

Your Title and Settlement Operation: Is it time to get a Check-Up?

Take Care of Yourself and Your Title and Settlement Operation

Nobody really likes to go to the doctor. There is always something else that we would rather do. Ultimately we go for many reasons. We go because we want to make sure that we are healthy or we want to get healthy. Sometimes we go at the request of a loved one. We send our kids to the doctor to get a physical so they can attend school or a camp. All of these reasons are good ones, but whatever the reason, we can all agree that a regular checkup should be a part of our personal health routine.

But what about our professional health? We are all so busy that while we may have found time to get ourselves personally checked out, it is possible we haven't taken the time to give our Title and Settlement Operations a check-up. We lack the aforementioned motives to do so. Closings are clipping along, the trust account is balanced and reconciled, and overall our operation is feeling healthy. It now appears that federal regulation is giving us the motive to make sure. In April 2012, the Consumer Financial Protection Bureau (CFPB) issued a three-page memorandum ("CFPB Memo"), (http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf) that put banks on notice that they have "legal responsibility" to "oversee their business relationships with service providers..." In much the same way that you had to have an annual physical from a doctor to enroll in the first grade or college, the CFPB asked the banks to give their service providers a metaphorical "check-up."

Who Are Service Providers

The CFPB Memo specifically singles out service providers as: ". . . any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service." In this definition the bank is the covered person and for purposes of this article, we will focus on those service providers that have the most direct impact on real estate transactions – the title agent and the settlement agent, including attorneys.

CFPB Recognizes Need for Service Providers

The CFPB Memo acknowledges that banks use and/or allow the use of service providers as an appropriate and necessary business decision. The fact that the CFPB acknowledges and approves the use of service providers is very important, as it shows that the CFPB does not intend to threaten the role of the title agent or settlement agent in the closing process. However, the CFPB has asked the banks to look at these relationships and make sure that the bank is working with trusted, ethical professionals. The CFPB wants banks to use and oversee service providers "in a manner that ensures compliance with Federal consumer financial law, which is designed to protect the interests of consumers and avoid consumer harm. The CFPB's exercise of its supervisory and enforcement authority will closely reflect this orientation and emphasis." The CFPB Memo sent a shockwave through the lending industry, title industry and legal industry, as banks can now be fined or sued by the CFPB for the activities of their non-compliant service providers.

CFPB Sets Expectations

The CFPB Memo says that banks are expected to:

- Conduct thorough ***due diligence*** to verify that the service provider understands and is capable of complying with the law;
- Request and ***review the service provider's policies***, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;
- Include in the ***contract with the service provider clear expectations about compliance***, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities;
- ***Establish internal controls*** and on-going monitoring to determine whether the service provider (together with their employees or agents) is ***complying with the law***; and
- ***Take prompt action*** to address fully any problems identified through the monitoring process.

The CFPB gave these broad examples of expectations without any defined way to measure compliance. The CFPB did not try to define all of these metrics nor did the CFPB presume to tell the lending industry what is good enough. In reality, the CFPB merely stated that banks must *check out their service providers*. Since the CFPB Memo lacks detail on compliance with this new federal mandate, the American Land Title Association (“ALTA”) has stepped forward to provide direction by promulgating industry Best Practices which will assist the legal, title and settlement industries in complying with the heightened expectations.

ALTA - Filling the Gap

In an effort to fill the gap left by the broad examples given in the CFPB’s Memo, the ALTA Best Practices offer the title industry (title agents and settlement agents, including attorneys) guidance on how to be a trusted and ethical title professional in the new regulatory environment. In short, the ALTA Best Practices indicate what the standard business “check-up” should include and provide a path to demonstrate that you are a trusted and ethical professional.

To help the banking industry verify compliance, ALTA has offered seven standards by which each bank should measure its service providers. These seven standards called the ALTA Best Practices (<http://ALTA.org/BestPractices>) can be summarized with seven routine questions, which are:

ALTA Best Practice #1 - Licensing

- *Are they properly licensed?*

ALTA Best Practice #2 - Escrow Account Controls

- *Do they have proper controls in place to safeguard the millions of dollars that flow through their trust accounts?*

ALTA Best Practice #3 - Protect Confidential Info

- *Do they have proper controls in place to safeguard the bank customers’ personal information from identity theft and cyber fraud?*

ALTA Best Practice #4 - Follow Federal & State Consumer Laws

- *Do they know and follow the consumer laws that are required to protect the bank’s customers?*

ALTA Best Practice #5 - Deliver Policies on Time

- *Do they have procedures in place to make sure that title matters are concluded in a timely fashion?*

ALTA Best Practice #6 - Maintain Appropriate Insurance

- *Do they maintain the appropriate levels of insurance to protect the bank’s interests and the bank customers’ interests in the event that things do not go according to plan?*

ALTA Best Practice #7 - Address Consumer Complaints

- *Do they address the bank’s complaints and the bank customers’ complaints (if any) in a timely and professional manner?*

Compliance with some of the ALTA Best Practices can be as simple as asking: “Is the service provider properly licensed in their state?” Other Best Practices, such as Escrow Account Controls and Protection of Non-Public Personal Information for example, are a little more complex. One thing upon which everyone can agree is that the client’s money and confidential information must be protected. It appears that banks want to add a level of scrutiny above the current norms to fulfill their obligations under the CFPB Memo. While the situation is fluid and still unfolding, the banks intend to require the service providers to not only do a professional job, but to demonstrate that they are doing a professional job.

The Check-Up

ALTA has developed an assessment standard for the Best Practices, so that all service providers may earn a certification confirming they have substantially met the standards. ALTA took the lead by defining the expectations contained in the CFPB Memo through the Best Practices and providing a way to measure compliance through an assessment. Using compliant service providers will not eliminate the bank's responsibility to perform due diligence and know their providers, but the certification could answer a lot of due diligence questions for the bank without the expense of performing the due diligence themselves.

There is concern in the industry with how high the bar for compliance has been raised. Banks have expressed concern that their trusted service providers will not be compliant and that as a result they will have to stop using them. While these concerns are valid, with proper preparation the compliance standards are within reach. The first step is AWARENESS, the second is PREPARATION.

Conclusion

The CFPB Memo changed the lens through which the banks will view service providers. The regulatory environment and marketplace reactions are fluid. The political, economic and regulatory landscape involves the CFPB, the banking industry, the title industry, and the service providers all evaluating their position in the post CFPB Memo world. The members of the title and settlement services industry, the banks, and the CFPB have a primary consistent goal, protecting the client, and over the next few months, an understanding of how client protection may best be achieved will emerge. The current projected date for compliance is a year away, but banks may not wait and may ask for compliance sooner. Together we must be aware and prepare.

Investors Title has been engaged at the highest level in national discussions from the ALTA Auditors Committee, to the ALTA Underwriters Committee, to the ALTA Best Practice Task Force itself. We are committed to staying abreast of these new initiatives in the marketplace and sharing what we learn with our trust professional partners.

Investors Title will continue its dedication to these efforts so that we may assist our partners through any necessary transition. As these changes in our industry take shape we remain committed to educating all of our approved service providers through a series of articles designed to keep everyone current on this subject. Specifically for our title insurance issuing agents, we will provide additional support through email blasts, webinars and sample policy templates designed to provide ALTA Best Practice guidance. As we begin this process, your Investors Title Representative stands ready to assist and offer solutions to meet your needs. If you have other needs for information or other ideas we want to hear from you.

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