ALTA List of Concerns – Proposed RESPA Rule

I. CLOSING SCRIPT

A. **Rule Provides No Instruction** - The proposed rule provides no instruction as to what the closing agent is to do when there is a discrepancy in settlement charges, loan terms, or the lender exceeds applicable tolerances. For instance, the rule does not state whether a closing agent is supposed to stop the closing when the lender exceeds the tolerances by $20 overage. HUD's proposed rule puts the closing agent on the spot to resolve issues created by the lender, which, without instructions from the lender, cannot be resolved.

B. **Unauthorized Practice of Law** - By placing a title agent in the role of explaining loan terms and settlement charges, a consumer is likely to view the title agent as an expert who can advise the consumer as to the particulars of the transaction or answer any questions. However, many states require licensed attorneys to answer specific borrower questions and explain the details of a real estate transaction. If HUD requires a title or settlement agent to be responsible for reviewing loan documents and explaining the loan terms to a borrower at closing, the agent may commit the unauthorized practice of law under many state laws.

C. **Increased Time and Fees** - Although HUD's purpose for the rule is to simplify the process and reduce costs for consumers, the completion of the closing script will lengthen the time for closing and increase closing fees. HUD estimates that it will take an additional 45 minutes to close a loan with the closing script; however, this is an underestimation. HUD does not appear to anticipate the questions borrowers will ask the title or settlement agent. Once the questions arise, the settlement agent may be unable to answer them and will have to call the lender for explanations. This could substantially increase the time required to close a transaction, which will decrease the number of closings a title or settlement agent can complete in a day. This, in turn, will increase a title or settlement agent's closing fees.

1. **State Law Cap on Fees** - Yet, in many states, the closing fee is part of an all-inclusive rate (i.e., Pennsylvania) or is otherwise capped. Even if it costs more for a title agent to conduct a closing, the title agent cannot pass through these increased costs to the consumer or recapture this lost income.

D. **No Instructions for Tolerance Calculations** – The rule subjects certain settlement charges to different tolerances depending on whether the borrower uses a lender-recommended settlement service provider or shops independently for a provider. In completing the comparison chart portion of the closing script, the rule does not identify how a settlement

agent is supposed to know which service providers are borrower selected and not subject to tolerance calculations. This is a reason the lender should be responsible for preparing a final statement of settlement charges.

E. **Face-to-Face Closings** - The proposed rule assumes that all residential real estate closings are conducted face-to-face, which would allow a closing script to be read aloud to the borrower and acknowledged in writing by the consumer at the closing table. However, not all closings are conducted in this manner (i.e., escrow closings, internet closings, or closings by mail), which makes this requirement impractical, and the rule provides no alternatives.

F. **Conflicts with State Law** - The proposed rule requires that the "settlement agent" prepare the script. The rule, however, fails to appreciate that closings in many states use a different format without a single settlement agent (i.e., table closings in New York and dual settlement agent areas, such as Utah).

G. **Multi-Language** - HUD's proposed rule is silent with regard to the language of the closing script, although the examples provided in the rule show the closing script in English. Borrowers, however, often speak languages other than English, and the rule does not address this multi-language issue. If a closing agent must read aloud a script in a face-to-face closing and obtain the borrower's written acknowledgment that the closing agent explained the loan terms, this may be an impossible task if the borrower does not speak and understand English.

H. **Time Frame to Prepare Script** - As the closing script must be prepared and read aloud to the borrower at closing, the rule fails to appreciate the time frame for closing. The rule would require a closing agent to prepare both the HUD-1 and closing script and provide it to the borrower 24 hours prior to closing. Yet, title and settlement agents often receive the closing package shortly before closing. The rule does not address what happens and who bears the liability if the lender does not provide the closing package in sufficient time to allow the closing agent to prepare the documents and provide them 24 hours prior to closing.

I. **Additional Liability for Closing Agent** - By requiring title and settlement agents to prepare the closing script, the rule forces additional liability on title and settlement agents for possible mistakes in its preparation. Title and settlement agents, therefore, will have to obtain Errors & Omissions insurance coverage to protect them. Lenders should be responsible for preparing the script, as they are already responsible for the loan's terms and settlement charges (or at least that portion that relates directly to the lender's charges).

J. **Possible Loan Modification** - If a title or settlement agent is required to review the loan documents, interpret them, and enumerate the loan terms in the closing script, it is possible that a closing agent could misstate the loan as, for instance, an adjustable-rate mortgage when it is a fixed-rate loan. This could have the effect of modifying the loan, which is another reason title and settlement agents should not be explaining loan terms.

K. **Rule Does Not Envision Use of Notaries** - Title and settlement agents often subcontract closing functions to notaries, but the rule does not instruct whether the responsibility to read the closing script to the borrower may also be delegated to a notary. If a notary is not allowed to perform this function in connection with a closing script, this will have an adverse effect on closing agents' ability to provide convenient and timely closings for their customers.

L. **Lender Should Be Responsible for Explaining Loan Terms** – The rule does not obligate lenders to provide accurate loan information and settlement charges to the closing agent to use in the preparation of the closing script. The closing agent must rely on the lender for this information. Rather than require the closing agent to obtain information from the lender, the responsibility for explaining loan terms and lender-controlled settlement charges is best placed with the lender.

1. If a borrower must rely on the closing agent to verify loan terms at the closing table, at this point it is too late to make changes to the loan (without a delay in closing) when the borrower does not understand the terms or believes he or she was getting a different loan. The closing agent also cannot answer these borrower questions about the loan without getting answers from the lender. As noted above, the process of waiting for answers from the lender could significantly increase the time it takes to close a loan.

II. RECORDING FEES

A. **Recording Fees on GFE Are Not Allowed to Change** - The proposed rule subjects government recording fees to a zero tolerance. This is impractical because recording fees are not known until closing (i.e., when a closing agent receives the loan documents from the lender). The change in the number of pages to the mortgage documents (i.e., the addition of another signature page) or the recording of a lien release discovered during a title search will change the amount of recording fees. This is something that neither a lender nor a closing agent can predict at the time a lender provides a borrower with a GFE.

B. **Average Cost Pricing Should Apply to Recording Fees** - As written, the rule appears to allow only lenders to use the average cost pricing. However, because of the uncertainty of recording fees prior to closing, an

average cost could benefit both the consumer, who, in some cases, pays more than actual recording fees, and the title or settlement agent, who is at risk for claims of overcharges under RESPA. The rule should allow title and settlement providers to use average cost pricing.

C. **Rule Does Not Instruct How to Disclose Recording Fees** – The rule states that a lender must estimate the sum of all state and local government fees, charges, and taxes, but does not instruct whether the lender must disclose only the borrower's portion of these fees. In many cases, the seller is responsible for certain recording fees, and the rule does not address whether the "sum" must also include the seller's recording fees. If the seller's recording fees are included, this would inflate the amount of settlement charges for which the borrower would actually pay.

III. GOOD FAITH ESTIMATE

A. **Legal Authority** - The RESPA statute allows for a range of fees to be disclosed on the GFE and does not impose penalties if the estimate is not consistent with final settlement charges; however, the proposed rule does not allow for the disclosure of a range. One must question whether HUD has the statutory authority to require exact fees to be disclosed.

1. The rule also refers to ALTA's prior comments regarding a lack of statutory authority to impose tolerances. The reasons given by HUD in the preamble to the rule for overcoming these prior comments are not persuasive.

B. **Format of Disclosure Does Not Provide Clarity** - If HUD is going to impose tolerances on certain categories of settlement charges, these charges should be grouped and listed on page 2 of the GFE according to their categories. The form also needs more space under the categories of fees to allow for the listing of all applicable fees.

1. This will aid a consumer's comparison of the GFE to final closing documents.

C. **Certain Items Should be Removed From the GFE** - Page 3 of the new GFE includes a place for estimates of property taxes, homeowners insurance, and other items, and states that a consumer should not refer to these items in comparing the cost of loans.

1. If these items do not help a consumer shop for a mortgage, they should not be included at all, which could shorten the length of the form and lessen a consumer's information overload.

2. If, however, HUD believes it is important for the consumer to be told that these items are an ongoing responsibility during the life of the

loan, we would recommend that the GFE include a mere statement that these kinds of costs will be incurred by the borrower separately on an annual basis.

D. **The GFE Does Not Envision that a Seller Will Pay Certain Costs** – The rule assumes that a borrower will be responsible for paying all settlement charges reflected on the GFE. HUD fails to recognize that a seller often pays for a portion of settlement charges, including title insurance. In those cases, the rule provides no guidance as to how the tolerances apply when certain closing costs are being paid by the seller.

E. **Title Fees Should Be Itemized** – (This comment also relates to the HUD-1). The rule requires that a single fee be disclosed for "primary title services."

1. But, more than one provider often performs these services. Without knowing the separate fee these multiple providers charge for their services, the consumer is unable to effectively shop around for title services. HUD, therefore, should leave the disclosure of title fees as is – that is, the lender should continue to separately disclose them.

2. The borrower and the seller also each pay for certain of these title fees. The rule does not provide instruction as to how to disclose title-related fees when the borrower may not actually pay for them.

3. Other services, such as escrow and attorneys, would be disclosed separately according to the rule. But, the closing fee is to be wrapped up in the single fee for primary title services. The rule provides no guidance in how to disclose the closing fee when the closing is conducted by a separate attorney.

4. The GFE already requires separate disclosures for the price of a lender's title insurance policy and an optional owner's insurance policy. The rule, however, fails to appreciate that the price for title insurance could be vastly different depending on whether only a lender's policy is purchased or both lender's and owner's policies are purchased. The rule provides no instructions as to whether the price for title insurance should be disclosed with the assumption that a consumer may choose not to purchase the "optional" owners policy or on the assumption that both policies will be issued simultaneously.

IV. HUD-1 SETTLEMENT STATEMENT

A. **Disclosure of Agent/Underwriter Premium Split** - The proposed HUD-1 includes two disclosures that HUD does not propose for the GFE. In lines 1113 and 1114 of the new HUD-1, a title agent/closing agent would be

required to disclose the title agent's portion and title underwriter's portion of the total title premium.

1. In the Appendix to the rule, the Department expressly states that it removed the premium breakout from the GFE, as title agents argued that itemizing the premium split is costly and serves no useful purpose. If this is the case, then the disclosure serves no useful purpose on the HUD-1 and should be removed.

2. No other insurance agents (i.e., homeowners, auto, and life insurance) are required to disclose the percentages of insurance premium they receive as compensation. (Nor do other settlement service providers, such as real estate brokers and agents.) Accordingly, title insurers similarly should not be required to disclose premium splits.

3. We also have to question whether HUD has the authority to require the disclosure of such a split.

B. **"Optional" Should Be Removed** - The proposed HUD-1 and GFE require a separate itemization for "Optional owner's title insurance" for which the borrower pays.

1. By including the term "optional" in the disclosure, this appears to be a suggestion on HUD's part that a consumer does not need title insurance, which may discourage consumers from obtaining owner's coverage.

2. In many states, owner's coverage is required for residential real estate transactions and is paid for by the seller. By labeling it "optional," this directly conflicts with state law.

3. The cost for title insurance can be lower if both a lender's policy and an owner's policy are purchased concurrently.

4. The owner's policy also can be the more expensive policy as compared to the lender's policy. However, this disclosure makes the lender's policy seem as though it is the primary policy, and the owner's policy is a mere add-on if the consumer elects to purchase it.

5. While it may be acceptable to separately itemize the cost for owner's title insurance on both the GFE and HUD-1, the word "optional" is misleading and should be dropped from the form.

C. **There is No Clear Comparison to the GFE** - The proposed changes to the HUD-1 do not allow for a clear comparison to the GFE. For instance, HUD does not impose a tolerance on each individual charge, but the

HUD-1 refers the borrower back to each individual fee on the GFE for a comparison. Several itemized fees on the HUD-1 also refer the consumer back to the same line of the GFE (i.e., appraisal fee, credit report fee, tax service fee, and flood certification fee).

D. **Mark-Up of Third-Party Fees** - The rule proposes to include new language governing the HUD-1: "The amount stated on the HUD-1 or HUD-1A for any itemized service cannot exceed the amount actually received by the third party for that itemized service, unless the charge is based on an average cost price in accordance with paragraph (b)(2) of this section."

1. **Contrary to Current HUD Position** - If read literally, this language seems to suggest that the mark-up of third-party fees would be prohibited under the new rule. This is in contrast to HUD's current position on mark-ups, which allows the mark-up of a third-party fee as long as additional services are performed to justify the mark-up and the amount of the mark-up is reasonable for those services. If HUD is changing its position on mark-ups with this language, it needs to more directly address the issue.

2. **Responsibility of Provider Assessing Fee** - This language also seems to suggest that the closing agent preparing the HUD-1 is responsible for ensuring that no mark-ups are charged. But, HUD fails to address how a closing agent is supposed to know whether the lender or a title company (if not the same entity as the closing agent) has marked-up a third party fee or is using an average cost for the purpose of disclosures reflected on the HUD-1. Only the party assessing the fee should be responsible for any mark-ups.

V. NEGOTIATED (VOLUME) DISCOUNTS

A. **Effect on Small Businesses** - Small title agents will be disadvantaged as compared to large title insurance companies, who have the resources to discount their own services. Even if small companies could offer some discount, small title companies are not able to offer the same substantial discounts that a large company can offer consumers to attract business. As a result, small businesses will be unable to compete with the prices offered by large companies, which effectively decreases a consumer's options when shopping for title services.

B. **Lender Packages of Providers at Discount Will Discourage Shopping** – This issue is related to the tolerances imposed on lender settlement charges. There is concern that large, nationwide mortgage lenders, when faced with the tolerances, will stifle competition by creating teams (or packages) of providers that can offer discounted prices to the lenders' borrowers.

1. If a small title insurance agency cannot compete with a large provider's prices, small agencies would be shut out of these teams.

2. If large lenders create teams of affiliate providers, even the large title providers may find it difficult to compete with an affiliate's discounted prices.

C. **Conflict With State Law** – Certain state laws prohibit the discount of title rates and other related costs or require the title company to file any deviations they plan to make to their filed rates. Title companies are placed at a disadvantage in these circumstances when they cannot offer volume discounts to their customers.

VI. PENALTIES

A. **Penalties for Disclosure Violations Should Apply Only to Lenders** - Although the proposed rule does not contain penalties for violations of Section 4 and Section 5, HUD states its intent to seek authority from Congress to assess civil money penalties and injunctive relief.

1. If HUD receives Congressional authority to impose penalties, these penalties should not be imposed on the title or settlement agent for preparation of documents containing loan terms and settlement charges that are the responsibility of the lender. If the lender provides incorrect information to the closing agent for inclusion in the closing script, the closing agent should not be held responsible for the mistakes of the lender.

VII. REQUIRED USE

A. **Restrictions on Affiliated Business Arrangements** - HUD's rule proposes to modify the definition of "required use" to include both economic incentives and disincentives that are contingent on a borrower's use or failure to use a particular provider of settlement services. If, however, a settlement service provider offers an optional combination of services at a lower price, these discounted services would not constitute required use.

1. The "required use" definition is written to refer to the offering of an incentive by a "settlement service provider." As an argument can be made under current RESPA regulations that a home builder is not a settlement service provider, it appears that HUD intended to preclude home builders from offering bona fide discounts. If title insurance companies own joint venture title companies with builders, this could negatively impact the builder's ability to recommend the use of the builder's joint venture title agency by offering customer incentives.

2. The rule also calls into question whether settlement service providers may continue to offer discounts on their own services, as the rule seems to suggest that a provider may only discount a combination of services offered by its affiliate companies. In other words, rather than allowing a builder to discount the price of its home if the consumer elects title insurance from the joint venture, the builder would have to offer to discount the joint venture's title services.

   a. As mentioned above, certain state laws prohibit the discount of title rates and other related costs or require the title company to file any deviations they plan to make to their filed rates. Even if a builder wanted to offer a discount on its joint venture title agency's services, state law may prohibit it. This places joint venture title companies and their owners at a competitive disadvantage.

VIII. ALTERNATIVES

A. **Lender Responsibility** - The responsibility for verifying loan terms and lender-controlled settlement charges should be put back on the lenders, with the closing agent only responsible for reading aloud the documents or disclosures the lender prepares and provides as part of the closing package.

1. **Eliminate Closing Script** - HUD should scrap the idea of the closing script and require the mortgage lender to prepare and provide the closing agent with an affidavit that certifies to the loan's terms at closing. Upon receiving this certification with the closing package, the closing agent could read the affidavit aloud to the borrower while using language such as "the lender has certified that your loan has an interest rate of X."

   a. If the closing is not conducted face-to-face with the borrower, HUD should allow this certification only to be provided in writing and sent electronically or through the mail.

2. **Re-Sign the GFE** - HUD should require the lender to re-sign a new GFE, certify to the accuracy of the settlement charges on the new GFE, and provide the new GFE at closing (much like lenders currently do for final TIL disclosures). The borrower then could take the initial copy of the GFE and compare it to the final fees reflected on the GFE provided at closing. The closing agent could aid the borrower in comparing these forms.

   a. **Lender Determines Tolerances** - By providing a second GFE, the lender would be responsible for determining

whether it was exceeding applicable tolerances. If any tolerances are exceeded, HUD should allow the lenders a 14-day period after closing to refund any overages in settlement fees.

B. **Modify the GFE and HUD-1** – Rather than work within the constraints of the documents proposed by HUD, we could recommend that HUD modify page 2 of the GFE and HUD-1 to match exactly.

1. Page 1 of the GFE also would be modified to include the loan terms that would otherwise be included in closing script.

2. The same form would be provided initially as a GFE, then again at closing by the lender in final form. At the GFE stage, page 2 would only show settlement fees in the GFE column. At the HUD-1 stage, page 2 would reproduce the GFE fees and show the final fees in a side-by-side column.

C. **Other Alternatives??**