



ALLIANT
NATIONAL
TITLE INSURANCE COMPANY

The 2016 ALTA Commitment and the “New” CPL Form

Credit: 1 hour CE Ethics / 1 hour CLE (RE)

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2:00 pm – 3:00 pm

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W. Jeffry Stein, Esq. is Regional Counsel for Florida and the Southeast and Senior Vice President for Alliant National Title Insurance Company.

Jeff manages legal issues throughout the country on behalf of Alliant National, and is responsible for underwriting and our independent agent education programs in Florida and the Southeast. With over thirty eight years experience working for major underwriters in both claims and underwriting, as well as in private practice actually writing title policies for underwriters, he brings a deep and rich understanding of not just the legal ramifications inherent to the title insurance industry, but of the critical elements necessary to ensure an Independent title insurance agent's success.

Jeff is a past president of the FLTA and currently an advisor on the ALTA Forms Committee. When not wrangling title issues, Jeff can be found racing cars, taking professional quality pictures and working with his wife on their horse farm.

OVERVIEW

Name of Provider: Alliant National Title Insurance Company

Name of Course: 2016 ALTA Commitment and the “New” CPL Form (Classroom)

Targeted audience: Florida Title Insurance Agents

Course Objectives:

To increase Florida Title Agents familiarity with:

- the recently adopted 2016 ALTA Commitment (with Florida revisions) which includes a substantial rewrite of the Commitment regarding its uses and liability of the insurer under the Commitment.
- the changes to the Closing Protection Letter “CPL” and how to address questions from lenders. regarding what the CPL provides.

This presentation will provide Florida Title Agents the opportunity to understand the provisions of the Commitment and CPL and become more knowledgeable regarding these important contract.

Course Relevance: Florida Title Agents are responsible for delivering a title insurance policy based upon an ALTA Commitment with Florida Modifications and a CPL to lenders and buyers. This presentation will educate and inform title agents on the recent changes and updates to the particular forms and provide context behind the purpose of these changes.

Study Method: Classroom

OUTLINE

Florida Title Agents: 2016 ALTA Commitment and the “New” CPL Form (CLASSROOM)

I.	Why have a new Commitment?	5 Min
II.	The 2016 ALTA Commitment Summary of Changes	30 Min
	a. Parts of the Commitment	
	b. Summary of Changes	
	c. All the parts have to be present	
	d. Commitment is a Contract	
	e. Prohibition of Use of “TBD”	
	f. Commitment date	
	g. Addition of Transaction ID	
	h. Schedule B, Part-II changes	
	i. Pro Forma language	
	j. Commitment Conditions	
	k. Commitment Schedules	
	l. Conclusion	
III.	New CPL updates	15 Min
	a. What is a “CPL”?	
	b. What does a CPL not do?	
	c. The Fine Print	
	d. The Changes	
	Total Instruction Time	50 Min
	Time for Break and Sample Scenarios	10 Min
	Total Time	60 Min

THE 2016 ALTA COMMITMENT and the “New” CPL Form

1. 2016 Commitment

ALTA created the new 2016 commitment to deal with issues that were being presented in court cases around the country and to clarify for the proposed insureds what the commitment should be used for and what it should not be used for.

In this seminar we will delve into the new provisions of the 2016 commitment and discuss the reasons they were created.

The purpose of the changes to the commitment is to clarify that the commitment is in fact only a contractual agreement to issue a title insurance policy or policies. It serves no other purpose. Most of the changes from the 2006 commitment to the 2016 commitment are designed to make this clarification.

Summary of the Changes:

1. All of the parts of the commitment have to be present for it to be valid. Each page contains a reminder that all parts need to be together.
2. It is a contract to issue a policy only.
3. No third party liability-it is only a contract between the proposed insureds and the Company.
4. “TBD” can no longer be used for the proposed policy amounts or proposed insureds.
5. Effective Date is now the commitment date.
6. Adds Transaction ID information to Schedule A.
7. Schedule B, Part II contains a general statement that it does not republish a covenant in violation of State or Federal Law (a trap for the unwary discussed later).
8. Provides that a Pro Forma Policy may be issued and explains that it is not a report on status of title or a commitment.
9. The Conditions section contain some new provisions.

1. All of the parts have to be present

The contract, also known as the commitment, must be presented in its entirety to be valid. In other words all of the parts of the commitment are important to the contract and none are valid without the others.

This is set out in Condition 3 of the new commitment which reads:

The Company's liability and obligation is limited by and this Commitment is not valid without:

- (a) The Notice (this is located at the top of page 1)
- (b) The Commitment to issue the Policy
- (c) The Commitment Conditions
- (d) Schedule A
- (e) Schedule B Part 1 – Requirements;
- (f) Schedule B Part 2 – Exceptions
- (g) A counter-signature by the Company or its issuing agent that may be in electronic form

Each page of the commitment contains a legend that this is the case.

2. It is a contract to issue a policy only

(a) The Notice.

In all caps at the beginning, this provides clarity that the commitment is not an abstract of title, report of the condition of title, legal opinion, opinion of title, or other representation of the status of title.

It also clarifies that the procedures used to determine insurability are proprietary to the company and create no extra contractual liability. Proprietary procedures include the search and examination of title as well as underwriting standards and other internal procedures.

The obligation of the Company is set out to issue a policy to the proposed insured shown in Schedule A in accordance with the terms and provisions of the commitment to the proposed insured.

IMPORTANT—READ CAREFULLY: THIS COMMITMENT IS AN OFFER TO ISSUE ONE OR MORE TITLE INSURANCE POLICIES. ALL CLAIMS OR REMEDIES SOUGHT AGAINST THE COMPANY INVOLVING THE CONTENT OF THIS COMMITMENT OR THE POLICY MUST BE BASED SOLELY IN CONTRACT.

THIS COMMITMENT IS NOT AN ABSTRACT OF TITLE, REPORT OF THE CONDITION OF TITLE, LEGAL OPINION, OPINION OF TITLE, OR OTHER REPRESENTATION OF THE STATUS OF TITLE. THE PROCEDURES USED BY THE COMPANY TO DETERMINE INSURABILITY OF THE TITLE, INCLUDING ANY SEARCH AND EXAMINATION, ARE PROPRIETARY TO THE COMPANY, WERE PERFORMED SOLELY FOR THE BENEFIT OF THE COMPANY, AND CREATE NO EXTRACONTRACTUAL LIABILITY TO ANY PERSON, INCLUDING A PROPOSED INSURED.

THE COMPANY'S OBLIGATION UNDER THIS COMMITMENT IS TO ISSUE A POLICY TO A PROPOSED INSURED IDENTIFIED IN SCHEDULE A IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THIS COMMITMENT. THE COMPANY HAS NO LIABILITY OR OBLIGATION INVOLVING THE CONTENT OF THIS COMMITMENT TO ANY OTHER PERSON.

(b) Condition 6(b) states that any claim must be based in contract and must be restricted solely to the terms and provisions of the commitment

3. No third party liability

The Notice includes language that the Company has no liability or obligation involving the content of this commitment to any other person. The specific language is:

THE COMPANY HAS NO LIABILITY OR OBLIGATION INVOLVING THE CONTENT OF THIS COMMITMENT TO ANY OTHER PERSON.

4. No longer can use a TBD for amount or proposed insured (not really a change from the 2006 commitment, just made clearer on the 2016 version)

In the section titled COMMITMENT, there is a provision that specifically states:

"This Commitment is effective as of the Commitment Date shown in Schedule A for each Policy described in Schedule A, only when the Company has entered in Schedule A both the specified dollar amount as the Proposed Policy Amount and the name of the Proposed Insured." (Note that these are now defined terms which we will discuss.)

This is clarifying that this is a contract and that the name of the other party (Proposed Insured) and the amount of the contract are in fact material contract terms.

Contrast this language with the prior 2006 commitment which contained the following provision and no defined terms.

"This Commitment shall be effective only when the identity of the Proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A by the Company."

This language did not define the amount of the policy or the Proposed Insured. TBDs were common but are no longer acceptable to create an agreement.

The definitions also clarify that a "Proposed Insured" is each person identified in Schedule A and that the Proposed Policy Amount is each dollar amount specified in Schedule A.

Practice Point: Even though this language is different, the real issue is pretty much how it has been. If a commitment is delivered to a customer without the identity of the other party or the amount, the commitment is ineffective. The delivery is being made knowing someone will be "relying" upon the information provided in the commitment and also knowing that whoever that the person is not entitled to rely upon what has been provided. It is our position that this is something that should not occur; hence requiring names and amounts.

What to do when the names and amounts are not known?

- It is easy to say don't send the commitment out until you have the information, but that may not always be practical. However, if you truly have no information to fill in, that is the answer. If the parties need something to draft a contract or review the title for a foreclosure purchase etc., then we can provide them a property information report giving them the information they need. Once the names and amounts are determined we can then issue a commitment.
- If you have a name but no amount, fill in the name. When you do not know the contract purchase price or the loan amount, we suggest a meaningful estimate be used. Perhaps the property appraiser's appraised value is a reasonable starting point. Once the actual amounts are known, a revised commitment can be issued.
- Note: some other insurers have suggested or required arbitrary amounts just to insert a number. We disagree with that practice and ask that you not use arbitrary amounts, but make a good faith effort to determine meaningful amounts.

5. Effective Date is now the Commitment date

This is changed in Schedule A. It is the same date, being the date for which the search/exam has been completed.

6. Adds Transaction ID information to Schedule A

This is designed to aid lenders by providing them information commonly requested but does not make that information an actual part of the commitment to insure. It is not mandatory, but highly recommended. Lenders are starting to ask for this information and it is expected it will become a requirement for most lenders.

Condition 5(e) provides that the Company shall not be liable for the content of the Transaction Identification Data, if any.

The data includes:

Issuing Agent: This is the licensed agency or agent issuing the commitment.

Issuing Office: If the agent has multiple locations this clarifies which office issued the commitment.

ALTA Universal ID: This is being rolled out right now by ALTA and is a unique identifier for each agent or agency. By the title agency/agent registering with ALTA, the lender can review which insurers the agent is appointed to write for and to confirm that the agent is actually the agent issuing the commitment. It will cut down on fraudsters spoofing your information. You do not need to be a member of ALTA to have an ID #. The link is <https://www.alta.org/registry/>. If you are not listed you can go to this link and start the process <https://www.alta.org/registry/rms.cfm?first>

Loan ID: This is the lender's identifying number.

Commitment No: The number for this commitment.

Issuing Office File No. The issuing agent's number.

Property Address: This allows us to provide this information in an informative way without accepting liability for inaccuracies. This is the only place this should appear in the

commitment;, i.e. do not add it to the legal description or add an informational note to one of the schedules.

Revision No. : This allows you to continue to use the same commitment number for various iterations of the commitment as things change or it is updated. This also goes along with the specified right for us to amend the commitment.

7. Schedule B, Part II contains a general statement that it does not republish a covenant in violation of State or Federal Law

This has been added to avoid the necessity of adding it to every restrictive covenant shown in Schedule B.

The trap is that the policy does not have this same language in Schedule B. If the policy typist “cuts and pastes” the exceptions from the commitment to the policy, it is easy to then forget to add back in this limitation. (The ALTA Forms Committee is working on a revision to the current 2006 policies that will contain this same language in Schedule B.)

8. Provides that a Pro Forma Policy may be issued and explains that it is not a report on status of title or a commitment.

9. Commitment Conditions

1. Definitions: These are specific definitions as related to the commitment (not by reference to the policy to be issued as in the 2006 commitment). The following is a summary of the definitions.

(a) Knowledge or Known. Actual or imputed knowledge but not constructive knowledge.

(b) Land. This is the land described in Exhibit A and the improvements that by law constitute real property. It includes no property beyond the area described in Schedule A and no right in easements in roads or waterways abutting the Land.

(c) Mortgage. Includes deed of trust or other security instrument.

(d) Policy. Each contract of title insurance, in a form adopted by ALTA issued or to be issued by the Commitment.

(e) Proposed Insured. Each person identified in Schedule A as a proposed insured.

(f) Proposed Policy Amount. Each dollar amount specified in Schedule A as the Proposed Policy Amount. (TBD is not a dollar amount and therefore not part of the definition)

(g) Public Records. Those records that impart constructive notice of matters related to real property.

(h) Title. The estate or interest described in Schedule A.

2. Provides for termination of the commitment if all of the requirements of Schedule B 1 are not met within the time frame of the commitment. This clarifies that the commitment terminates and obligations end instead of just “expiring”.

3. Defines the parts and requires them all to be together as a part of the contract.

4. Company has a right to amend, and clarifies that the company may have liability but it is limited by Condition 5.

5. Limitations of Liability

(a) The Company's liability under Commitment Condition 4 is limited to the Proposed Insured's actual expense incurred in the interval between the Company's delivery to the Proposed Insured of the Commitment and the delivery of the amended Commitment, resulting from the Proposed Insured's good faith reliance to:

(i) comply with the Schedule B, Part I—Requirements;

(ii) eliminate, with the Company's written consent, any Schedule B, Part II—Exceptions; or

(iii) acquire the Title or create the Mortgage covered by this Commitment.

(b) The Company shall not be liable under Commitment Condition 5(a) if the Proposed Insured requested the amendment or had Knowledge of the matter and did not notify the Company about it in writing.

(c) The Company will only have liability under Commitment Condition 4 if the Proposed Insured would not have incurred the expense had the Commitment included the added matter when the Commitment was first delivered to the Proposed Insured.

(d) The Company's liability shall not exceed the lesser of the Proposed Insured's actual expense incurred in good faith and described in Commitment Conditions 5(a) (i) through 5(a) (iii) or the Proposed Policy Amount.

(e) The Company shall not be liable for the content of the Transaction Identification Data, if any.

(f) In no event shall the Company be obligated to issue the Policy referred to in this Commitment unless all of the Schedule B, Part I—Requirements have been met to the satisfaction of the Company.

(g) In any event, the Company's liability is limited by the terms and provisions of the Policy.

6. Liability of the Company Must Be Based on This Commitment

(a) Only a Proposed Insured identified in Schedule A, and no other person, may make a claim under this Commitment.

(b) Any claim must be based in contract and must be restricted solely to the terms and provisions of this Commitment.

(c) Until the Policy is issued, this Commitment, as last revised, is the exclusive and entire agreement between the parties with respect to the subject matter of this Commitment and supersedes all prior commitment negotiations, representations, and proposals of any kind, whether written or oral, express or implied, relating to the subject matter of this Commitment.

(d) The deletion or modification of any Schedule B, Part II—Exception does not constitute an agreement or obligation to provide coverage beyond the terms and provisions of this Commitment or the Policy.

(e) Any amendment or endorsement to this Commitment must be in writing [and authenticated by a person authorized by the Company].

(f) When the Policy is issued, all liability and obligation under this Commitment will end and the Company's only liability will be under the Policy.

7. IF This Commitment Has Been Issued by an Issuing Agent

The issuing agent is the Company's agent only for the limited purpose of issuing title insurance commitments and policies. The issuing agent is not the Company's agent for the purpose of providing closing or settlement services.

8. Pro-Forma Policy

The Company may provide, at the request of a Proposed Insured, a pro-forma policy illustrating the coverage that the Company may provide. A pro-forma policy neither reflects the status of Title at the time that the pro-forma policy is delivered to a Proposed Insured, nor is it a commitment to insure.

9. ARBITRATION (omitted in FL)

SUMMARY

The 2016 commitment has been created to clarify that it is in fact a contract to issue a policy and is nothing else. Therefore using a commitment for purposes other than fulfilling requirements to issue a policy is at the user's risk, as claims will likely not be covered.

The 2006 commitment will not be de-certified by ALTA for some time yet, so we are in a transition period. It is our strong preference that you use the 2016 commitment exclusively.

2. New CPL

Florida has had a few versions of the CPL over the years. The last two have mirrored the ALTA CPL forms. The most recent of these was approved for use by the Florida Office of Insurance Regulation (OIR) in May of 2016. It is the ALTA December 2015 CPL, with Florida modifications.

First, let's go through what a CPL is and is not. We can then highlight some of the significant changes to the CPL.

What is a CPL?

The CPL is an agreement designed to provide lenders specific comfort when dealing with an insurer's agents instead of dealing with the company directly for closing services.

As we saw in the new commitment, the activities that are needed to close a transaction when performed by an agent are not part of the responsibility of the insurer under the commitment. The agency agreements you, as agents, have with the insurers also make this clear.

Lenders, however, want assurances that we as the insurer will stand behind certain activities of our agents in the process of closing a transaction and handling of their funds. This is where the CPL comes in.

What does a CPL do?

- The CPL provides lenders (and in some cases the buyer) an indemnity against their actual losses if the loss is caused solely by:
 - o The issuing agent or approved attorney's failure to follow the written closing instructions, as those instructions relate to
 - Disbursement of funds to establish the status of the Title to the Land
 - Validity and enforceability of the lien of the mortgage
 - Obtaining any document specifically required by the lender/buyer but only to the extent the failure adversely affects the status of the Title to the Land or the validity, enforceability or priority of the lien of the insured mortgage
 - o Fraud, theft, dishonesty or misappropriation of the issuing agent or approved attorney in handling the lender's/buyer's funds or documents, but only to the extent that adversely affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the insured mortgage.

What does a CPL not do?

- The CPL does not cover:
 - o For the failure to comply with the instructions when the instructions ask for title coverage inconsistent with the commitment.
 - o Loss of funds due to a bank collapse or the failure of the agent to deposit funds in a specific bank.
 - o Construction liens when a part of the funds are to pay for construction.
 - o Defects, liens or encumbrances in the title.

- The lender's or lender's employee, agent, attorney or broker's theft, fraud, misappropriation, dishonesty or negligence.
- Unauthorized settlement or release of a claim by the lender.
- Matters that are created, suffered, assumed or agreed to by the lender.
- Failure of the issuing agent to determine the validity, enforceability or effectiveness of a document that is required by the closing instructions.
- Consumer Financial Laws.
- Investor or secondary market standards or requirements including an issuing agent's failure to comply with the closing instructions.
- Periodic disbursement of funds to pay for construction.
- Issuing agent acting as an intermediary for 1031 exchanges.
- Compliance with Closing instructions that would constitute a violation of any law or regulator interpretations. A failure of an agent to comply with such instructions does not create liability under a CPL.

The fine print and conditions:

Liability:

- Liability is limited to the smaller of the following:
 - The amount of the lender's funds
 - The liability under the policy at the time of a written notice of claim
 - The value of the lien of the insured mortgage
 - The value of the title to the Land insured or to be insured at the time of a written notice of claim
 - The amount stated in Section 3 of the requirements
- The company is only liable to the holder of the indebtedness at the time payment is made (of course this would not apply to a purchaser, borrower or lessee that suffers a covered loss).
- Payment under the policy or any other source reduces liability under the CPL by the same amount.
- Payment under the CPL is considered a payment under the Conditions of the Policy.

Expiration:

- The CPL expires if a written claim is not made within one year of the transmittal of funds (even if there is no prejudice to the company caused by the delay).
- The company has no liability if the closing does not occur within one year of the date of the CPL.
- The company has no liability if the company terminates the CPL prior to the closing.

Miscellaneous:

- Clarifies that the issuing agent is only an agent of the company for the limited purpose of issuing policies. Neither the issuing agent nor an approved attorney is the company's agent for closing or settlement.
- Is a strictly limited contract for what is described.

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The Changes:

- The Addressee should no longer include "successors and assigns". This provided an avenue for courts to disagree on whether the CPL followed the mortgage or if it could stay with an assignor. The FDIC took advantage of this and filed claims under CPLs even after they had sold the loan.
- Exclusion 2(d) (A) now makes it clear that the lender or ("You" as used in the CPL) is the lender or the assignee of the insured mortgage for value without knowledge of the facts that are the subject of a claim under the letter.
- Condition 8 now states that the company is only liable to the holder of the indebtedness at the time of payment.
- Requires the cooperation of the claimant lender with the investigation.
- Limits the events for which coverage applies by stating a failure to follow instructions but only for the matters described in Requirement 4 as described above in what it covers.
- Clarifies that negligence of the lender is not covered. Requirement 4 provides that the loss must be **solely** caused by the covered acts and Condition 3(e) excludes **liability from any fraud...** of the lender's employee, agent, attorney, or broker. Condition 3(g) excludes matters created, suffered, assumed or agreed to or known by the lender.
- Termination date of 1 year and the ability of the company to terminate the CPL
- Clarifies the upper amount of loss.
- Makes it clear that the CPL is a contract (much like the changes to the commitment) and there is no liability in tort such as negligence, negligent failure to supervise the issuing agent, or apparent agency.

Overall, the changes have been made to make sure that the losses under the CPL are limited to specific assurances and limited acts of the agents and to clearly define who can file a claim under a CPL and for what amount and when. If you have any questions, never hesitate to contact your ANTIC underwriting team. We always love hearing from you and helping.