

What You Need to Know About the New ALTA Title Commitment Form

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On August 1, 2018, the American Land Title Association decertified the June 17, 2006 ALTA Commitment form in favor of the improved August 1, 2016 ALTA Commitment form with technical corrections effective April 2, 2018 (the “2016 Commitment”) [see attached form]. The definitions of certain of the terms that appear in capital letters can be found in the 2016 Commitment. The overlap between the adoption of the 2016 Commitment and the decertification of the 2006 form was necessary to support regulatory approvals, systems changes, and industry continuing education.

The central focus of the 2016 Commitment effort was the need to clarify the character of the product as an offer to enter into a contract of indemnity with the proposed insured. While this has always been the case, the new form better defines the business relationship between the parties with a conspicuous Notice at the beginning of the form.

The Notice forthrightly and unambiguously addresses four main issues:

1. All company obligations are in contract only;
2. Neither the 2016 Commitment nor the subsequent policy are information products;
3. The search and examination of title evidence is performed only for the issuer’s determination of insurability and for no other purpose; and,
4. The issuer does not assume any third-party liability under the contract.

All four of these points are reiterated within the Conditions section of the 2016 Commitment to prohibit misinterpretations of the 2016 Commitment form.

Acceptance of a company’s offer to indemnify is accomplished by the proposed insured’s reliance upon the 2016 Commitment terms and Conditions.

Central to the contractual nature of the 2016 Commitment is the need to set forth both the name of the proposed insured(s) and the proposed policy amount(s). “To be determined” or “TBD” are inappropriate and obviate any liability of the issuer. The importance of this issue should be a point of discussion with the issuing underwriter given any number of scenarios. For instance, the loan amount may not be finalized at the time the commitment is generated. Or the special purpose entity for a given project has not yet been constituted when the commitment needs to be published. Foreclosure or auction situations create their own set of considerations. Each title insurance company will have their preferred method of addressing the various scenarios presented in the marketplace, but every option will focus on certainty of both the parties and the amount of liability for the protection of all parties.

A commitment is not an information product. Before title insurance, abstracts of title were the preferred method of protecting parties, but the marketplace has evolved because of the superior protections delivered by a title insurance policy. There is greater certainty delivered by an

indemnity contract with an unlimited tail issued by a regulated and actuarially sound company than by an abstract or opinion of title that may well be wrong but not prepared negligently. The evolution from abstracts to policies has, however, resulted in parties trying to inappropriately ascribe an information character to title insurance commitments and policies.

The point here is that a commitment generally should not contain in Schedule B items “for informational purposes only.” Generally, a matter either relates to a Covered Risk under the policy and should be set forth as an Exception, or it should not be addressed.

The exception to this general rule is set forth in the Transaction Information Data situated above Schedule A of the commitment. No previous ALTA commitment form has provided for the ability to set forth ministerial information such as the issuing agent’s name and issuing office, their ALTA Universal ID, the Loan Number, Issuer’s file number, property address or revision number of the commitment. Use of the Transaction Information Data provisions is optional and the issuer has no liability for its accuracy under Condition 5(e).

The new ALTA 2016 Commitment form is the first to address modifications and damages. This is a significant improvement for all parties. It is now clear under Condition 4 that the issuing company (the “Company”) may, as a general rule, amend the 2016 commitment at any time prior to closing without liability. But, by way of exception, should the Company add any matter recorded in the Public Records prior to the Commitment Date, the Company has liability under Condition 5.

More specifically, the Company is liable for the actual expenses incurred between the prior commitment and the amended or revised commitment that resulted from the proposed insured’s good faith reliance on the prior commitment to comply with the Requirements, eliminate an Exception, or acquire title or create a mortgage. There are caveats to this liability such as prior knowledge by the proposed insured, but generally it should be recognized that the clarity of these liability provisions is a major advance.

Under the Federal Fair Housing and Equal Opportunity Act it is unlawful to republish covenants, conditions and restrictions (“CC&Rs”) that attempt to discriminate based upon race or religion. It is difficult to make reference to CC&Rs that impose both legal and illegal provisions. The ALTA 2016 Commitment specifically addresses this issue in a positive way through an affirmative statement that any such reference does not republish such offensive and illegal provisions.

In summary, it is clear that the current ALTA 2016 Commitment jacket delivers better protections for the Company, their agent, and, most importantly, the consumer.