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# TitleNews

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American Land Title Association

# Transfer Fees May Create Road to Unmarketable Title

**Profit-sharing tool often hidden in CC&Rs causing headache for industry**

**Special Inside:** Four-page **Federal Conference Brochure**, pages 17 - 20

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| *May 2-4* | Business Strategies Conference *St. Louis, MO* |
| *October 13-16* | 2010 Annual Convention *San Diego, CA* |

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| | |
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# TitleNews

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# from the editor's desk

Well, my friends, I hope 2010 brought you a renewed optimism in the mortgage market and overall health of the economy. As we forge into the New Year, there are many indications that we are on the path to recovery. While a weaker than expected December jobless rate tapered confidence, a strong fourth quarter followed economic growth in the third quarter. Interest rates have slowly increased, but are still hovering slightly above 5 percent and the housing sector seems to have stabilized.

Total new and existing home sales have risen 43 percent through November from their January low. Home prices also have leveled off, according to many indexes.

Despite the good news, two distinct risks remain: the end of the government's mortgage-backed securities (MBS) and GSE debt purchase programs and the expiration of the homebuyer tax credits. ALTA supported the extension and expansion of the homebuyer tax credit Congress approved last year, and it should sustain the market through the winter months. It has helped bring more buyers into the market and shrink inventories for moderately priced homes.

U.S. Department of the Treasury MBS purchases were completed by year-end and Federal Reserve (Fed) purchases of MBS and Freddie Mac and Fannie Mae debt are scheduled to terminate by the end of the first quarter 2010 – both potentially pose the risk of a rise in mortgage rates relative to benchmark yields. With respect to Fed purchase activity, the Fed plans a gradual diminishing of its MBS and debt purchases to allow time for new investors to enter the MBS market in the place of Fed purchases.

I haven't even discussed the new RESPA rules that went into effect Jan. 1. I hope it hasn't been the complete train wreck many anticipated. In light of the problems, ALTA has invited HUD officials to attend the 2010 Federal Conference, being held Feb. 28-March 3. During this session, attendees will be able to talk directly to HUD staff and get their responses to issues surrounding the new GFE/HUD-1 forms. Nowhere else, will you get candid commentary from the RESPA rule crafters.

Also on hand will be David Stevens, assistant secretary of housing and FHA commissioner, who will offer the inside scoop on the mortgage market and the role the FHA will play in continuing the economic recovery. Attendees also will have the opportunity to meet with Congressional leaders about the importance of the industry and to share how federal decisions impact the future of your business.

Take a look at pages 17-20 of this edition to see the conference schedule. In the meantime, we'd like to hear what bumps in the road you are enduring with the new forms. ALTA will continue to work closely with HUD to work through issues and we will need membership feedback.

We hope to see you at one of our upcoming meetings.

Jeremy Yohe
Editor, TitleNews

## ALTA PAC Passes $250K Goal

The American Land Title Association's Political Action Committee (TIPAC) achieved its 2009 goal of raising more than $250,000 in contributions.

The PAC raised about $251,000 last year. That comes on the heels of raising $200,000 in 2008. The PAC hopes to raise another $250,000 this year, which would give it more than a half million in contributions over an election cycle. John Voso, chairman of PAC, and ALTA Past-President Mike Pryor were driving forces in making the PAC a priority.

"This is an awesome accomplishment and in spite of a poor economy, our industry has begun to understand the importance of a strong PAC and trade association," Voso said. "Many thanks go out to everyone who contributed, the Board of Governors, the TIPAC committee, past presidents, the ALTA staff and all our members. This was a team effort and we all have done a part in exceeding our goals. I can only think about how excited Mike Willey would have been with this milestone."

## FHA 1 Percent Origination Fee Cap Removed

The 1 percent origination fee cap on FHA-insured loans originated under FHA's standard mortgage insurance programs has been removed, according to Mortgagee Letter 2009-53 released Dec. 30 by the U.S. Department of Housing and Urban Development (HUD).

This letter clarifies how fees and charges for FHA-insured loans must be disclosed on the new Good Faith Estimate and HUD-1 Settlement Statement.

There is no specific origination fee cap that replaces the 1 percent origination fee for most forward FHA loans. Both Home Equity Conversion Mortgage (HECM) and Section 203(k) Rehabilitation Mortgage Insurance programs retain their statutory origination fee caps.

## Future of Financial Regulatory Reform in Limbo with Dodd Decision

Sen. Christopher Dodd's decision to not seek re-election in November has left the fate of the financial regulatory reform and the proposed Consumer Financial Protection Agency up in the air.

Dodd, chairman of the Senate Banking Committee, is in negotiations to reshape the financial reform bill he introduced in November into bipartisan legislation with Sen. Richard Shelby, R-Ala., the committee's top Republican member. Dodd is expected to remain in charge of the committee while it hashes out the bank reform legislation, which is expected to be completed by July, at the latest.

Shelby has had issues with Dodd's proposal to create the CFPA. The revised legislation was on track to be released in late January or early February.

In December, the House passed its version of the Wall Street Reform and Consumer Protection Act, which excluded title insurance from the CFPA definition of "financial activities." This ensures that title insurers will not be subject to the new regulatory regimes intended to be applied to bank and non-bank financial institutions under the bill. Title insurance providers will continue to be subject to existing federal consumer laws.

"Most notable from the perspective of the title insurance industry was what wasn't included in HR 4173," said Kurt Pfotenhauer, chief executive officer of the American Land Title Association. "We were able to carve the title industry out of the most onerous federal regulation under the proposed CFPA, and we were once again able to defeat the mortgage cramdown proposal in a floor vote. ALTA will continue to work with the Senate to craft legislation that won't conflict with existing state regulation and cause more confusion in the market place."

## ALTA Releases RESPA-Compliant Uniform Instructions to Aid Transition to New Mortgage Documents

The American Land Title Association has created a uniform set of instructions to help facilitate the handling of new settlement documents that became mandatory Jan. 1, 2010 due to changes to the Real Estate Settlement Procedures Act (RESPA).

The Uniform Supplemental HUD-1/1A Instructions designed by ALTA will facilitate lender and settlement agent compliance with the new RESPA regulations. Among other things, these regulations require the settlement agent to obtain new information from the lender in order to create an accurate, compliant HUD-1/1A.

"Adopting a standardized format for transmitting the information from the loan originator to the settlement agent that is necessary for the completion of the HUD-1 will benefit all of the participants in the settlement process by improving the efficiencies and accuracy of the finished product," said Dan Wold, chairman of ALTA's RESPA Implementation Taskforce. "Uniformity will benefit the loan originator, settlement agent and consumer by reducing the incidence of errors, thereby eliminating problems at and after the settlement as well as speeding up the settlement process."

By including this information in a standardized format, ALTA's Uniform Supplemental HUD-1/1A Instructions greatly reduce the burden on lenders and settlement agents related to preparation and approval of final HUD-1/1A documents.

Lenders and settlement agents who seek a more efficient and compliant closing and funding process will adopt this form.

"This uniform document will add to the transparency and efficiency of the new forms," said Mark Winter, president of ALTA. "It's obviously not mandatory, so lenders are free to use all of it, part of it or none of it; however, with all of them trying to figure out how to adopt the new HUD-1, its timing could not be more advantageous."

## ALTA Supports Pro-Consumer Mortgage Bill

The American Land Title Association announced its support for a bipartisan bill introduced in December in the House of Representatives by U.S. Reps. Melissa Bean (D-IL) and Shelley Moore Capito (R-WV) that would bring greater transparency to the mortgage lending process by allowing borrowers more time to review their closing documents.

The Borrowers' Right to Inspect Closing Documents Act of 2009 would require borrowers receive their closing documents at least three business days before their scheduled closing.

"U.S. Reps. Melissa Bean and Shelley Moore Capito have listened to consumers who want more time to review their closing documents so that circumstances don't pressure them into agreeing to a bad loan or excessive closing costs" said Kurt Pfotenhauer, ALTA's chief executive officer. "ALTA strongly supports the representatives' efforts and the passage of this bill."

Currently, under the Real Estate Settlement Procedures Act (RESPA), consumers have the right to request and review a draft HUD-1 Settlement Statement 24 hours before closing. Unfortunately, many borrowers are not aware of this option, nor is there a corresponding requirement that this preliminary HUD-1 Settlement Statement be complete.

The proposed bill would require the lender to provide the completed promissory note, deed of trust or other mortgage instrument, all items needed to complete the uniform settlement statement and the final closing instructions at least four business days before the scheduled date of settlement to the settlement agent. This would allow the settlement agent to make the documents available to the borrower three days prior to closing.

"The Borrowers' Right to Inspect Closing Documents Act will strengthen RESPA by helping consumers help themselves," Pfotenhauer said. "The proposal amends RESPA to give borrowers the time they need to review their final closing documents before they get to the closing table."

# TITLE 101

## A Day in the Life of a Title

Two years ago, Anne Anastasi asked the Pennsylvania Insurance Department if it would allow the Pennsylvania Land Title Association to conduct a seminar for department staff. To her surprise, the department scheduled a date and two hours of their time to listen to the program.

BY JEREMY YOHE

Soon after conducting the Title 101 seminar, Anastasi gave the department a Title 201 seminar by taking officials to the local courthouse and conducting a 60-year search.

"They were all troopers going up and down stairs and ladders while running their fingers down dusty books," she said. "The local county courthouse has some technology but the officials realized that technology will never replace an examiner's brain while he or she reads and passes risk decisions over every document in the chain of title."

Anastasi said she has used a simplified version of "A Day in the Life of a Title" when she addressed local service organizations such as Rotary and Kiwanis groups. The Title 101 seminar is more detailed, however.

ALTA soon adopted the initiative and began offering the training across the country to explain to anyone who will listen the steps and procedures taken by the title industry to avoid claims. The industry's claims percentages are constantly compared to property and casualty companies. Because the title industry's paid claims percentages are typically in single digits, the industry is accused of charging excessive rates.

"Our belief has always been that once it is understood that we spend a great deal of time and money discovering, negotiating and curing items that if unattended, would turn into claims in the future, they begin to understand that our claims percentages do not tell the whole story," Anastasi said. "The cost of curing our claims prior to the issuance of our policies is the same as the cost of claims handled by P&C companies after the issuance of their policies."

So far, the Title 101 training has been offered in six states, including Pennsylvania, Oklahoma, Nebraska, Indiana, Virginia and Minnesota. Many other state associations are in the process of scheduling the seminar, which has also been given to the National Association of Insurance Commissioners. HUD also has expressed interest in the program.

Before each seminar, land title associations gather together a group of potential presenters. The trainer will spend about three hours with the gathered group going over the outlines that have been used in the past and will then help them tailor the outline to best fit their state's need. Presenters are assigned to each segment and some time is spent describing successful moments from previous presentations.

"The goal is to describe each step in the title-avoidance process from the search through the closing and the issuance of the policy," Anastasi said. "Each segment is accompanied by a claim story that fits that particular segment."

Reaction to the seminars has been overwhelmingly supportive. One regulator said it was nice now to have a face for those who do things right in our industry, since he only met with those who didn't follow the rules prior to Title 101. Another regulator made a very telling comment, "Now I get it, I think you guys don't charge enough for all of the work you do."

"When they realize that the records in this country would be chaotic without our searching and curing,

## Bring Title 101 to Your State

Legislators and regulators need to hear our story, and its ALTA's goal to have this training offered in every state. Do your part to help educate the decision makers. To schedule a Title 101 training session, contact Justin Ailes, at jailes@alta.org or 202-296-3671.

> "The goal is to describe each step in the title-avoidance process from the search through the closing and the issuance of the policy."

they have a whole new perspective and appreciation for our fine industry," Anastasi said.

Richard Welshons, president of the Minnesota Land Title Association, said following the presentation to the NAIC, his state's head of enforcement at the Minnesota Department of Commerce requested that the MLTA visit his office and give an expanded presentation to his staff. About 25 people from the department attended the scheduled three-hour seminar.

"When it became apparent that we were running long, they requested that we continue rather than cut the presentation short," Welshons said."After we wrapped up, attendees stuck around for one-on-one questions with our presenters. Many simply wanted to thank us for coming to speak with them. We made significant inroads with the department."

Chaney Haynes, president of the Oklahoma Land Title Association, said OLTA had two goals to achieve through the Title 101 training. First, the association wanted to educate the staff at the Oklahoma Insurance Department about title insurance and the steps involved. Second, it wanted to strengthen the relationship with the department.

"There were no particular issues, we just wanted to strengthen our relationship and give them a deeper understanding of the amount of work and effort that goes into producing title insurance products and services that protect the investment consumers make in real estate," he said.

Anne Anastasi presents HomeClosing101 to Capitol Hill staffers.

As a result of the training, OLTA experienced additional benefits. The association learned that a long-time department employee, who had been OLTA's contact person on everything from continuing education to legislative issues, was leaving. As a result of the departure, a new producer licensing manager was appointed. This person, according to Haynes, worked for an abstract company in southern Oklahoma.

"Working with us in her new position, she realized that the licensing exam for title insurance did not adequately cover critical title insurance issues," Haynes said. "With her help, we formed a committee of several people from the OLTA and from the insurance department, and one from the third-party vendor for testing."

Over a two-month period, the committee completely rewrote the department title insurance study manual and the title insurance test. OLTA now has a committee that will continue to work with the department on licensing issues, as well as a group that will help review title insurance continuing education courses.

"Through the process we learned about the department's testing and licensing procedures, and they in turn learned about the valuable work that we do to produce abstracts and title insurance," Haynes said. "As a result, our relationship with the insurance department is now the best it has ever been."

# Transfer Fees May Create Road to Unmarketable Title

The title industry is starting to pay closer attention to transfer fee covenants as lenders may not be willing to loan on properties subject to such agreements and many states have passed legislation prohibiting or limiting them.

A relatively new trend that began in Texas and California a few years back to generate revenue for builders and developers is drawing increased concern from the title insurance industry. At the root of this concern is the possibility of creating unmarketable title and the difficulty in finding these recorded instruments filed deep in the covenants, conditions and restrictions.

Recently, private sellers of land have started to utilize transfer fee covenants as a means of additional future income for such sellers. It is alleged that homebuyers are often not aware of a transfer fee on their property until they appear at closing because the existence of the fee is listed in fine print in the CC&Rs.

by Jeremy Yohe

At first, title companies felt it was safe to ignore these liens on the basis that they were based on faulty law and lacked consideration. However, these transfer fees appear to be supported by reduced purchase prices, and so far, remain valid in most states. As these schemes have gained popularity across the country, title companies need to be more aware of their existence and how they work.

## The Basics

A transfer fee covenant requires the payment of a transfer fee every time the property is transferred to a new owner. The fee can be payable to any person or entity. These fees can be expressed as a fixed amount or 1 to 3 percent of the sales price. Generally, they are set up so there is a collecting agency, such as a trustee, who acts for the developer who places the transfer fee covenant on a subdivision. This is distributed either back to the developer or whatever beneficiaries are named in the document.

Most of the transfer fee programs have a 99-year term and are marketed to developers as an opportunity to develop additional revenue,

Because, statistically, the typical residential property is resold every seven years, the transfer fee collection opportunity is quite attractive. If a seller (not a future owner of the encumbered real estate) is pressured to release the covenant because of a potential lost sale, it is free to do so. However, according to marketing materials, a 1 percent additional fee on the purchase price generally is not enough to cause a purchaser to "back down" or, on the other side of the deal, to cause a future title-holder to sue to release the covenant. As a covenant running with the land, it may create a lien that may be foreclosed.

Parties involved:

*Covenantor:* The original seller and the party that places the declaration of CC&Rs onto the property.

*Licensor's agent:* The original real estate broker, who traditionally represents the covenantor and, in addition, enjoys the future benefit reserved in the covenant.

*Licensor:* The company that came up with this transfer fee technique, which also shares the future benefit.

Typically, where there is a 1 percent transfer fee covenant, for the first 30 years, the interest is split among the covenantor (60 percent), the licensor (30 percent) and the broker (10 percent). For the remaining 69 years of the 99-year life span, only the licensor (90 percent) and the licensor's agent (10 percent) share in the proceeds.

## Founding Player

A major player in the creation of transfer tax covenants is Texas-based Freehold Licensing LLC, although there are many other companies selling these directly to private sellers. Freehold Licensing reports it has an estimated $488 billion in real estate have these covenants attached to the property. According to Freehold, it is the title companies' responsibility to collect the fee and remit it to the covenantor or trust if one has been established.

> According to a company marketing transfer fee covenants, these fees are no different than musicians who figured out a long time ago that when they created something of lasting value, it is fair and reasonable for them to structure their compensation accordingly."

"It is important to keep in mind the purpose of the fee. In order to impose the fee, the property owner must have created something of value," according to Freehold. "The fee is simply a way to structure long-term income in return for long-term benefits that the property owner has created. This is no different than musicians and authors who figured out a long time ago that when they create something of lasting value, it is fair and reasonable for them to structure their compensation accordingly. In other words, this isn't revolutionary in concept – just in its application to the real estate industry. Freehold believes that when a property owner has created something of lasting value, they should structure their compensation accordingly."

In its marketing material, Freehold Licensing offers a lucrative example of the potential income a residential

## States Take Action to Ban Transfer Fee Covenants

### Florida

**HB 391 (Rep. Charles McBurney)**
**SB 464 (Sen. Dave Aronberg)**
**Signed into law on May 28, 2008**
*Creates statute section 689.28 F.S. declaring that:*

- Transfer fees violate public policy and legislative intent for marketable title
- Transfer fees violate the prohibition of unreasonable restraints on alienation by inhibiting the ability to freely transfer real property
- Section defines what constitutes a transfer fee and exceptions
- Transfer fees "entered into" after July 1, 2008 are void

The bill "imposes prohibitions against transfer fee covenants that violate the public policy favoring the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation. A "transfer fee covenant" refers to a declaration or covenant recorded against the title to real property which requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant, or to their successors or assigns, upon a subsequent transfer of an interest in the real property. Transfer fee covenants constitute an unreasonable restraint on alienation, regardless of the duration of such covenants or the amount of such transfer fees, and do not run with the title to the property or bind subsequent owners of the property under common law or equitable principles."

### Missouri

**SB 907**
**Presented to Governor on May 29, 2009**
*Creates statute section 442.582.2 declaring that*:

- Any transfer fee covenant recorded after September 1, 2008 shall not run with the title and will not be enforceable
- Any lien recorded after September 1, 2008 will be void and unenforceable
- Provides definition of a transfer fee and exceptions

### Kansas

**HB 2092 (Rep. Anthony Brown)**
**Signed by Governor March 30, 2009**

- Precludes covenants that impose transfer fees from being enforceable against future owners

### Ohio

**HB 292 (Reps. Letson & Oelslager)**
**Assigned to the House Committee on Civil and Commercial Law**

- Provides that a transfer fee covenant recorded after the effective date of the bill does not run with the title to real property and is not binding on or enforceable against any subsequent owner

### Texas

**Texas Property Code. Chapter 5. Sec. 017**
**Effective January 1, 2008**
*Creates section .017 to the Texas Property code:*

- Precludes covenants that impose transfer fees from being enforceable against future owners
- Defines transfer fee covenants and exceptions
- Allows transfer fees for HOA and charitable organizations as defined in IRS Code 501(c)(3) or a government entity
- Transfer covenants violating this code are void and unenforceable upon enactment

### California

**AB 980**
**California Civil Code sections 1098 and 1098.5**
**Effective January 1, 2009**

- The effect on fees imposed before Jan. 1, 2008. Recipients of fees existing and imposed before January 1, 2008 were required to file detailed information about the fee with the appropriate county recorder, and to do so by Dec. 31, 2008. Recording of the disclosure is a condition to future collections of the fee.
- The effect on fees imposed after Jan. 1, 2008. The person or entity imposing a transfer fee on or after Jan. 1, 2008 is required to file a statement entitled "Payment of Transfer Fee Required" along with the instrument creating the fee, also with the appropriate county recorder. Failure to record invalidates the fee.

developer can make if a developer buys 250 acres, plats it into 1,000 lots and files a covenant with a 2 percent transfer fee. The homebuilder then builds $200,000 homes on each lot. After the subdivision turns over once (meaning each homes sells just one time), the developer would earn an estimated $3.5 million, according to Freehold. The next time the homes are sold, and presumably the homes have increased in value, the developer can earn another $4.5 million.

**Provisions from the Freehold Transfer Fee Instrument include:**

- The closing agent shall have no obligation to investigate or ascertain the location of a Trustee or any other information related to the Transfer Fee Instrument by any means other than by reference to the official public records (OPR);
- If for any reason a trustee cannot be located by reference to the OPR, a closing agent shall administer the transfer fee applying applicable state escheatment rules. Compliance with the foregoing shall satisfy all sums then due under the transfer fee instrument and any lien securing same;
- A closing agent shall be entitled to an estoppel letter from trustee upon tender of payment to trustee of sums due under the Instrument or upon agreement to hold same in trust until tender of payment;
- Where permitted by law a closing agent shall be and hereby is entitled to withhold from each transfer fee collected and retain as a fee the greater of $100 or 2 percent of the Transfer Fee collected;
- When in doubt as to duties or liabilities related to disbursement of funds, a closing agent shall be entitled to deposit said funds with the clerk of any court of competent jurisdiction and shall thereafter have no liability with respect to the deposited sums; and
- A closing agent shall be entitled to rely solely upon information contained in the OPR and is released as to claims resulting from unrecorded information.

## Opening Pandora's Box

The transfer fee does not apply on the sale from the creator of the covenant to the following owner. It is only charged on subsequent transactions, which may not repeat the covenant language on the new deed. This could potentially be missed on a short search or if it's not found buried in the CC&Rs.

The existence of homeowner association fees opened Pandora's Box for the transfer fee covenants. Homeowner associations always had transfer fees to help fund associations, but there's concern about how these transfer fee covenants benefit the property it touches.

Frank Pellegrini, president of Prairie Title Inc. in Illinois, said one of the issues with these transfer fees is identifying the parties that will need to be paid.

"Documents of record may not contain all the information necessary to properly and effectively address the prescriptions of the encumbrance created by these covenants," he added.

Pellegrini said his company's underwriters have instructed the agency to insist and demand a full release and abrogation of the covenant.

This will take more time to complete the search and exam because agents will need to wade through the documents to see if there are transfer fee covenants included.

Cort Ashton, vice president of Cottonwood Title Insurance Agency and president of the Utah Land Title Association, agreed that finding the transfer fees offered by Freehold is problematic because they are disguised as CC&Rs.

"They incur an 18 percent interest if left unpaid after closing," he said.

Another issue, according to Ashton, is that the covenantor can't terminate the transfer fee after the first transfer. All beneficiaries must terminate the fee.

According to a senior underwriter for a national title insurer, there are some procedure issues that could arise in communicating with the collecting agent and getting estoppel information.

In all probability, a copy of the contract will need to be provided and an agent will have to wait for a response from the collecting agency as to what they deem the amount to be paid should be, the underwriter said. An agent will then have to communicate that information back to the seller to see if there are any objections. This will cause delays in closing. Privacy issues surrounding documentation may also create another opportunity for delays in closing. Many lenders are pushing privacy safeguard requirements onto their subcontractors. Title agents may need to get buyers to sign waivers before they can provide copies of purchase agreements to the collecting agent.

Craig Page, executive vice president and counsel for the California Land Title Association, said these fees are a problem in California. He said that in the past, developers have put the fees in the CC&Rs, deeds or other recorded documents as part of settlements reached with environmental groups opposing their developments.

"Developers facing significant environmental opposition have seen these fees as a way to remove opposition from environmental groups who become the recipients of the fees, Page said.

The named environmental group then hopes that the fee is charged to the subsequent buyers in escrow by a settlement service company or paid independently by the new buyer directly to the environmental group listed in the document containing the transfer fee language.

"The politics of this issue has divided traditional allies," Page added. "On one side are environmental groups siding with the developer community to allow these fees. Developers support these fees because they are able to avoid costly litigation and the projects move forward. On the other side of the issue, CLTA and the California Association of Realtors oppose the fees as anti-consumer, unwarranted restrictions on alienation, and essentially transfer fees that dramatically increase the cost of housing."

California is one of the states that passed legislation limiting the use of transfer fees. CLTA and the California Association of Realtors were not able to get a prohibition on the collection of these fees, but the fees now must be prominently flagged on recorded documents so they aren't hidden.

"This was not the prohibition we were seeking, but at least it helps identify these fees in the home buying process rather than being buried in a lengthy CC&R or other document," Page said.

## Tips on Getting Familiar with Transfer Fee Covenants

Title professionals should take the following steps to ensure they are ready to understand transfer fee covenants:

- Familiarize yourself with transfer fee covenants, how they work and the jargon associated with them. Transfer fee covenants are beginning to be the focus of many state legislatures and have cropped up in discussion in academia, the news media and industry blogs.
- Determine what the law is in your jurisdiction regarding transfer fee covenants. They may be regulated at both the state and local level. Some states have enacted strict bans while others are allowing use of these covenants within a certain regulatory framework.
- Familiarize yourself with the requirements of transfer fee covenant creation and how to locate these covenants. Educate yourself so you may educate consumers about their potential obligation and legislators about the unintended consequences of these fees.
- Monitor state and local legislative activity for changes in the transfer fee covenant laws. Tell ALTA about activity occurring in your state.
- Communicate with your underwriter on how you should deal with these covenants, now and in the future.

## ALTA Reviewing Transfer Fee Covenants

Several American Land Title Association committees are actively reviewing transfer fee covenants and will present findings to the association's Board of Governors, which will then issue an official ALTA policy position. We will keep you posed on updates regarding this issue. For more information on transfer fee covenants, contact Justin Ailes at jailes@alta.org or 202-296-3671.

In areas around Lake Tahoe, Calif., where nature reigns supreme, it's not uncommon for a builder to get hit with lawsuits claiming their developments could harm the environment and be forced to pay hefty impact fees imposed by local governments.

If builders weren't allowed to pass along those costs in a transfer fee, they'd have to make up for it by adding thousands of dollars to their homes' initial selling price, shutting out buyers, said Kimberley Dellinger, legislative advocate for the California Building Industry Association in Sacramento. "Why shouldn't the second and third buyers share the costs?" she said.

### Impact on Home Values

From an economic standpoint, transfer fee covenants reduce the future value of a homeowner's property because of the economic burden that such covenants place on future sales.

According to Alan Hummel, chief appraiser for Minnesota-based Forsythe Appraisals, said appraisers will not know if a transfer tax covenant is attached to a property, but he believes they will have an adverse impact on property values.

"Appraisers know about some covenants," he said. "We know that a property must be a certain size, or have a certain roof, but something as intrinsic as this, that's not normally something we would know about. Somewhere along the line, someone will say an appraiser over valued a property because they didn't take into consideration the covenant."

## Unmarketable Title?

Underwriters have received a number of questions concerning transactions in which the Freehold Licensing transfer fee covenant has been placed on a property. According to several underwriters, there are questions about the validity and enforceability of these covenants such as restraint on alienation, a personal right that does not touch and concern the land, covenant against public policy for free transferability of property or an illegal private transfer tax. There is exposure to future claims for the underwriter if payments are not properly made by the trustee to the appropriate parties.

"Accordingly, if a transaction involves property for which a Freehold Licensing covenant is previously recorded or to be recorded as part of the insured transaction, then it will be necessary to either require that the covenant be released prior to insuring, or decline to insure the transaction altogether," several underwriters have said in similar bulletins.

In an article for the American Bar Association, Marjorie Ramseyer Bardwell, vice president and senior staff underwriter for Fidelity National Financial, said the covenantor could be vulnerable to litigation before it has the opportunity to receive any future payments.

"If the covenantor signs a purchase agreement to sell fee simple title, and then attempts to reserve some of that title before closing, the contract has not been performed. Reliance on the standard language excluding CC&Rs of record may not protect the original seller because the transfer fee servitude may not be in the record at the time of the contract. Even if the servitude is recorded before the purchase agreement is signed, reliance on the 'restrictions of record' language without clear disclosure to the buyer may be misplaced if the recording falls within the 'gap,'"

The gap period varies by jurisdiction and often runs more than three weeks. According to Bardwell, a buyer could claim the covenantor did not disclose the attempt to reserve an interest in the property. She wrote that in general, when a buyer purchases fee simple land, he or she is not obligated to share appreciation without clearly consenting to do so. Also, if the transfer fee servitude is included with the closing package, it violates the standard instructions from the lender on what are acceptable exceptions from title, as well as raises the issue of whether it violates the original contract.

Some in the industry believe an exception can be taken for the fee, but this won't help with lenders because contracts require their mortgages to be insured as having priority over such liens.

Some of these seem to indicate the payment of the transfer covenant is a condition precedent to the transfer of title. The industry is concerned about coverages given in the ALTA Short Form Policy and several endorsements and the ALTA Expanded Residential Loan Policy. Some give coverage against existence of these, but concern exists because lenders require these endorsements and those policies, and title agents would have to go back to lenders to modify closing instructions.

"The lending community is becoming increasingly aware of this issue and may not be willing to loan on properties subject to such agreements," Bardwell said. "The conflicts raised by the participation of all of the parties, the timing of recording the agreement after signing the contract to sell 'fee simple title' and then attempting to reserve rights, the vulnerability to future litigation to determine the consequences of these 'rights,' and the effect on the marketability of title need to be understood and explained to the client."

# 2010 FEDERAL CONFERENCE

## SUNDAY, FEBRUARY 28

**9:00 a.m. – 5:00 p.m.**
*Education Committee (with lunch)*

**3:30 p.m. – 5:30 p.m.**
*State Executive Staff Meeting*

**3:30 p.m. – 6:30 p.m.**
*Registration Open*

**5:30 p.m. – 6:30 p.m.**
*Reception for Early Arrivals (includes state leaders)*

## MONDAY, MARCH 1

**7:30 a.m. – 6:30 p.m.**
*Registration Open*

**8:00 a.m. – 10:00 a.m.**
*Government Affairs Committee*
*(with continental breakfast)*

**10:00 a.m. – 12:00 noon**
*Agents Section Meeting*

**10:00 a.m. – 12:00 Noon**
*Underwriters Section Meeting*

**12:00 Noon**
*Lunch*

**12:00 Noon – 1:00 p.m.**
*State Leaders Lunch with Mark Winter*

**12:00 Noon – 1:00 p.m.**
*TIPAC Trustees Lunch with Mark Winter*

**1:00 p.m. – 2:00 p.m.**
*TIPAC Trustees Meeting*

**1:00 p.m. – 4:00 p.m.**
*Agent Specialty Networking*

**1:00 p.m. – 5:00 p.m.**
*Board of Governors Meeting*

**5:30 p.m. - 6:30 p.m.**
*TIPAC Reception (all attendees)*

**Evening**
*Dine Arounds & Board Dinner*

## TUESDAY, MARCH 2

**7:30 a.m. – 6:30 p.m.**
*Registration Open*

**7:30 a.m. - 8:30 a.m.**
*Continental Breakfast*

**9:00 a.m. – 10:00 a.m.**
*White House Briefing*
*Shaun Donovan, Secretary U.S. Department of Housing & Urban Development (invited)*

**10:15 a.m. - 11:45 a.m.**
*NAIC State Regulators Briefing*

**12:00 Noon - 1:45 p.m.**
*Luncheon*
*David Stevens, Assistant Secretary of Housing & FHA Commissioner*

**1:45 p.m. – 2:45 p.m.**
*RESPA Dialogue with HUD Officials*

**3:00 p.m. – 4:15 p.m.**
*ALTA Policy Briefing*

**5:30 p.m. – 7:30 p.m.**
*Congressional Reception*

**8:00 p.m.**
*TIPAC Congressional Dinner (invitation only)*

## WEDNESDAY, MARCH 3

**8:00 a.m. – 9:00 a.m.**
*Capitol Hill Team Planning Breakfast*

**9:30 a.m.**
*Buses Leave for Capitol Hill*

**10:00 a.m. – 4:00 p.m.**
* *Capitol Hill Appointments & Hospitality Room at Capitol Hill Club*

**12 Noon - 2:00 p.m.**
*Lunch at Capitol Hill Club*

* Building on last year's successful meetings, ALTA again will schedule group congressional meetings – organized by state – throughout the day. Please plan to depart after 5 p.m. Wednesday, March 3 to ensure your participation in all of your scheduled meetings.

## FEDERAL CONFERENCE GENERAL SESSIONS AND SPECIAL SPEAKERS

### White House Briefing
*Tuesday March 2, 2010*
*9:00 a.m.–10:00 a.m.*

Shaun Donovan
Secretary of the U.S. Department of Housing and Urban Development *(Invited)*

Attendees will hear Secretary Donovan, who previously served as Commissioner of the New York City Department of Housing Preservation and Development, discuss how the federal government will proceed with what has been called the most extensive reform of the financial services markets since the Great Depression. How will these changes affect the title industry? How will a new Consumer Financial Protection Agency regulate your business? Will the real estate transaction be fundamentally altered? Don't miss this informative session to learn how changes in federal regulation will impact your operation.

### NAIC State Regulators Briefing
*Tuesday March 2, 2010*
*10:15 a.m.-11:45 a.m.*

Insurance regulators from around the nation will discuss their agenda for the coming year and how your business could be affected. Hear the latest on an effort to create a national data collection plan for title agents' expenses. Will title agents be required to report financial data to their insurance regulator? Find out at this timely briefing.

### Luncheon: Reflections, Projections of the Mortgage Market
*Tuesday March 2, 2010*
*12:00 Noon-1:45 p.m.*

David Stevens
Assistant Secretary of Housing and Commissioner of the Federal Housing Authority

Don't miss this insider discussion as Commissioner Stevens will offer his perspective on the mortgage market and the role the FHA will play in continuing the economic recovery. Stevens has extensive experience in the mortgage industry, serving as president and chief operating officer of the Long & Foster Companies, which includes Long & Foster Real Estate and its affiliated businesses, including mortgage, title insurance and home service connections.

### Bumps and Bruises: New RESPA Reform Era Begins
*Tuesday March 2, 2010*
*1:45 p.m.–2:45 p.m.*

Ivy Jackson
Director of the Office of RESPA & Interstate Land Sales
Housing and Urban Development

Laura Turner Gipe
Compliance Specialist
Housing and Urban Development

Barton Shapiro
Deputy Director, RESPA & Interstate Land Sales
Housing and Urban Development

The new RESPA Rule will have been in full effect for two months come the Federal Conference, and attendees will hear HUD's staff discuss how the industry has transitioned during the implementation process. HUD's staff will also discuss any major compliance issues surrounding the new rule and offer advice to help agents better equip their operations. Learn how the rule has changed the way transactions are closed and get your questions answered.

Registration includes general sessions, breakfast, Congressional Reception, Federal Conference Luncheon, White House Briefing, and Congressional Day. Use the registration form to indicate if you plan to attend the optional events.

## PRIMARY REGISTRANT *(PLEASE PRINT OR ATTACH BUSINESS CARD)*

First MI Last Badge Name (Nickname)

Company Title

Address

City State Zip

Phone Fax E-mail

Cell Phone Departure Date/Time

## GUEST / SPOUSE REGISTRANT (NON-ALTA MEMBER / NON-INDUSTRY ONLY)

First Last Badge Name (Nickname) E-mail

## EMERGENCY CONTACT INFORMATION

Name phone number

| | |
|---|---|
| ALTA Member | $549 |
| Member Spouse/Guest | $299 |
| Non-Member | $1,059 |
| Non-Member Spouse/Guest | $499 |

## Optional Events

The Federal Conference Luncheon and Congressional Reception are included in the cost of registration. Registered conference attendees only. Please let us know if you plan to attend and whether the Spouse/Guest Registrant (per above) will attend as well. Extra tickets for the Federal Conference Luncheon and the Congressional Reception are available at the rate of $65 for the Luncheon and $75 for the Reception.

**Federal Conference Luncheon** (Tuesday, March 2) Number Attending: ________

**Congressional Reception** (Tuesday, March 2) Number Attending: ________

**White House Briefing** (Tuesday, March 2) ☐ Yes, I am Attending

**Lobby Day** (Wednesday, March 3) ☐ Yes, I am Attending Home Zip Code ______

** White House Briefing and Lobby Day are available to registrants only.*

*Do you require any special accommodations or have dietary restrictions? Please explain:*

## PAYMENT – *full payment must accompany this form*

Total registration fee(s): $ ________

***Payment Method***

☐ Check (enclosed) ☐ AMEX ☐ MasterCard ☐ VISA

Name of Cardholder Cardholder's Signature

Card Number Expiration Date

Billing Address (if different from above)

***MAIL*** this completed form with payment to:
American Land Title Association,
P.O. Box 17249
Baltimore, MD 21297-1429

***FAX*** this completed form with credit card payment to:
888-FAX-ALTA (329-2582) or
202-223-5843

# Proposed TILA Changes Would Include Title Fees in Finance Charge

A proposal to amend a portion of the Truth in Lending Act to include title fees in the finance charge for residential mortgage transactions could result in severe consequences to the title insurance industry, including the pressure to lower fees, deregulation of rates and the possibility of lenders wading deeper into the title insurance business.

BY JEREMY YOHE

The Federal Reserve Board has issued draft regulations last year on Regulation Z (TILA), which excludes from the finance charge a number of fees charged in transactions secured by real property or in residential mortgage transactions if those fees are bona fide and reasonable. Under the proposal, the following fees currently excluded would be included in the finance charge for closed-end credit transactions secured by real property or a dwelling:

- fees for title examination, abstract of title, title insurance, property survey, and similar purposes;
- fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents;
- notary and credit-report fees;
- property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest-infestation or flood hazard determinations; and
- amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

According to the board, premiums for credit insurance (or fees for debt cancellation or debt suspension agreements) and premiums for lender's coverage under a title insurance policy are finance charges because they are imposed as an incident to the extension of credit. In contrast, premiums for owner's title insurance coverage are not finance charges because they are not imposed as an incident to the extension of credit.

By putting title fees into the finance charge, the Annual Percentage Rate also will be impacted. Because the Truth in Lending Act designed the APR to be a shopping tool for consumers, this proposal would put downward pressure on title fees in much the same manner as the new RESPA rules, according to Kurt Pfotenhauer, chief executive officer of ALTA.

Pfotenhauer said ALTA, which sent a letter to the Fed in December commenting on the changes, will examine the potential liability, including class action suits, from title fees being included in the finance charge.

"In a worst case scenario for the title industry, it would create a marketing incentive for lenders to eliminate title insurance and concomitant fees," he said. "We will need to examine if a lender can sue a title company for recoupment of Truth in Lending damages and we need to ask why state-regulated fees are being included in a federal cost of credit statute."

## Effect of the Proposal

Robert Cook, partner with the law firm Hudson Cook, said the inclusion of title insurance premiums in the finance charge would make more loans subject to the Home Owner's Equity Protection Act (HOEPA), the new federal classification of "higher-priced mortgage loans" and many of the state higher cost or predatory mortgage loan laws. Because of the extreme regulatory risk of making a loan subject to HOEPA, or similar state high-cost or predatory loan laws, most creditors do not make these loans.

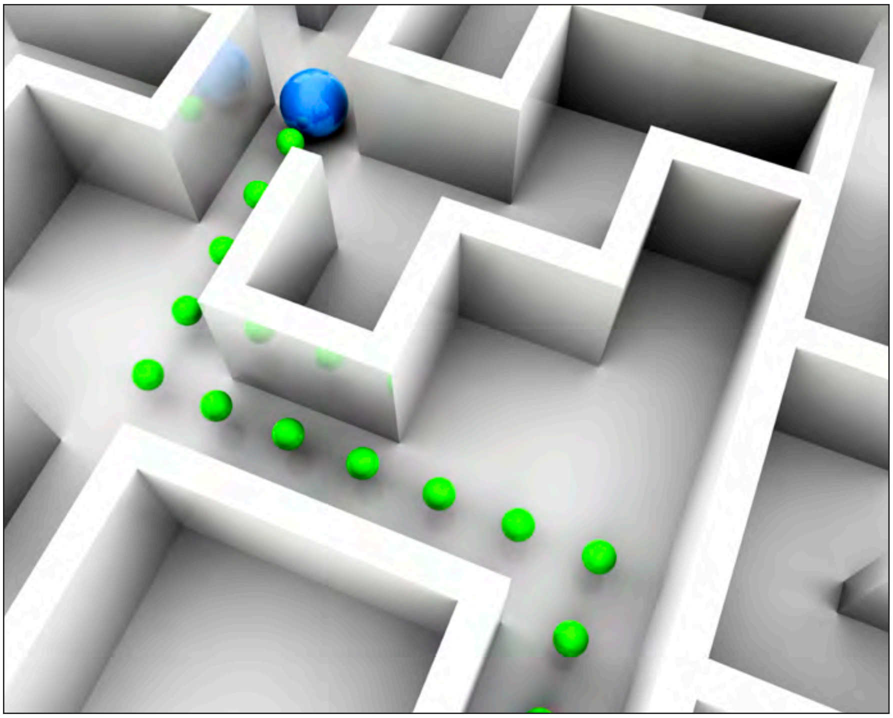
"Thus, either less loans will be made or title insurance companies will be forced to reduce their premiums," Cook said.

He also said including title insurance premiums in the finance charge will not assist borrowers in shopping for credit. For first mortgage loans, title insurance is ubiquitous as it is required by Fannie Mae, Freddie Mac and other investors.

"Including title insurance premiums within the finance charge will not help borrowers differentiate between loan offers, but it will make loans unavailable to the least-served segments of the community," Cook said.

According to Howard Lax, partner with the law firm Lipson, Neilson, Cole, Selzter & Garin, an unintended consequence of this proposed rule is that states will be forced to deregulate title insurance premiums to allow a level playing field for competition between title agencies and title companies.

"The Fed's proposal, if implemented, will enable lenders to issue title insurance at any rate they wish, irrespective of filed rates," Lax said. "Underwriters will permit lenders to issue title insurance policies, or reinsure lender policies, cutting their agents out of the market. Title agents will revolt, leading to legislation that deregulates title insurance premiums so that title agents can compete for title insurance business with lenders."



## Connecting the Dots

Lax said Congress enacted the Depository Institution Deregulatory and Monetary Control Act in 1980 (DIDMCA). A portion of this act deregulated interest rates and finance charges for first lien residential mortgage loans. Regulations promulgated by the Office of Thrift Supervision preempt all limits on interest and other finance charges imposed by state laws and regulations for first lien mortgage loans, even criminal statutes, unless the state legislature passed a law by April 1, 1983 that expressly overrode DIDMCA. Fifteen states and Puerto Rico did override DIDMCA preemption.

Pursuant to DIDMCA, courts use the definition of "finance charges" in TILA and its implementing regulations as the standard for which fees may not be regulated under state law. In the 2005 case *U.S. Bank National Association v. Clark*, the Illinois Supreme Court ruled that the 3 percent limit on lender charges for mortgages with interest rates of more than 8 percent is preempted by DIDMCA.

Lax said state limits on finance charges and interest for first lien mortgage loans in the rest of the states have been largely ignored in the 26 years since implementation of DIDMCA. No state law (other than in states that overrode DIDMCA) can limit fees imposed by a lender.

"Hence, the proposed rule has unintended consequence of permitting lenders to provide all types of services while avoiding any state law limit on the amount of the fee," he said. "For example, state laws that limit document preparation fees or title insurance premiums paid to the lender will be preempted."

DIDMCA does not preempt state limits on fees charged by other settlement service providers, according to Lax. In *Sweeney v. Savings First Mortgage*, the Court of Appeals of Maryland held that mortgage broker fees may be regulated by state law, even though they are finance charges. The court determined that DIDMCA preemption only applies to charges collected by a lender. Hence, state limits on title insurance premiums will apply to policies sold by title agents, but lenders will be free to charge as much or as little as they want for title insurance.

Federal laws and regulations permit federally chartered banks to offer title insurance. Some states, including Michigan, Lax said, have given mortgage companies authority to issue insurance directly to the consumer, or to sell insurance as an agent of an underwriter. He said premiums charged by lenders that are authorized to issue insurance will not be regulated if the title insurance premium is a finance charge, while premiums charged by insurance agencies will be regulated under the state insurance code.

"If you think that lenders will avoid wading into the title insurance business, think again," Lax said. "Lenders routinely establish joint ventures to sell title insurance. Large lenders may decide that they, and not the title industry, should reap the profits of providing title insurance. At the end of the day, lenders will undercut title agencies to draw borrowers and make more money. States will have no choice but to deregulate the cost of title insurance to create parity in the marketplace, or watch most title agents go out of business."

> "The Fed's proposal will enable lenders to issue title insurance at any rate they wish, irrespective of filed rates. Underwriters will permit lenders to issue title insurance policies, cutting their agents out of the market. Title agents will revolt."

Another issue surrounding the proposal, involves the presumption that borrowers pay for and finance lender's title insurance policies. According to member of ALTA's Government Affairs Committee, there are some areas where by custom and practice the seller always pays title and escrow charges, some where the charges are split evenly between the buyer and seller and some where the borrower pays.

In today's REO market, the lender/seller escapes a RESPA section 9 violation by paying the buyer's title and escrow charges to the settlement agent to which it directs its business. In a "no cost refi" the "cost" of a lender's title policy is paid by the lender, which should mean the cost of financing the title premium is either already included in the lender's calculation of the APR. Also, because it's the lender's cost and not a "cost to the borrower," the lender's title insurance premium should not be included as a finance charge or part of the APR calculation.

While the lender has to produce TILA disclosures three days after a loan application is submitted, there is no requirement that the loan application be submitted with a purchase contract that identifies which party is paying closing costs or title insurance. It's been common for people to apply for a loan to see various loan products or how much money they qualify to borrow before shopping for a new home.

When the initial disclosures are made it's not necessarily possible to determine whether title insurance premiums will be financed. A significant difference between RESPA and TILA is the nature of the disclosures. TILA is all about disclosing the cost of the loan. RESPA allows for settlement costs, including title insurance, to be disclosed on the GFE and then allocated between borrower and seller on the HUD-1. The buyer's cash brought into closing or reduction in seller's proceeds to pay for title insurance is not accurately described as a finance charge.

# Agents Urged to Follow Good-Funds Policy

Thirty-two states now have legislation modifying how funds are handled at the closing table.

BY JEREMY YOHE

The subprime implosion three years ago forced title agents to go on high alert to follow a good-funds policy and make sure funds are in hand before disbursing.

Several states have taken notice, crafting legislation in 2009 modifying how funds are handled at the closing table. There are now 32 states that have similar legislation.

"Title agents must always be on guard and watch for signals like a lender client delaying more funds than normal," said Kurt Pfotenhauer, chief executive officer of the American Land Title Association. "While there may be exceptions, it's important that agents safeguard themselves and their customers by closing only on collected funds.

In Illinois, "Good Funds" legislation was signed by the governor as Public Act 96-645 and went into effect Jan. 1, 2010. The legislation provides protection for title insurance companies with respect to escrow transactions. It requires that all funds over $50,000 originating from a single party to a real estate transaction be wired funds as opposed to personal or cashier's checks, thereby guaranteeing the transfer of funds without delay.

"The good funds requirement will provide significant protections to title companies and their consumer customers against the risk of checks, drafts and other instruments which might not be honored by the institutions on which they are drawn," said Mike Brandt, vice president – claims and legislation for Attorneys' Title Guaranty Fund.

Indiana also enacted legislation that bans cashier's, corporate or personal checks from being used on most real estate closings. Effective July 1, 2009, House Bill 1374 prohibits title companies from disbursing real estate closings without funds of more than $10,000 having been wire transferred to the title company's escrow account.

Certified or cashier's checks or cash may be accepted from any single party that needs to deposit less than $10,000. Corporate checks under $10,000 from Realtor's trust accounts for earnest money will be acceptable in most situations.

In providing guidance for the new regulation, Indiana Insurance Commissioner Carol Cutter issued a bulletin clarifying how the Department of Insurance will interpret the state's new Good Funds Law.

Cutter said that for the purposes of the Good Funds Law, the department will interpret "wired funds" to include intra-bank transfers.

"Wired funds means any deposit or credit to a closing agent's escrow account by electronic means and may include Federal Reserve wire, automated clearing house and electronic funds transfer methods, if unconditionally held and irrevocably credited," Cutter said in the bulletin. "Since these methods are not always irrevocable, it is the responsibility of the closing agent to ensure the irrevocable and unconditional nature of any transfer before disbursing funds."

The bulletin also points out that the $10,000 threshold references funds received from a single party. Cutter stated that it will interpret single party to mean a buyer, seller or lender, "regardless of the number of people or entities making up the buyer, seller or lender."

"We live in a financial environment now where the previously unthinkable is happening all too often," said John Bethell, president and owner of Indiana-based John Bethell Title Company, Inc.

He said the law is necessary to ensure that funds from one closing are not used to cover checks written for another closing. Title companies often use the same bank account for many closings, and it may take a week before the bank realizes a bad check has been passed. The reversal of the deposit may not result in a shortage in the checking account until days or weeks later because deposits from other closings are constantly being made.

"When the float disappears and if we don't immediately make up the shortage, checks from completely unrelated transactions will bounce," Bethell said. "When checks from a closing bounce, the resulting carnage is not pretty. The law helps to protect all parties to the real estate closing from the effects of this happening.

Bethell said lenders who currently fund their loans with wire transfers should like the new law. He said competitors who insisted on providing corporate checks, drafts and forms of positive pay, held a competitive advantage because their costs of funds were lower since they didn't have to actually let go of the loan proceeds until their check was presented for payment several days after the closing.

"The essence of the new law is that title companies are no longer allowed to disburse closings until they are certain that the specific funds associated with that closing are collected," Bethell said.

He said title agents should make buyers aware in advance that wiring of money may be required, and sellers should be cautioned that funds may not be available immediately at the closing. Bethell's title company provides instructions for wire transferring funds with each title insurance commitment issued.

"After talking with several banks it seems that three or four hours is the average time that it will take for a wire to be initiated by the buyer at their bank and received by the settlement agent's bank," Bethell said. "Many banks have early afternoon

## HUD Releases Settlement Cost Booklet

The U.S. Department of Housing and Urban Development has released a 49-page Settlement Cost Booklet, which lenders and mortgage brokers must provide within three days after a consumer applies for a mortgage loan.

The booklet helps consumers become familiar with the various stages of the home-buying process. The booklet provides information on how to use the Good Faith Estimate to shop for loans, the required settlement services needed to close a loan and the HUD-1 Settlement Statement.

The booklet also includes a section that discusses title insurance and how it can protect homeowners.

"If a title claim occurs, it can be financially devastating to an owner who is uninsured. If you want to protect yourself from claims by others against your new home, you will need an owner's policy," the booklet states.

To save money on title insurance, the booklet suggests, consumers should compare rates among various title insurance companies.

"If you are buying a newly constructed home, make certain your title insurance covers claims by contractors. These claims are known as "mechanics? liens" in some parts of the country," the booklet said.

cut offs for processing both outgoing and incoming wire transfers. This will result in some wire transfers not being completed until the following day."

The biggest concern expressed by Bethell's clients is that the new law will result in even more delayed closings. He said the most common reason for this is because the lenders are unable to meet the scheduled closing date. About 25 percent of Bethell's closings are being rescheduled at the last minute due to loan approval issues.

"Until we have the lender's closing instructions and their approval of the HUD-1, we are unable to provide a firm figure to the buyers. And without a firm figure, the buyer, of course, cannot initiate a wire transfer of funds," he said.

Wire transfer requirements also can impact when closings are scheduled. To minimize delays, Bethell recommends title agents try to schedule closings on Tuesday or Wednesday mornings.

"A Tuesday or Wednesday closing will be among the first ones to be worked on by the lender each week," he said. "Friday closings only get worked on after the previous day's closings are completed. We find that many scheduled Friday closings get bumped back to later in the day or rescheduled for the following Monday. Closing Tuesday or Wednesday puts your deal near the front of the line."

A closing that is completed by 10 or 11 a.m. should allow enough time for the closing agent to order the wire transfer to the next closing agent and for the wire transfer to be sent and received by the banks involved.

"Successfully completing wire transfers involves a number of people and processes," Bethell said. "The title company at either end has little or no control or influence over these people or processes. Some banks will process wire transfers immediately. Some banks do them in batches only two or three times a day. Over the years, I've come to realize that no one I can talk with knows for sure when a wire transfer has actually been sent. When people tell me that they've sent the wire they almost always mean that they've just given it to the next person in the process."


perseverance
has its rewards

## Underwriter Vigorously Contests Accusations It Overcharged Georgia Consumers

Stewart Title Guaranty Co. said it would vigorously contest allegations made by Georgia's insurance commissioner in December that it overcharged thousands of consumers for title insurance over a four-year period, and assured its customers that it adheres to the state's rules and regulations.

John L. Killea, executive vice president and general counsel for Stewart Title Guaranty Co., said the company has reviewed the charges made by Georgia Insurance Commissioner John Oxendine and is "extremely disappointed" the commissioner "has chosen to forego the customary way to proceed on the department's routine examinations of its regulated companies."

Oxendine has charged Stewart Title Guaranty with violating Georgia's insurance laws, including overcharging for its products. Oxendine has ordered a show-cause hearing at 10 a.m. Feb. 23 in his office for Stewart Title Guaranty, asking that the insurer explain its practices.

"Stewart does not take these allegations or attacks on its reputation lightly," Killea said. We want to reassure all of our longstanding and loyal customers in Georgia that we have and will continue to adhere to the correct interpretations of Georgia's rules, regulations and statutes that govern our doing business in the state. We intend to vigorously contest the allegations of the commissioner in the appropriate forum and look forward to an expeditious hearing on the merits."

Oxendine reported discrepancies were found during an examination of title insurance sales made by Stewart during real estate closings between Jan. 1, 2003 and Sept. 30, 2007. Killea said since the department commenced its market conduct examination in 2006 Stewart has cooperated by submitting scores of documents and responses. Representatives of Stewart met with the commissioner in 2007 to discuss industry-wide solutions in areas of concern to the commissioner, Killea said.

"Notwithstanding our cooperation, since December 2007, Stewart has not heard from the department or received a preliminary report to which it could respond as is usually the case for these examinations nationwide," Killea said. "Stewart finds the timing of the commissioner's release especially peculiar given that the exam has been dormant for two years."

### Auction Company to Acquire Pulte's Retail Title Platform

California-based Real Estate Disposition LLC (REDC), a real estate services company and a real estate auction company, has signed a definitive agreement with Pulte Homes to acquire the Commerce Title retail title insurance agency platform. The Commerce Title brand, retail branch network, and certain additional support assets are included in the sale. Subject to regulatory and licensing approvals, the sale is expected to close in the first quarter of 2010.

REDC is part-owned by Stone Point Capital, LLC, a private equity firms whose experience and relationships assist REDC in expanding its business worldwide.

Approximately 130 Commerce Title retail employees will transition with the sale. Headquarters for the Commerce Title retail operation acquired by REDC will be located in Dallas. Pulte will retain that portion of the Commerce Title operations that support its new home sales, and the headquarters for those operations will also remain in Dallas. Commerce Title was formerly a subsidiary of Centex Corporation, which merged with Pulte effective Aug. 18, 2009.

"This is a good transaction for both companies as it allows Pulte to focus on its builder title operations while providing new growth opportunities for the Commerce Title retail team," said Debra W. Still, who oversees Pulte's Financial Services Operations.

### ISGN Completes Deal for Fiserv Division, Including GATORS Technology

ISGN Solutions Inc., a provider of technology products and services to the U.S. mortgage market, completed its previously announced acquisition of the Loan Fulfillment Services (LFS) business from Fiserv Inc. on Dec. 14. The acquisition will add broker price opinions, closing and settlement services, valuation services, flood and title certification, home retention and loan modification solutions, and vendor management solutions to ISGN's portfolio of products and services for residential mortgage lenders. The deal includes Fiserv's GATORS technology, which offers workflow and vendor management platforms for the settlement services and title industry. The ASP application offers Web-enabled e-commerce solutions for land title and settlement information service on a monthly subscription basis.

### Laid Off Title Company Workers Win $4.29M Settlement

More than 600 former employees of Mercury Companies' title operations in California were awarded $4.29 million following the settlement of a suit filed against the company for failing to properly pay laid off employees in 2008.

The settlement was approved by U.S. Bankruptcy Court Judge Michael E. Romero in Colorado and applies to 633 employees of companies operating under Denver-based Mercury Companies.

Under the terms of the settlement, the employees will recover more than 92 percent of the allowed priority wages, expenses, commissions, and other amounts owed to them, but not paid, when they were abruptly laid off. Under California labor law, all wages are due and payable upon termination.

Former employees of Denver-based Mercury Companies working at Financial Title Co., Lenders Choice Title Company and Lenders First Choice Agency, Inc., were to receive in excess of $3.6 million by the end of 2009.

At a later date, additional sums in excess of $125,000 will be paid to these employees as restitution of 401(k) contributions that were deducted from their pay, but not transferred to the employees' accounts.

The suit was filed in Alameda County Superior Court against Mercury in February 2008 after Alliance Title, another Mercury affiliate, closed without notice and failed to pay employees vested vacation benefits, commissions, expenses, and notary fees. In September of 2008, the case was expanded to include claims by Financial and Lenders employees. Alliance Title filed for bankruptcy in June of 2008, followed by Mercury and its other affiliates in October of 2008.

Mercury employed an aggressive recruiting style in order to expand quickly when it entered the California market in 2000. At its high point in 2005, Alliance Title operated 200 offices in 34 California counties and employed 2,500 workers. The aggressive recruiting and flash-pan expansion to snare high-end title orders left it too fat once the market crumbled in 2007.

### ALTA Mourns Loss of Two Industry Associates

The wife of a former president of the American Land Title Association recently passed away, while a former executive of the association lost a battle with cancer.

Betty Foster, the wife of former ALTA president Charlie Foster, passed away in December. Charlie Foster served as ALTA president in 2000. The couple, who met while employed by IBM in Richmond, Va., has two daughters.

Cara Detring, who succeeded Charlie as ALTA president in 2001, described Betty as a friend to everyone.

"She was very supportive of Charlie in his career which included all that came with his service to ALTA," she said. "She was a bright spot in our board functions and delighted in telling stories about their girls and Charlie. Because our connection was through ALTA, I have not had much contact with Betty or Charlie for the last few years, but I feel a distinct loss knowing that she is not there to add her special grace to our Past President's group."

David R. McLaughlin, who previously served as vice president – administration for ALTA, passed away Tuesday, Dec. 8, 2009.

In 1968, McLaughlin was appointed ALTA business manager after completing active duty in the Army. He retired in 2000.

McLaughlin worked closely with the association's executive vice president and was responsible for developing financial reports and handling a great variety of administrative tasks, according to Bill McAuliffe Jr., who served as ALTA EVP from 1965-1984.

### Florida Grapples With New Bill to Establish File-and-Use Model, Eliminate Agency Split

The Florida title insurance industry will once again deal with a proposed bill this year that would bring an end to promulgated rates by establishing a file-and-use rate setting model and radically restructure the economics of all title agents by abolishing the premium split.

Senate Bill 260, which is substantially the same as last year's SB 444 that died in committee, is strongly opposed by Florida Land Title Association. The FLTA recommends that "significant restructuring of the current business model of title insurance in Florida be structured in accord with the industry's recommendations to the Title Insurance Study Advisory Council."

Among other changes, it would eliminate promulgated rates in favor of each underwriter having a different, actuarially validated rate, would provide for treble damages in the case of any negligence in underwriting or closing, and provides that no portion of the premium would be paid to agents.

#### Snapshot of the Bill:

1. Establishes an underwriter only rate
2. Removes the current statutory duty to set rates considering maintaining the solvency of agents
3. Sets rates based on a file and use model
    a. Burden on each underwriter to justify their rates
    b. Annual rate Filing Required
    c. Deemed approved after 90 days
4. Agents may charge for primary title services – a concept that was eliminated in HB 111 two years ago – and title searches and closing services or parts thereof actually performed
    a. Not clear on passing through of other charges/costs
    b. Must submit those charges to OIR to be published on the Internet
    c. Must charge at least actual cost to provide the service
5. No portion of premium would be paid to the agent
6. If Insurer or Agent is negligent in performing any of the activities required in this section, the insurer is liable for damages up to three-times policy limits.

#### Charges for Services

A title insurance agent or agency may charge a reasonable fee for primary title services, title searches, and closing services, or the components thereof, actually performed by the agent or agency. Any charges under this section do not constitute a part of the rate charged by the title insurer for the issuance of the title insurance form, policy, commitment, or contract issued in connection therewith. The agent or agency must file with the office the amount of each such charge or change to such charge, including the components thereof, together with related information as required by the office on a form adopted by the office. The office shall publish the information collected from agents or agencies pursuant to this section via the Internet or otherwise as the office deems sufficient to apprise the public of costs for these services among the various agents or agencies. Charges for the services or components of services by the agent or agency may not be set below the cost of providing such services.

#### Adoption of Rates

If passed, each title insurer would have to make an annual filing with the Office of Insurance Regulation (OIR) no later than 12 months after the date of that insurer's previous filing, which demonstrates that the rate is actuarially sound. Rates for the required filing may not include any charge for primary title services, closing services, or title searches, or any commission or other compensation made to title agents.

### Texas Judges Recommend 2.66 Percent Rate Increase

The State Office of Administrative Hearings (SOAH) judges in Texas, who heard the 2008 Biennial Rate Case in September, have recommended a 2.66 percent rate increase in the basic premium rates for title insurance, according to the Texas Land Title Association (TLTA). The proposal includes the judges' underlying rationale including their analysis of all the parties' recommendations. The Texas Department of Insurance had recommended no change to the rates, the Office of Public Insurance recommended a 9.6 percent rate decrease and TLTA recommended a 13.3 percent rate increase.

The recommendation has been sent to Texas Department of Insurance Commissioner Mike Geeslin, who will render a final decision.

## Stewart Subsidiary Partners with Valuation Firm

Stewart Lender Services (SLS), a wholly owned subsidiary of Stewart Title Co., has formed a strategic alliance with StreetLinks to provide lenders complete valuation services. Stewart, already providing centralized title, closing and settlement services to the nation's top lenders, now includes a full suite of compliant and warranted valuation products in its offering.

## SoftPro Introduces Web-based Service Portal

SoftPro has introduced a Web-based service portal that attempts to streamline the ordering of closing, title and escrow services. According to the company, SoftPro 360 connects customers with title and closing vendors to generate and transmit orders for whatever services are needed. SoftPro 360 transfers the appropriate data digitally from the customer's file to the vendor.

## Regional Underwriter Selects Transaction Management System

Agents National Title Insurance Co. recently executed a technology partnership with Windward Consulting to implement ResWare, a real estate transaction management system, for the company's internal underwriting operations. David Townsend, chief executive officer of Agents National Title, said the company chose Adeptive Software's flagship product to improve its competitive position in its growing markets, improve efficiency and better serve its agents.

# Missouri Operating Under New CE Requirement; Credits Available Through ALTA

Effective Jan. 1, 2010, title agents operating in Missouri must now obtain continuing education credits. Missouri law changed with Senate Bill 66, an insurance bill passed in 2007. Producers authorized to sell title insurance, during renewal every two years, must show proof of eight hours of continuing education.

Missouri CE credits are available for ALTA's Land Title Institute Distance Learning courses: Title 101, Title 201, and Ethics in the Title Industry. Missouri CE credits will also be available for ALTA's 2010 in-person educational offerings: Federal Conference, Business Strategies Conference and the 2010 Annual Convention. The Business Strategies Conferences is being held May 2-4 in St. Louis.

Qualifying courses may include, but not be limited to:

- A real property law or title insurance-related course taught by a college or university or instructor who has taught a course of real property or title insurance law at the school;
- A course approved by the Department of Insurance, developed or sponsored by an authorized insurer, recognized agents' association, title insurance trade organization, or appropriate private provider; and
- A course approved for continuing legal credit (CLE) by the Missouri Bar Association.

"Selling title insurance with consumers' best interests in mind requires not just expertise of the insurance business, but also the real estate business," said John M. Huff, director of the Missouri Department of Insurance, Financial Institutions and Professional Registration (DIFP). "This new requirement will help to ensure title agents stay current on the often complex and ever-changing world of real estate."

Some agents are exempt – namely those who live in a different state, provided that state has continuing education requirements for title licensing.

States that issue a title license and require continuing education include: Arkansas, Florida, Indiana, Kansas, Louisiana, Maryland, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Virginia, and Wyoming.

SB 66 enacted other provisions intended to improve regulations of title insurance. The new law prohibits misuse or commingling of escrow with other funds, with tight restrictions on deposits and payments; requires title insurers to review the practices of their contracted agencies; requires full disclosure of affiliated business arrangements; and requires prompt issue of a title insurance policy after closing.

# people on the move

## Old Republic Makes Exec Changes, Names New President

Old Republic International Corp. has made several executive changes in its title insurance segment that take effect July 1, 2010.

Mark Bilbrey was appointed president of the Old Republic Title Companies. He succeeds Rande Yeager who retains his responsibilities as chairman and chief executive officer. Both continue in the title segment's Office of the Chief Executive Officer (OCEO), which is being enlarged from its eight member configuration with the appointment of Cheryl A. Jones, executive vice president - Human Resources & Communications, and Charles Kovaleski, executive vice president of Old Republic National Title Insurance Co. and president of the Attorneys Title Division. The Title Group's OCEO will therefore consist of the following individuals:

OLD REPUBLIC TITLE INSURANCE GROUP

**Mark Bilbrey**, *president, Title Insurance Companies*

**Mark Budzinski**, *executive vice president and general counsel*

**Robert Chapman**, *executive vice president and chief information officer*

**Patrick Connor**, *executive vice president, National Services Group*

**Gary Horn**, *executive vice president and chief financial officer*

**Cheryl Jones**, *executive vice president - human resources*

**Charles Kovaleski**, *executive vice president*

**R. Wayne Shupe**, *president - western title operations*

**Stephen Wilson**, *vice chairman*

**Rande Yeager**, *chairman and chief executive officer*

### Thomas Title & Escrow

**Brett Hopper** was recently named executive vice president for Arizona-based Thomas Title & Escrow. Prior to joining Thomas Title & Escrow, Hopper served as vice president of residential development and investment for Trammell Crow Company, investing in residential projects throughout metropolitan Phoenix. He began his real estate career as an attorney for one of Arizona's largest firms representing investors, developers, homebuilders and lenders involved in the acquisition, development, sale and financing of commercial and residential projects.

### RedVision

**Steve Young** has been hired as director of government partner programs for RedVision, a national provider of real property research solutions. McDonald spent the past 12 years as the recorder of deeds in Lancaster County, Pa. As a nationally recognized authority on the operations and technical advancements relating to land recording offices, Young's efforts have been successful in the development and deployment of computer programs that resulted in staff scalability and increased productivity at recording offices.

### NAIC

**Birny Birnbaum**, a long-time critic of the title insurance industry, its marketing practices and rate structure, has decided not to reapply as the consumer representative for the National Association of Insurance Commissioners (NAIC) in 2010. Birnbaum, who is the author of several studies on title insurance marketing and rates, served at the NAIC for three years as a regulator and 12 years as a designated consumer representative.

# New Members

## COLORADO
Fernon Meeks
**Axis Title and Escrow**
*Denver*

Robert Hopp
**National Title, LLC**
*Denver*

## DISTRICT OF COLUMBIA
Randy A. Weiss
**Weiss LLP**
*Washington*

## DELAWARE
Valerie M. DeFontes
**Law Offices of Bayard Marin**
*Wilmington*

## FLORIDA
Valerie Arias
**Law Offices of Valeria Arias, PA**
*Miami*

David Brown
**Warranty Title Solutions, LLC**
*Fort Myers*

Evie Peacock
**North Florida Title Company**
*Tallahassee*

Leland Talcott
**Florida Advantage Title & Escrow, LLC**
*Boca Raton*

## GEORGIA
Ann Basham
**Southeast Title and Processing**
*Lawrenceville*

Wright Coley
**Wright Asset Management Inc.**
*Gainesville*

## INDIANA
J. Garry Stevens
**Sycamore Land Title, LLC**
*Marion*

## MAINE
Timothy S. Keiter
**Keiter & Associates, PA**
*Portland*

## MICHIGAN
Lee Baskey
**LenderLive Settlement Services**
*Troy*

## NEW JERSEY
Joe Chambrone
**Town Title Agency, LLC**
*Hackensack*

## RHODE ISLAND
David M. Dolbashian, Esq.
**Law Office of David M. Dolbashian, Esq.**
*Providence*

## SOUTH CAROLINA
Stephanie M. Corley
**Golden Corner Title Ins.**
*Walhalla*

## VIRGINIA
Amy Johnson
**Abstract Title Services, LLC**
*Glen Allen*

## VIRGINIA
Mary Sue Nunley
**Bedford Title Agency, LLC**
*Bedford*

Hien T. Vo, Esq.
**Terra Title, LLC**
*Fairfax Station*

Kedron A. Springer
**Titlesurance, LLC**
*Suffolk*

# Associate Members

## NEBRASKA
Jon Yoachim
**Faulk and Foster**
*Lincoln*

# TIPAC Contributors

## Diamond Club Members
William Peirson
*PeirsonPatterson LLP*

## Platinum Club Members
Sherri Landauer
*Lakeside Title Co.*

Jeanette Liesen
*1st Service Title & Closing*

Richard Patterson
*Connecticut Attorneys Title Insurance Co.*

Gregory Wick
*Pennington Title Company*

## Gold Club Members
Roger Bell
*The Security Abstract & Title Co., Inc.*

Shonna Cardello
*White Rose Settlement Services*

Michael Fromhold
*First American Title Insurance Co.*

Wendy Gibbons
*Stewart Title Guaranty*

Mitchell Rengel
*Tri-County Abstract*

## Silver Club Members
Kathy Abbinante

Anna Anastasi
*Genesis Abstract, LLC*

David Baum
*Chicago Title Insurance Company*

Joey Benton
*Ozark Abstract Company*

Cathy Bilbrey
*Warranty Title & Abstract, Inc.*

Judith Braun
*Old Republic National Title Insurance Co.*

Armil Curran Jr.
*Curran's Abstract & Title Company, Inc.*

Shannon Eubank
*First Equity Title Corporation*

James Graham
*Ottawa County Abstract & Title*

Cornelia Horner
*American Land Title Association*

Michael S. Kearns, Esq.
*Gerner & Kearns Co,. L.P.A.*

Chris Lieser
*Old Republic National Title Insurance Co.*

Linnette Pryor

Manbir Sandhu
*Ohio Real Title Agency LLC*

Elissa Buonarota Santoro
*Esquire Title Services, LLC*

Robert Scherer
*Chicago Title Insurance Co.*

Sandra Schoen
*Old Republic National Title Insurance Co.*

R.Wayne Shupe
*Old Republic Title Holding Company*

Stephen Sklamba
*Land America/CommonWealth State Counsel*

# Devoted Group Proves Persuasive

*"Never doubt that a small group of committed people can change the world. Indeed, it is the only thing that ever has."*

**-Margaret Mead**

What possible relevance can the musings of a preeminent anthropologist have on any topic for this article? Bear with me as I try to demonstrate the appropriateness of this statement by focusing on just two of Ms. Mead's words: "small" and "committed."

Let's deal first with "small." For trade associations, there can be no dispute that in the arena of legislative agendas and governmental affairs "size matters." Size is measured in two respects: membership numbers and the magnitude of political action committees. Conventional wisdom dictates that size determines who gets into the game and who sits on the bench. Comparing ALTA with other groups serving segments of the real estate industry and with which we compete for the attention of lawmakers and regulators yields no conclusion other than we are, indeed, small. ALTA membership held around 3,000 last year, and TIPAC reported expenditures of just under $273,000 for the 2008 election cycle. Here are membership counts and PAC expenditures for the 2008 election cycle for some of the other notable players:

- The Mortgage Bankers Association is about the size of ALTA, but its PAC expenditures for the 2008 cycle were more than four times the amount of ALTA's at over $1.1 million;
- The Independent Community Bankers of America enjoy a membership roster of 5,000 institutions and its PAC spent almost $2 million for the 2008 cycle;
- The National Association of Homebuilders boasts membership of 235,000 and doled out over $3.5 million in PAC money for 2008;
- The American Bankers Association wrote over $3.8 million in PAC checks for the same period;
- And finally, the behemoth National Association of Realtors eclipses all others with membership count of over 1.1 million and PAC largesse of nearly $12 million.

So, how does an association of such humble size and financial stature as ALTA get any game time at all? The answer lies in the other word I mentioned, Ms. Mead's well-scripted adjective, "committed." "Commitment" (a word near and dear to the title industry) is the essential element that gives force and mass to an idea, a principal, or a message. When people are committed they are inexorably bound to a cause or a course of action. Commitment provides the resolve and firmness of purpose that propels their endeavors.

Through the strong commitment of its members and, in large measure, thanks to the unrivaled talents and experience of its extraordinary staff, ALTA is not only in the game but is putting points on the board. Over just the last year or so, ALTA has positioned its members as the unquestioned leaders and experts of the settlement process. We have forged an unprecedented bond of cooperation between our association and HUD. We have kept title insurance out of the rush for national regulation. We have succeeded in excluding our businesses from the grasp of a Consumer Financial Protection Agency. We have spear-headed efforts to bring about a borrower right of inspection of mortgage documents in advance of closing. Policy makers and regulators are not only paying heed to ALTA comments, but are looking to us for input. We are growing in stature and gaining respect, despite our modest numbers. Just think of the possibilities as we attract new members and build our PAC.

The commitment of our small group of people may not necessarily change the world, but will surely provide the leverage for us to vastly improve our industry. Indeed it is the only thing that ever can.

**Frank Pellegrini**, Chair, Agents & Abstracters Section

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