceptable practices that provide parallels to the decisions businesses make every day. This type of guidance gives businesses a solid basis for

making decisions and investments that they know will not harm consumers and not lead to potential enforcement actions and fines.

Second, guidance improves the effectiveness of regulators' supervision and enforcement processes. It provides examiners with more reference points for judging business practices for compliance purposes. For an agency like the Bureau, this can be invaluable because of the myriad industries and business products its examiners oversee.

Guidance also provides common language for businesses and examiners to discuss their compliance practices and how they make decisions. Effective supervision programs often focus on the way businesses make decisions and the types of information they rely upon along with the potential outcomes of those decisions. Guidance provides a stronger basis for those conversations among businesses, consumers and regulators than just regulation alone. The result would be a supervision program with lower examination costs and shorter examination timeframes (allowing examiners to visit more companies), ideally leading to fewer enforcement actions and improved consumer protections.

The GUIDE Compliance Act

The purpose of the bipartisan GUIDE Compliance Act is to streamline and improve the Bureau's process for supporting implementation and compliance efforts for new and existing regulations. The legislation requires the Bureau to:

1. Issue guidance that is necessary or appropriate to carry out the purpose of the law it is responsible for, including facilitating compliance;

2. Publish in the Federal Register within one year of enactment the definitions, criteria, timelines and process for issuing each type of guidance the Bureau shall provide, with a final rule required within 18 months of enactment;
3. Allow industry to rely on guidance in good faith;
4. Establish a process and timeframes for requests for guidance, including time limits to provide answers in response to requests for guidance;
5. Create a process for amending or revoking guidance, including a process for public notice and comment;
6. Develop guidelines for determining the size of any civil money penalties.

This simple five-page bill will help improve the way the Bureau works with the title and settlement industries.

The Title and Settlement Industry' Experience with CFPB

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 it is part of the business of insurance.

Second, our members act as third-party settlement agents in real estate and mortgage transactions. This service is within the Bureau's authority and is the subject of the Real Estate Settlement Procedures Act (RESPA).

While the Bureau does not directly supervise ALTA members, it is important to remember that supervision and regulatory drafting are two sides of the same coin. This is

particularly apparent given the complexity of the Bureau's TILA-RESPA Integrated Disclosure (TRID) or Know Before You Owe (KBYO) rule.

The Bureau Provided Some Guidance on TRID But More Would Have Made Implementation Easier

At 1,888 pages, the Bureau's final TRID rule included a lot of detail and discrete instructions for completing the new consumer mortgage disclosures. Along with the regulatory text, the Bureau produced more than 100 official staff interpretations. These staff interpretations provided helpful guidance about how to correctly complete the new disclosures in different transactions scenarios.

The problem was that despite that forethought while drafting the regulation, there were still hundreds of questions that arose only after the industry began to develop systems to implement the regulation.

The Bureau provided our industry with 21 months to develop processes and technology to implement TRID. This was extremely helpful because of the time it took to update software needed to produce new mortgage documents. Unfortunately, during this 21 months the Bureau missed opportunities to provide meaningful guidance that would have made implementation much easier.

Prior to TRID's effective date, the Bureau hosted five webinars to review and respond to frequently asked questions. The webinars were intended to provide information to help businesses make compliance decisions. However, the webinars didn't achieve their objective because of the way they were designed.

Each webinar began with Bureau staff reading a disclaimer that said, “This presentation does not represent legal interpretation, guidance, or advice of the Bureau. While efforts have been made to ensure accuracy, this presentation is not a substitute for the rule. Only the rule and its Official Interpretations can provide complete and definitive information regarding requirements. This document does not bind the Bureau and does not create any rights, benefits, or defenses, substantive or procedural, that are enforceable by any party in any manner.” This disclaimer made it impossible for industry to rely on the information provided in the webinars. They essentially said, “Trust us, but don’t rely on us.”

While webinars are a helpful way of disseminating information to a large group at one time, the Bureau refused to provide written public answers to the questions they addressed during the webinars. This decision is difficult to understand because Bureau staff produced written answers that they read during the webinars.

Our customers rely on title professionals to lead and serve as the authority in real estate transactions. During implementation and every day since, our members get questions from real estate agents, mortgage lenders and attorneys about compliance with the TRID disclosures.

The failure to provide answers in writing made the webinars extremely difficult for the industry to use. Title professionals had to find a way around these limitations. Publicly available written guidance is ideal because it makes it easy for title professionals to copy and paste their source of information when answering customer questions. It also allows them to provide others with a citation to the guidance.

Instead of providing a simple answer, title professionals had to send links to the recording of the webinar. They then provided instructions for the listener to fast forward to

specific time frames in the recording to hear the answer. This method was time consuming but it also intruded more opportunity for mistakes as people needed to get both the time stamps and transcript of the recording correct before discussing a topic.

Guidance is most effective when it is in written format and published on an agency's website. This is a central requirement of the GUIDE Compliance Act.

Another area where more guidance would have been helpful in TRID is with sample completed disclosure forms for different transactions. Over the course of the 20-plus months of implementation, the Bureau wound up producing 11 sample completed disclosures. These included samples of a Loan Estimate and Closing Disclosure for a simple fixed-rate purchase and refinance mortgage loan, along with samples showing closing costs increasing in excess of the good-faith requirement, the issuance of a simultaneous second mortgage loan and disclosure of funds paid outside of the closing.

These 11 samples were hugely helpful for the title and mortgage industries. They especially helped the software vendors, who used the samples to test their systems through the upgrade process. Mock-ups also are valuable training tools for understanding compliance, especially given the various permutations of real estate transactions across the country.

The problem was not the quality of the samples, but rather the volume. Prior to the final rule being implemented and during the implementation period, ALTA and the lending trade associations asked for model forms showing both simple transactions (like those produced by the Bureau) and more complex ones involving construction loans, loans with specific fee limits and requirements like Federal Housing Administration and Veterans Administration loans, and

loans on properties that required unique fees, such as homeowners association transfer fees and flood zone determination fees.

The Bureau declined to provide these mock-ups. The rationale conveyed to us was that the Bureau wanted to be flexible and not limit the industry by suggesting there was only one way to complete the disclosures. The problem with this flexibility is that the lack of examples only made it harder to make decisions. The GUIDE Compliance Act would require the Bureau to have a standard process for assessing these requests and timelines for responding to them.

The Best Example of How the Market Reacts When Guidance is Not Available is the Bureau Bulletin on Third-Party Service Providers

ALTA members are indirectly supervised by the Bureau's oversight of both depository and nonbank mortgage lenders. Our industry acutely feels this indirect supervision due to CFPB Bulletin 2012-03, Service Providers.³

The bulletin simply 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. It restated longstanding guidance from other federal regulators. However, given the lack of examples in the bulletin, it shook the title insurance industry and our lender customers.

Unlike similar guidance from prudential regulators, the Bureau's bulletin provided little direction to banks and nonbanks. The Bulletin was two and a half pages long, compared with the 16 pages of guidance from the Office of the Comptroller of the Currency (OCC) and 14-page

³ Bureau of Consumer Financial Protection, *CFPB Bulletin 2012-03, Service Providers; April 13, 2012.*
https://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf

document from the Federal Reserve Board. Examples of more useful guidance on this topic include the OCC in 2001, the Federal Deposit Insurance Corporation (FDIC) in 2006, as well as subsequent guidance from the OCC and Federal Reserve Board in 2013, and the Mortgage Servicing Settlement and accompanying consent judgments in 2012.

This lack of guidance provides businesses with many unanswered questions about how to demonstrate compliance. Because of the bulletin, some lenders require small title companies only doing a handful of closings with them a year to follow the same processes as a large company doing thousands of closings. This uncertainty pushed some small businesses to exit the market, reducing consumer choice.

Another area of uncertainty was on oversight of consumer versus lender-selected providers. Commonly, the consumer—and not the lender—selects their title and settlement company (with the advice of a real estate agent, attorney or other trusted party). Given the lack of guidance, most lenders treated vendors they selected and vendors selected by the consumer the same. To manage the risk, some lenders chose to severely limit consumers' options. This is the wrong outcome and created a conflict in states where the law limits a lender's right to restrict consumer choice.

The title industry stepped up and attempted to deliver clarity to its customers by creating the Title Insurance and Settlement Company Best Practices in 2012. This standard compliance management system for title companies provides lenders with a framework for understanding how the title companies they work with do the right thing, the right way—before, during and after the transaction. Today, lenders use this tool to manage and mitigate the risks inherent within the vast national network of more than 20,000 settlement companies.

Many lenders have adopted the Best Practices as part of their compliance management program. However, due to lack of guidance, lenders are unsure whether the Best Practices keep them in compliance with regulatory requirements. A public statement in support of the ALTA Best Practices from the Bureau would provide much desired clarity and guidance to supervised entities.

After more than four years of discussions with Bureau staff, they made a few minor clarifications in October 2016⁴. The guidance clarified that a lender's risk-management program for service providers may be scalable depending on several factors. This has been helpful, but more is still needed, especially regarding the collision between consumer choice and vendor management.

A more valuable guidance bulletin would provide banks and non-banks with examples of vendor-management programs based on different risks. It should highlight ways to review a potential vendor's operations, while not limiting consumer choice. It should note that the vendor management program should be tailored to the specific consumer risks posed by each type of vendor. Additionally, the Bureau could call out companies with good vendor management programs in its supervisory highlights publication. These are all options that the Bureau would be required to consider if Congress passed the GUIDE Compliance Act.

Advisory Opinions

Guidance that is applicable to the entire industry is helpful. However, Congress should also consider establishing an advisory opinion program at the Bureau. Advisory opinions allow

⁴ Bureau of Consumer Financial Protection, *Compliance Bulletin and Policy Guidance; 2016-02, Service Providers*; 81 FR 74410; October 26, 2016.

the Bureau to provide specific guidance to individual companies about individual products or process. While only that company can rely on the opinion, they provide more clarity and certainty for companies looking to launch new products.

The use of advisory opinions is widely used by other federal agencies including the Internal Revenue Service and Securities and Exchange Commission. They analyze how the applicable laws apply to a specific set of facts or a proposed design, operation or maintenance of a consumer financial product or service. Publishing redacted versions can help other companies make better decisions. This proposal was included as Section 721 of the Financial Choice Act sponsored by Chairman Hensarling and passed by this committee last year.

Financial Product Safety Commission Act of 2018

Lastly, we believe the committee should consider legislation to change the leadership structure of the Bureau from a single director to a five-member bipartisan commission as proposed by H.R. 5266, the Financial Product Safety Commission Act of 2018. We believe the bipartisan bill sponsored by Reps. Dennis A. Ross (R-FL), Kyrsten Sinema (D-AZ), Ann Wagner (R-MO) and David Scott (D-GA) would make the Bureau a more open, transparent and accessible regulator. Experience demonstrates that a commission lends itself to better collaboration between regulator and industry. We can see good examples of this collaboration at other financial regulators, such as the Federal Deposit Insurance Corporation, the Federal Reserve Board and the National Credit Union Administration. This ultimately benefits consumers and business.

Last year, ALTA commissioned a poll with the Consumer Bankers Association and Independent Community Bankers of America. The poll found that 58 percent of registered

voters in key battleground states believe entities run by a commission are more transparent and accountable. Commissions help ensure that minority viewpoints have a strong voice during the regulatory process. They also help ensure that an agency's leadership better reflects the industry and consumers it serves.

TRID Improvement Act

We applaud this committee and the House for passing H.R. 5078, the bipartisan TRID Improvement Act. The TRID Improvement Act fixes one of the most confusing requirements of the Bureau's mortgage disclosure rule. It is a simple one-page bill that allows title insurance and settlement companies to accurately disclose available discounts for title insurance on the Bureau's required disclosure forms. This ensures that those disclosures match the rates for title insurance filed with state insurance regulators.

This problem spawned much confusion for consumers, over 40 percent of American homebuyers feel taken advantage of or are confused by the Bureau's rule. It also causes significant confusion for industry about how to compliantly account for this discrepancy in prices. Despite these questions about how to ensure consumers understand the costs of their transaction, the Bureau did not address the topic through reliable guidance. We urge the Senate to follow the House's lead on this important bill.

Conclusion

Thank you for offering this opportunity to provide input. Our experience with the Bureau gives us a unique view on how it can improve its processes.

Compliance is about more than protecting consumers. It protects a company's reputation, financial well-being and employee morale.

As an industry predominantly made up of small- and medium-sized businesses, we need a regulator that helps remove the gray. We need a regulator that matches simple and clear regulations with helpful and illustrative guidance and examples. A regulator that makes it easier for us to protect our reputation, bottom line and ultimately our consumers.

I think everyone would agree that the more reliable information you have available, the better decision you are likely to make. The GUIDE Compliance Act is narrowly tailored to do just that. It requires a process to provide more information and examples so businesses can make better decisions and comply with the law. This helps not only businesses like ones that ALTA represents, but also the consumers our members strive to protect every day. The GUIDE Compliance Act also makes providing reliable guidance a part of the Bureau's DNA, ensuring that industry will have the information it needs regardless of changes in administration.

The best step this committee and Congress can take to improve transparency and accountability at the Bureau is to pass the GUIDE Compliance Act.

I appreciate the opportunity to discuss the need for a formal guidance mechanism at the Bureau. ALTA is eager to serve as a resource to this subcommittee, and I am happy to answer any questions.