The Koogler Group
Education Matters

July 4, 2015

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

Dear Ms. Jackson,

This letter is submitted on behalf of small and midsize Title (Settlement) Agents throughout the country – not simply as Commentary on the Bureau's proposal to change the effective date of the Integrated Mortgage Disclosures Rule from August 1, 2015 to October 3, 2015, but to make one last *"Hail Mary"* attempt to get the Bureau to understand the severe impact the TRID Rule will have on Consumers and Title (Settlement) Agents once the Rule goes into effect.

If nothing else is achieved by this submission, it is hoped that the Bureau will better understand the aforementioned impact of the Final Rule and will grant a further extension of the Effective Date to January 1, 2016. As the leading author of title insurance prelicensing and compliance textbooks – the *Integrative TILA-RESPA Final Rule Study Manual* being the 31st industry textbook written during the past 30 years as an industry compliance educator – I have spent tens of thousands of hours in the classroom with Title (Settlement) Agents throughout the country. Since January 2015, I personally delivered Federal compliance courses including the *Integrative TILA-RESPA Final Rule Implementation Program* to thousands of title (settlement) agents, attorneys, and loan originators. The TILA-RESPA Program is available online at www.KooglerGroup.com.

After 2 ½ years of Industry attempts to make the Bureau aware of the aforementioned impact of the Final Rule – including multiple attempts made by the American Land Title Association [ALTA] – I chose to go a different route. On March 2, 2015, I released a 14-page letter to all State Governors, State Insurance Commissioners, and State Attorneys General. Those three groups were specifically chosen for the following reasons:

- The National Governors Association [NGA] had previously submitted letters to the Secretary of the Treasury regarding concerns related to creation of the Federal Insurance Office [FIO] under the Dodd-Frank Act. In their letter they cited that *"federal laws and regulations must not preempt or undermine the strong state-based insurance regulatory system… which has, for more than 140 years, protected consumers and safeguarded the capital adequacy and solvency of insurers."*

- Insurance Commissioners were put on notice regarding *Treatment of Title Insurance under the Final Rule* and *Treatment of Settlement Agents under the Final Rule* – specifically the Rule-required parenthetical description of "(optional)" for Owner's title insurance and the Rule-required disclosure of title insurance premium for Loan and Owner's policies on Loan Estimates and Closing Disclosures in amounts other than actual rates filed, published, or promulgated [and regulated] at the State level.

- Attorneys General were alerted to the possibility of an increase in Unfair or Deceptive Acts or Practices [UDAP] against Title Insurers and Title Agents regarding what some Consumers [Borrowers] might conclude to be a "bait and switch" tactic – e.g., full loan policy premium disclosed being significantly higher than actual [filed/published/promulgated] simultaneous-issue rates quoted by Title Insurers/Agents.

In response to the letter, on March 24th, I received a request from the Chair of the NAIC Title Insurance Task Force, Bruce R. Ramge (NE), to present to the Task Force regarding the intent of the letter and start the discussion with State Regulators and interested parties at NAIC's Spring National Meeting the following Sunday. Director Ramge was kind enough to turn over his five minutes of the meeting to me and I did my best in that short time period to highlight points of concern. Because the true impact of the Final Rule – preceded by CFPB Bulletin 2012-03 – cannot be understood in a five-minute presentation, one-hour meeting, or 14-page letter, I offered to donate one set of the *Federal Compliance Trilogy* which includes the *Integrative TILA-RESPA Final Rule Study Manual*, *Federal Compliance Risk Management Manual*, and *Multi-State Study Manual for Closing Agents* to each State Regulator, to aid in better understanding the title (settlement) industry as a whole. *It should be noted that I made the same offer to the CFPB on multiple occasions, but received no reply or expressed interest in learning more about our industry.*

The 14-Page Letter to State Governors, Insurance Commissioners, and Attorneys General may be downloaded at www.KooglerGroup.com and is incorporated herein by reference.

It should be noted that The Koogler Group is independently owned and operated. This is an important distinction, as many national companies, groups, and associations often have profit and/or political motives well hidden behind public Commentary. *My company does not have a dog in this fight.* For the past 40 years, my main focus has been one of Consumer advocacy. Applied to the real estate, mortgage, and title insurance industries, this segued into being an advocate for small and midsize businesses.

> *It is my personal and professional belief that Consumers [Buyer/Borrowers and Sellers] are always best served by unfettered choice in their selection of settlement services providers; and that such selection must be based on industries competing on a level playing field.*

Unfortunately for Consumers, the combination one-two punch of the Final Rule and CFPB Bulletin 2012-03 has essentially upended the playing field. Already we are seeing a slow but steady exodus of small and midsize title agencies, law firms, and settlement/escrow companies that can no longer afford to compete with direct operations offices of national title insurers and large multi-state title agencies.

> *Paralleling the exodus of independent title (settlement) agents from the title insurance industry was the 2008-2009 mass exodus of independent mortgage brokers following implementation of the S.A.F.E. Mortgage Act. Today, based on Commentary under CFPB-2015-0029 regarding combined appraiser and AMC fees being highly deceptive for Consumers, we may also be witnessing the mass exodus of independent appraisers.*

Regardless of the industry, once small and midsize *independent* settlement services providers are driven out of business by the economic burden placed on their shoulders by onerous, albeit well-intentioned, Federal regulations, unfettered Consumer choice becomes little more than smoke and mirrors. Applied to the mortgage lending and title insurance industries, Big Government overseeing Big Banks engaged via ownership, affiliation, or "preferred-partner" arrangements with Big Title is perhaps the greatest *unintended consequence* of an otherwise well-intentioned Final Rule. While "Big" will benefit greatly, *Consumers* will pay hundreds if not thousands of dollars more for less service, less information, and less protection.

Expansion on Issues of Industry Concern

Rather than repeat sections of the March 2015 letter to State Governors, Insurance Commissioners, and Attorneys General, I ask that the Bureau and other interested parties download and read the letter [www.KooglerGroup.com] which is incorporated herein by reference. Here, I would like to expand upon issues introduced in the letter. *These are issues that arose during the past several months, in presenting compliance programs including the Integrative TILA-RESPA Final Rule Implementation Program to thousands of title (settlement) agents, attorneys, and loan originators throughout the country and are representative of the hundreds of submitted questions we have received from Program attendees.*

To ensure that the two main issues do not get lost in the shuffle – *e.g., if the Bureau chooses not to download and read the aforementioned letter* – please consider removing the parenthetical description of "(optional)" from Owner's title coverage and reconsider your stance on disclosing Loan and Owner's title insurance premium in amounts other than actual filed/published/promulgated rates. The industry has provided sufficient information to support its request on these two issues.

As to the latter, I wish to address the reason for choosing to use the term "rate manipulation" in the letter. While the CFPB believes that as long as combined premium [OP and LP] disclosed on the Loan Estimate and Closing Disclosure total the same amount as state-regulated [filed/published/promulgated] premium – *e.g., actual premium of $1,000 OP plus $100 SI-LP equals the same amount as $300 OP plus $800 LP disclosed on the Loan Estimate and Closing Disclosure* – the manner in which title premium is *disclosed* does not matter.

While it may not matter to a Consumer [Borrower] who pays *both* premiums [$1,100] it makes a great difference on transactions where the Seller pays the OP premium and the Buyer [Borrower] pays the LP premium. State-regulated title premium is filed, published or promulgated in rate classifications and, as such, rates in the various classifications are what should be quoted, charged, and collected. To quote, charge, or collect anything other than each rate as classified – other than where State law permits rate negotiation or rebating – a Consumer [Borrower] could reasonably conclude that such rates were *manipulated* as part of a *bait-and-switch* scheme. Further, it is a very real possibility that Title Insurers and Title Agents may then be exposed to Consumer UDAP allegations, especially where the Title Insurer/Agent – based on the terms of a purchase/sale contract which shows the Seller paying for OP and the Buyer paying for LP – has quoted to the Buyer/Borrower a SI-LP rate of $100 and the Consumer [Borrower], under the Final Rule, receives both a Loan Estimate *and* a Closing Disclosure showing a LP rate of $800.

Final Rule Falls Short on Simplicity and Transparency

It further matters from the standpoint that the Final Rule was supposed to *simplify* the transaction by making [actual] costs *transparent* to Consumers [Borrowers]. *Continuing with the example of problems arising from OP-LP premium disclosure on a Purchase/Sale/Finance transaction where the Seller pays OP premium and the Buyer/Borrower pays LP premium* – Title Insurers/Agents must walk a fine line in an effort to comply with Federal law regarding *disclosure* of title premium and State law governing filed/published/promulgated title premium based on appropriate rate classification.

At minimum, Title (Settlement) Agents must reach out *early* to Sellers and Buyer/Borrowers, to inform them that what they will, respectively, be *charged* [at consummation/closing] for OP and LP title premium in amounts other than those *disclosed* on the Loan Estimate [Consumer/Borrower] and the Closing Disclosure [Buyer/Borrower and Seller]. For their own protection, we encourage Title (Settlement) Agents to put everything to everyone in writing. While this has always been a principle we have taught in prelicensing and regulatory compliance courses, we are strongly emphasizing the importance of creating a *documented paper trail* regarding quoting, charging, and collecting title premium where the Final Rule requires that it be *disclosed* in amounts that differ from *actual* [filed/published/promulgated] rates.

For example, on a Purchase/Sale/Finance transaction where the Lender discloses title insurance premium that differs from actual [filed/published/promulgated] premium rates, the Title (Settlement) Agent should, at the earliest opportunity, provide *written comparison* of costs as disclosed versus actual cost of such policy or policies to *both* parties [Seller and Buyer/Borrower]. Such cost comparison should, at minimum, address the following:

1. Actual OP and SI-LP rates versus Loan Estimate and Closing Disclosure disclosed rates.
2. Any additional charges for "enhanced" [expanded coverage] policies.
3. Any additional charges for [Owner] requested or [Lender] required policy endorsements.
4. A statement as to "who-pays-what" based on Buyer/Seller negotiated Purchase/Sale contract terms. ***
5. Explanation as to *why* actual rates are *not* disclosed on Rule-required Disclosures.
6. Explanation that a third document – e.g., a *"Settlement (Escrow) Statement"* – will be provided at closing, to ensure that all escrow deposits and disbursements are made in compliance with the Purchase/Sale Contract, Loan Closing Instructions, and [for title insurance premium] actual [filed/published/promulgated] rates.

*** *It seems appropriate [and necessary], at this juncture, to address the major misconception that real estate, mortgage lending, and/or title insurance professionals can, "by industry custom" unilaterally establish "who-pays-what" for OP and LP title insurance premium and/or other costs. "Industry custom" arises when uninformed or under-informed Consumers – Sellers and Buyer/Borrowers – sit back and passively allow industry professionals to suggest or tell them what to do. This is seemingly "inapposite" to the purpose of the TRID Rule, which is to empower Consumers. Each Purchase/Sale transaction is "unique like a snowflake" and, for the most part – setting aside loan-type [VA/FHA] requirements or prohibitions – "who-pays-what" is a matter generally negotiable by Sellers and Buyers, despite the "fine print" of the real estate contract. A swipe of the pen or attachment of an addendum is all that is required for Sellers and Buyers to assert control over their respective wallets. Yet, for the sake of transaction expediency – and, too often, for the sake of corporate or personal profit – many industry professionals do not inform Consumers of their "inalienable right" to negotiate, shop, compare, question, and even challenge settlement services providers in order to make informed choices in their own best interests. Hopefully, the fact that this Commentary was filed on July 4, 2015 – Independence Day – is not lost on those reading it.*

State Insurance Regulators may wish to make this type of written cost comparison mandatory via State rulemaking process. In so doing, they should consider whether it is sufficient to require simple *provision* of a written statement addressing the aforementioned issues prior to or at time of closing, or whether such statement should include some form of Buyer/Borrower, Seller, and Settlement Agent *certification* for purposes of State insurance fraud prevention – e.g., *"Any person who knowingly and with intent to injure, defraud, or deceive any insurer files a statement of claim or an application containing any false, incomplete, or misleading information is guilty of a felony of the third degree."* [More on this subject hereinbelow]

When asked by title insurers, title (settlement) agents, and attorneys what type of *wording* should be used in preliminary out-reach letters to Sellers and Buyer/Borrowers, mandated written cost comparisons, and/or final *"Settlement (Escrow) Statements*" – I struggle to arrive at language to *simplify* that which has been unnecessarily complicated by the Final Rule and make *transparent* that which has been made opaque, without opening a proverbial can of worms that could lead to Consumer complaints or unwarranted UDAP allegations.

In addition, as made clear to attendees of the *Integrative TILA-RESPA Final Rule Implementation Program*, in no way should Title Insurers/Agents create documentation that might make it appear to Consumers [Borrowers] that Creditors [Lenders] have taken it upon themselves to disclose title premium in a manner at odds with actual premium. *Creditors are so consumed with other compliance-related issues that many, if not most, do not have disclosure of title insurance premium on their radar screens. Moreover, since Creditors do not require Owner's title insurance, it is unlikely that they will see it as a problem that warrants a solution, when addressed by Title Insurers/Agents. Similarly, from a Title Insurer perspective, as long as they collect the correct amount of total premium, it does not seem to matter who pays the bulk of same – Seller or Buyer/Borrower – which is why many seem willing to entertain making the OP policy "simultaneous" to issuance of the LP, and reversing premium resulting in increased charges to Buyer/Borrowers. This seems at odds with the concept of "Consumer Financial Protection" under the Final Rule.*

Other than addressing the issue of Seller-paid OP as part of a recent CFPB webinar [*for which it should be commended*] – the Bureau remains generally uninformed as to what would actually be required, in many if not most States, for Title Insurers/Agents to remain in full compliance with State-regulated [filed/published/promulgated] rates and, at the same time, provide a *seamless settlement experience* both Sellers and Buyer/Borrowers. *It is to the latter point, that we continue this discussion.*

Sample [Florida] Title Insurance Premium Agent Certification Form

The following form is provided solely as a *sample*. Florida happens to be one of only three States in which title premium is *promulgated* – however this should not be construed as synonymous with the regulation of title insurance *business*. Most States in which title premium is filed, published, or promulgated – including *"file and use"* and *"use and file"* States – once rates are filed, published, or promulgated, Title Insurers/Agents are expected to quote, charge, and collect premium according to specified rate classifications. Only a minority of States permit rate negotiation or rebating of title insurance premium. Therefore, the Bureau or others who may read this Commentary should not assume that the sample form, *in same or similar language*, cannot be used in other [non-promulgated rate] States. *With modifications, it can and possibly should be used – voluntarily by Title Insurers and Title Agents or as mandated by State Regulators via State rulemaking process.*

Agency File # _____ Closing Date: _____

Federal law requires the costs of the policies to be calculated using the full premium for the lender policy. [Florida] law recognizes the owner's policy as being primary because it protects the interests of [Florida] consumers. [Florida] law allows the premium for the lender's policy to be calculated using a lower rate when purchased along with an owner's policy.

If both an owner's policy and a lender policy are being purchased, the title insurance premiums on this form might be different than the premiums on the Closing Disclosure. The owner's policy premium listed on the Closing Disclosure will probably be lower than on this form, and the lender policy premium will probably be higher.

The chart below lists the amounts disclosed by the lender and the premium for the policies being purchased. These amounts include the charges for any and all endorsements added to the base policy:

	Disclosure Amount		Florida Premium	
	Buyer	Seller	Buyer	Seller
Lender's policy				
Owner's policy				
Total				

The total for the policies as disclosed on the form should be equal to the total premium calculated using the [Florida] Insurance Code. The [Florida] Premium amounts listed above will be used to disburse the funds being held in escrow to (Insurer) and its agents.

The undersigned hereby certify that they have carefully reviewed the Closing Disclosure or other settlement statement form and they approve and agree to the payment of all fees, costs, expenses and disbursement as reflected on the Closing Disclosure or other settlement statement form to be paid on their behalf. We further certify that we have received a copy of the Closing Disclosure or other settlement statement.

[Seller and Buyer/Borrower Printed Names, Signatures, and Date Signed]

Settlement Agent Certification

The total for the policies as disclosed on the form should be equal to the total premium calculated using the [Florida] Insurance Code. The [Florida] Premium amounts listed above will be used to disburse the funds being held in escrow to (Insurer) and its agents.

The undersigned hereby certify that they have carefully reviewed the Closing Disclosure or other settlement statement form and they approve and agree to the payment of all fees, costs, expenses and disbursement as reflected on the Closing Disclosure or other settlement statement form to be paid on their behalf. We further certify that we have received a copy of the Closing Disclosure or other settlement statement.

[Settlement Agent/Attorney Printed Name, Signature, and Date Signed; Settlement Agent/Attorney [Florida] License/Bar Number; and Name of Title Agency holding funds, including Agency License Number]

Any person who knowingly and with intent to injure, defraud, or deceive any insurer files a statement of claim or an application containing any false, incomplete, or misleading information is guilty of a felony of the third degree. [Section 817.234, F.S.]

■ END INSERT

ALTA Settlement Statement

Coming to the forefront with another industry solution regarding properly administering settlement/escrow on Purchase/Sale/Finance transactions, the American Land Title Association [ALTA] has developed standardized ALTA Settlement Statements *"for title insurance and settlement companies to use to itemize all the fees and charges that both the homebuyer and seller must pay during the settlement process of a housing transaction. Settlement statements are currently used in the marketplace in conjunction with the federal HUD-1. The ALTA Settlement Statement is not meant to replace the Consumer Financial Protection Bureau's Closing Disclosure, which goes into effect on [October 3, 2015]. Four versions of the ALTA Settlement Statement are available."* [http://www.alta.org/cfpb/documents.cfm]

Each sample ALTA Settlement Statement contains an *acknowledgment* to be signed by Sellers, Buyers, and Escrow Officers:

> *"We/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction and further certify that I have received a copy of the ALTA Settlement Statement. We/I authorize _____title company name to cause the funds to be disbursed in accordance with this statement."*

This leads us to the issue of Signature/Certification – an area of much confusion for real estate, mortgage lending, and title (settlement) agents, most of whom continue to ask *"Where is the Signature/Certification page on the Closing Disclosure?"*

Settlement Agent Concern regarding "Signature-Certification"

The *Integrative TILA-RESPA Final Rule Study Manual* contains a chapter titled *To Sign or Not to Sign: The Real Story behind Signature/Certification and Future Applicability of the False Claims Act*. [Online Course (including Textbook) is available at www.KooglerGroup.com]. This is a chapter first appearing in the *2008 RESPA Final Rule Study Manual*, addressing a topic that continues to confuse many, if not most, industry professionals.

In short, neither RESPA nor the TRID Rule addresses signature/certification, other than addressing the Creditor-optional "Confirm Receipt" area of the Loan Estimate and Closing Disclosure and the acknowledgment that other information, including signatures [where required] may be included on a separate form – e.g., same or similar to that currently required for HUD-1 settlement statements on FHA mortgage loan transactions. *Signature* and/or *Signature/Certification* began as a loan type requirement – e.g., FHA loans and FHA HECM [Reverse Mortgage] loans and, over time, has evolved into yet another "industry custom" for most mortgage loan transactions in most parts of the country.

Once the Final Rule takes effect, the issue of concern for Settlement Agents who are requested or required by Creditors to sign the Signature/ Certification area of the Closing Disclosure *escalates* beyond that of current concern with HUD-1 certification. Using the standard FHA loan certification language as an example, Settlement Agents currently sign the following:

> CERTIFICATION OF SETTLEMENT AGENT IN AN FHA-INSURED LOAN TRANSACTION
> To the best of my knowledge, the [HUD-1 Settlement Statement] *which I have prepared* is a true and accurate account of the funds which were (i) received, or (ii) paid outside closing, and the funds received have been or will be disbursed by the undersigned as part of the settlement of this transaction. I further certify that I (we) have obtained the above certifications which were executed by the borrower(s) and seller(s) as indicated.
>
> _____ _____
> Settlement Agent or Attorney at Law Date
>
> [The certifications contained herein may be obtained from the respective parties at different times or may be obtained on separate addenda]
>
> WARNING: Federal law provides that anyone who knowingly or willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry may be criminally prosecuted and may incur civil administrative liability.

Unless the Creditor is the Settlement Agent [*a possibility set forth in the Final Rule on pages 593 and 1392 regarding Settlement Agent provision of the Seller's Closing Disclosure to the Creditor*] or unless the language required by HUD for FHA transactions is amended to remove the wording *"which I have prepared"* – it appears that the Settlement Agent or Attorney making such certification would be making a false statement, as it is the known intention of larger lenders including Wells Fargo, BOA, Chase, SunTrust, Citi and others, that they, as *Creditors*, will *prepare* and deliver the Closing Disclosure to the Consumer [Borrower].

While it may seem that the language creates an innocuous blip on the settlement screen, when one factors into the equation the Rule-required disclosure of title insurance premium in amounts other than actual [filed/published/promulgated] State-regulated rates, the liability factor for Title (Settlement) Agents escalates. Here, the attempt is to *protect* Consumers while, at the same time, *protecting* Settlement Agents from making false statements. There is *documented history* to support why this is [or should be] an issue of concern. *Please read the 2006 Whistleblower Lawsuit which was unsealed October 2011 [copy available at http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/10/04/National-Politics/Graphics/Second-Amended-Complaint.pdf].*

According to Washington Post report [and allegations set forth in the lawsuit], tens of thousands of VA Interest Rate Reduction Refinance Loans [IRRRL] have gone into default or resulted in foreclosures, resulting in "massive damages" to the U.S. government. The faulty loans will cost taxpayers hundreds of millions of dollars, with such costs rising as more VA loans go into default, according to the suit. The two mortgage brokers who brought the suit said in an interview that they were *instructed by the lenders* not to show *attorney's [closing] fees* on their Loan Estimates, but to add them to the *title examination fee*. During the decade preceding the lawsuit, more than 1.2 million of the refinanced loans were made to veterans and their families, with up to 90 percent potentially affected by the alleged fraud, according to attorneys for the plaintiffs.

Immediately upon the unsealing of the lawsuit, as an industry educator, I began using the case as an example of what *not* to do – e.g., blindly follow lenders' instructions without question. It was unsettling at the number of Title (Settlement) Agents in many parts of the country who reported – and continue to report today [*as recently as last week*] – being [*verbally*] instructed by mortgage lending personnel to leave HUD-1 line items for attorney/settlement fees blank, while adding such fees to line items for title search and/or title examination. *According to Title (Settlement) Agents reporting ongoing violations, they continue to be told by lenders who are charging a 1% flat fee, that attorney/closing fees are "non-allowable" charges [true]. Further, they are instructed to move the charge amount to an "allowable" line, e.g., calling it a title search or title examination fee. What the lenders fail to tell them is the reason the attorney/closing fee is "non-allowable." According to VA Lender Handbook Chapter 8, Section 2 (d) – Lender's One Percent Flat Charge – " the lender must cover any cost of [the noted] items out of its flat fee."*

The result of the VA Loan Fraud is that:

1. The unsuspecting Consumer [Veteran Borrower] is *over-charged* by the amount of the attorney/closing fee;
2. The Creditor [Lender] unlawfully pockets the same amount [furthering its profit-motive]; and
3. The Title (Settlement) Agent [attorney or non-attorney] becomes an *"unwitting goat who trusts others to his or her detriment"* – a term first arising in a 1980's False Claims case against a Mississippi closing attorney.

In the latter case, it is the Title (Settlement) Agent [attorney or non-attorney] who follows *verbal* instructions received from Creditors/Lenders, resulting in the Agent making several *false statements* involving their own fees when *preparing* the HUD-1 settlement statement, and further exacerbating the situation by *certifying* the statements as true and correct. In the lawsuit, they were referred to as *"Lender cohorts."*

The pertinent question at this point, is that if Creditors [Lenders] – *most of whom have already settled the 2006 lawsuit and, as such continue to knowingly and willfully engage in the same unlawful actions* – move forward with *Creditor-prepared Closing Disclosures* for Consumer [Borrowers] what hope do Consumer [Borrowers] have against overcharges by unscrupulous Creditor/Lenders seeking to line their pockets with unlawful profits? And – *tying it all together* – why should Title (Settlement) Agents continue to put themselves at risk by *"certifying"* a Disclosure they did *not* prepare, which they know includes discloses OP and LP title premium in amounts other than actual State-regulated [filed/published/promulgated] rates? *The answer is simple. Agents should not certify statements they know to be false regardless of how "minor" the false statement appears to be.*

Consumer Closing Disclosure vs Seller Closing Disclosure

Another concern addressed by numerous Title (Settlement) Agents relates to Consumer [Borrower] "sensitive" TIL-related information appearing on the 5-Page Closing Disclosure, and to whom it should *not* be provided. The analogy involves whether a Title (Settlement) Agent, today, would distribute copies of the Consumer/Borrower's Final TIL to the Seller and to Real Estate Brokers/Agents. All agree they would *not* do so, primarily because the Final TIL contains sensitive information specific to the Consumer/Borrower's loan transaction and, as such, is nobody's business other than the Creditor/Lender and Consumer/Borrower. Even the Final Rule [Page 1854] states that *"[s]ome State laws may prohibit provision of information about the consumer to the seller and about the seller to the consumer."*

Based on the number of Creditors [Lenders] currently informing Title (Settlement) Agents that they, as Creditors, will prepare and deliver the *Consumer Closing Disclosure* and requiring that Settlement Agents prepare and deliver the *Seller Closing Disclosure* and provide them a copy of same – it is likely that such Creditors are referring to the 2-page Model Seller Disclosure. *Therefore, a point of discussion between Creditors and Title (Settlement) Agents – and a final decision rendered by each Creditor – must be whether a copy of the 5-Page Consumer Closing Disclosure may be provided to anyone other than the Consumer [Borrower]. If the answer is "No" one must question the reasoning, under the Dodd-Frank Act, which led to the creation of an Integrative Closing Disclosure. While it may be fully appropriate for refinance transactions, it appears to potentially "cross the line" in terms of privacy issues if disseminated to those other than Consumers [Borrowers].* Similarly, that the Final Rule permits having two Closing Disclosures in a transaction, begs the question why it was not feasible, at point of the Proposed Rule, to return to the "old" 2-page HUD-1 Settlement Statement and deliver the Final TIL as a separate Disclosure – a procedure that worked successfully since the inception of the Real Estate Settlement Procedures Act. *That, however, is "yesterday's" argument which was laid to rest during TRID Proposed Rulemaking.*

No Two Creditors [Lenders] are Exactly Alike

As we are all aware, there are numerous choice-making moments for Creditors [Lenders] under the TRID Final Rule, among them:

- Who will *prepare* Loan Estimates?
- Who will *deliver* Loan Estimates to Consumer/Borrowers?
- Who will *prepare* Revised Loan Estimates?
- Who will *deliver* Revised Loan Estimates to Consumer/Borrowers?

- Who will *prepare* Consumer Closing Disclosures?
- Who will *deliver* Consumer Closing Disclosures to Consumer/Borrowers?
- Who will *prepare* pre-consummation Revised Consumer Closing Disclosures containing significant [TILA-related] changes?
- Who will *deliver* pre-consummation Revised Consumer Closing Disclosures containing significant [TILA-related] changes to Consumer/Borrowers?
- Who will *prepare* pre-consummation Revised Consumer Closing Disclosures containing RESPA-related changes?
- Who will *deliver* pre-consummation Revised Consumer Closing Disclosures containing RESPA-related changes to Consumer/Borrowers?
- Who will fulfill Consumer/Borrower request for *one-day advance inspection* of Revised Consumer Closing Disclosures containing RESPA-related changes?
- Who will *prepare* post-consummation Revised Consumer Closing Disclosures?
- Who will *deliver* post-consummation Revised Consumer Closing Disclosures to Consumer/Borrowers?
- Who will *prepare* Seller Closing Disclosures?
- Who will *deliver* Seller Closing Disclosures to Sellers?
- Who will *prepare* post-consummation Revised Seller Closing Disclosures?
- Who will *deliver* post-consummation Revised Seller Closing Disclosures to Sellers?
- Who will be the *"hunter/gatherers"* of information that must appear on Consumer Closing Disclosures?
- Who will be the *"hunter/gatherers"* of information that must appear on Seller Closing Disclosures?
- Who will *sign and certify* – where required by loan type [e.g., FHA] – the *accuracy* of the Consumer Closing Disclosure?
- Who will be responsible for creating any addition *Settlement (Escrow) Statement* that may be necessary to accurately collect and disburse funds?

The Final Rule assigns responsibility/liability for preparation and delivery of Loan Estimates and Consumer Closing Disclosures to Creditors which in turn makes them the primary "Choice-Makers" regarding most of the questions shown hereinabove. There is already evidence that Creditors take such responsibility/liability seriously – by virtue of larger Creditors choosing to prepare and deliver the Consumer Closing Disclosure directly to the Consumer [Borrower]. However, little has been addressed by these same Creditors in relation to all potential types of revisions which might occur. As one can see, there are many *nuanced questions* left to be answered.

The reason for pointing out the obvious is to address one simple fact that has seemingly fallen below the CFPB's radar screen – *or perhaps not, since the Bureau remains almost solely focused on the Creditor, the Consumer, and the Credit Transaction.* While each individual Creditor [Lender] must decide what to do at each junction point, and subsequently implement internal procedures to support such decision-making once – Title (Settlement) Agents who do business with five, ten, or more Creditors [Lenders] must conform to *multiple* variations upon a theme. As no two Creditors [Lenders] will "choose" exactly alike at each junction point, Title (Settlement) Agents are forced to adopt *multiple* procedures and keep track of them, Creditor-by-Creditor. Not only does this make implementation economically burdensome, it is simply *mind-numbing*.

Closing Comments

In closing, the issues raised in this Commentary [especially those cited immediately above] – in concert with the impact of CFPB Bulletin 2012-03 regarding Creditor oversight of Third Party Services Providers – have created an economic burden that is crippling many if not most small and midsize Title (Settlement) Agents. It has been gut-wrenching to witness the moment when owners, managers, and employees of small and midsize title agencies, law firms, and settlement/escrow companies first realize that the "cost of compliance" is something they cannot afford. To many, it seems as if the 2012-03 Bulletin and the TRID Final Rule were designed to put small and midsize businesses out of business. I remember the first Conference of State Bank Supervisors [CSBS] at which CFPB spokespersons addressed the Bulletin and the TRID Proposed Rule. In response to questions regarding Creditor oversight of Service Providers, the first spokesperson made the off-hand comment that "It's just easier for us [the Bureau] to oversee one group." This was followed later in the day when I approached the second CFPB spokesperson with my concern regarding Title (Settlement) Agents being lumped together under the broad term "Service Providers" and suggested that this might be an unintended consequence of an otherwise well-intentioned Rule, to which he replied, "There are no unintended consequences." Both of those statements continue to haunt me, especially when, in workshops leading up to publication of the TRID Proposed Rule, the Bureau, itself, noted that the Rule might cause some Creditors [Lenders] to take the settlement process in-house, via Creditor-owned, Creditor-affiliated, or Creditor-preferred-partner providers. As both a Consumer and a Consumer advocate, I can think of nothing worse for Consumer protection than Big Government overseeing Big Banks who own, affiliate, or partner with Big Title.

Thank you for the opportunity to, once again give voice to the concerns of thousands of small and midsize Title (Settlement) Agents. While I do not realistically expect this final *Hail Mary* attempt to make a difference in the Bureau's decision-making, I can at least rest easy knowing I tried.

Respectfully submitted,

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