ALTA
American Land Title Association

Frequently Asked Questions for Lenders Considering Title Insurance vs. Attorney Opinion Letters

When a property is sold or financed, the buyer and the lender want to make sure that no other party has a claim to the property or can claim to have a superior lien. Title insurance is the most common, cost effective and encompassing way of providing this protection. The need for title insurance arose historically from the fact that traditional methods of title assurance, specifically attorney opinion letters ("AOLs") did not provide adequate protection to the parties. With the development and growth of a secondary market for mortgages, title insurance became the industry standard, as it provides uniformity and a known level of assurance to minimize the potential losses that cannot be covered by an attorney opinion letter.

Title insurance provides an indemnity against actual monetary damages arising from defects in, or liens or encumbrances on, the title to real (or in some cases personal) property. Most states have adopted specific laws for licensing and regulating companies to provide title insurance to customers. These laws often require title insurers to be monoline or mandate that insurers sell other lines of insurance they may hold and apply their capital to only one line of insurance. One example of this is the National Association of Insurance Commissioner's Title Insurers Model Act that defines the business of title insurance as, "guaranteeing, warranting or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units and proprietary leases and for all liens or charges affecting the same[1]." The motivating force behind these monoline restrictions was the significant and simultaneous losses experienced by multiline insurers in their mortgage guaranty and title insurance lines during the Great Depression.

There are two categories of title insurance policies offered in real estate transactions. A loan policy protects a lender's security interest in a mortgage or deed of trust by primarily insuring the validity, enforceability and priority of the lien. An owner's policy insures the purchaser against financial loss that may arise from defects in the title including the assertion of liens and encumbrances against the property and non-record defects like fraud and forgery that even the most comprehensive search of the records would not reveal. In contrast, an AOL is a legal opinion which attests to the validity of the title deed to a parcel of property and is subject to the scope of whatever is negotiated between the attorney and their client[2].

In their selling guides, both Fannie Mae and Freddie Mac require mortgage lenders to make several standard representations and warranties, many of which are made for the life of the loan. Using the Fannie Mae guide as an example, these include that a mortgage loan must:

[1] National Association of Insurance Commissioners, "NAIC Model Laws, Regulation, Guidelines, and Other Resources", Title Insurers Model Act, April 1996, 682-3, https://content.naic.org/sites/default/files/model-law-628.pdf

[2] Charles B. Sheppard, Assurances of Titles to Real Property Available in the United States: Is A Person Who Assures A Quality of Title to Real Property Liable for A Defect in the Title Caused by Conduct of the Assured?, 79 N.D. L. Rev. 311, 339 (2003)

- be a valid and subsisting first lien enforceable in accordance with its terms (with no pending condemnation or other legal proceedings) and that otherwise meets Fannie Mae's requirements for loan documents;
- have a mortgagee policy of title insurance meeting Fannie Mae's requirements, or other title evidence acceptable to Fannie Mae. Lenders continue to be responsible for all warranties related to title, marketability, and lien position, regardless of whether included or excluded by coverage under a mortgagee policy of title insurance. Any defect shown on the title policy would not be considered to be an acceptable minor impediment if there was additional cost or delay involved in curing such defect;
- permit foreclosure or other enforcement of the note holder's rights under the loan documents and acquisition of good and marketable title to the underlying security property without incurring any expenses or delays as a result of any matters affecting title to the property, including legal or land use restrictions or other defects relating to the land or location of the improvements[3].

For each of these representations and warranties, a standard loan policy of title insurance provides the selling lender coverage designed to match the risk retained under this framework. The American Land Title Association ("ALTA") works with various stakeholders, including Fannie Mae and Freddie Mac, to design coverage based on these requirements. Along with the warranty that the loan is insured by a mortgagee policy, the selling guides also include a number of policy requirements including that the title insurer have sufficient financial reserves and ratings, is appropriately licensed and that only certain items are excluded from coverage.

In April 2022, Fannie Mae altered its selling guide to allow the use of attorney opinion letters in addition to title insurance for certain loans in limited circumstances[4]. The guide change was designed to conform to Freddie Mac's guide allowing attorney opinion letters, in existence since at least 2008. Following this announcement, both enterprises included calls to examine the expanded use of AOLs to reduce title and settlement costs under their Equitable Housing Finance Plans[5]. Subsequently, multiple providers announced plans to sell AOL products nationwide that purported to meet these guide requirements, though neither Government Sponsored Enterprise (GSE) has provided any indication as to whether these products meet the requirements of their guides. These products are not regulated by state insurance and consumer protection regulators and information about coverage is not readily

[3] Federal National Mortgage Association, "Doing Business with Fannie Mae", Selling Guide, October 4, 2023, ep36, https://singlefamily.fanniemae.com/media/37016/display

[4] Federal National Mortgage Association, "Selling Guide Announcement", Selling Guide, April 6, 2023, https://singlefamily.fanniemae.com/media/31151/display. See B7-2-06 "Attorney Title Opinion Letter Requirements (04/06/2022), https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B7-Insurance/Chapter-B7-2-Title-Insurance/2522435591/B7-2-06-Attorney-Title-Opinion-Letter-Requirements-04-06-2022.htm

[5] Federal National Mortgage Association, "Equitable Housing Finance Plan", June 2022, https://www.fanniemae.com/media/43636/display. Federal Home Loan Mortgage Corporation, "Equitable Housing Finance Plan", June 2022, https://www.freddiemac.com/about/pdf/2022-Freddie-Mac-Equitable-Housing-Finance-Plan.pdf.

available to the public. As noted in a recent update to the Equitable Housing Finance Plans, both Fannie Mae and Freddie Mac have only purchased loans with AOLs sparingly[6].

This guide is designed to assist a mortgage lender considering an AOL program in better assessing the additional risk it would take on when using an AOL instead of title insurance through key frequently asked questions (FAQs). These FAQs are broken into five sections, including questions regarding transaction eligibility, coverage, cost, representation and warranty risk, and legal concerns. This report references claims made by companies offering enhanced AOLs. However, since those products have not been made publicly available, this FAQ utilizes a report prepared by Blank Rome on October 16, 2023, as a sample.

1. Transaction Eligibility
    a. **What types of eligibility limitations do the GSEs place on the use of an AOL?**
    In general, both Fannie Mae and Freddie Mac only allow the use of AOLs in a limited subset of transactions. There are two main limitations for the use of AOLs. First, and most limiting, is the requirement that an AOL be "commonly acceptable in lieu of title insurance by private institutional mortgage investors in the area where the subject property is located." Second, there are a number of ineligible property types that are common in real estate transactions such as, "co-op share loans; and loans secured by a manufactured home," among others."

    As discussed in the following questions, there are not many areas of the country where AOLs are commonly accepted by private institutional lenders. These areas tend to be more rural.

    b. **Is there an authoritative list of locations where an AOL has historically been accepted by private institutional lenders?**
    No. Neither Fannie Mae nor Freddie Mac nor any mortgage related association has published a list of counties where AOLs are commonly accepted. However, based on the limited usage historically by Freddie Mac and discussions with ALTA members, the potential usage area is likely limited to a few select rural counties in southeastern Ohio, West Virginia, Kentucky, northeastern Indiana, and western New York. Additionally, in some areas, to avoid unauthorized practice of law issues, an attorney must review the title search and provide an opinion of title to serve as the basis of the title insurance policy. This includes states like Oklahoma, Iowa and North Dakota.

    c. **What property type limitations do the GSEs place on the use of AOLs?**
    In addition to the above geographic limitations, AOLs may not be used in connection with loans secured by cooperative share properties, dwellings on leasehold estates, and manufactured homes. AOLs are also not permitted to be used for Texas Section 50(a)(6) loans, community land trust mortgages, loans executed using a power of attorney, or HomeStyle Energy and HomeStyle Renovation Loans.

[6] See Fannie Mae, Equitable Housing Finance Plan 2022 Performance report, https://www.fanniemae.com/media/46616/display

While Fannie Mae updated its guidelines in December 2023 to allow the use of an AOL on a common interest community, planned unit development (PUD) and/or condo, it still maintains certain underwriting requirements that go beyond what is found in a search of public land records. This includes opinions as to payment of all currently payable association dues, lack of a right of first refusal or other need for association approval of sale, and that there is no present violation of covenants, conditions and restrictions (CC&Rs).

According to the Community Association Institute (CAI)[7], approximately 27.7 million housing units are within a community association. This includes both condominium, townhouse and single-family home associations. To create a condo or homeowner's association under state law, the owner of the real estate must issue a series of covenants, conditions and restrictions (commonly CC&Rs) that restrict the usage of the real estate. Roughly 74.2 million Americans live in community associations or almost 29% of the U.S. population. CAI estimates the total value of homes in community associations to be $11 trillion or roughly 23% of aggregate home values in the U.S.

As noted in the Blank Rome report, the opinion at the center of an AOL is made "solely based on the examination and review of 'Title Records' that the firm located in the 'Public Records'.[8]" These terms are defined in the AOL to include only those systems of records established by state law to impart constructive notice to bona fide purchasers. While title insurance policies use similar definitions of public records, the core coverages in title policies are not limited to matters that were discoverable in public records.

Most of the opinions necessary to comply with Fannie Mae's requirements for use of an AOL on a condominium, homeowners' association or planned unit development transaction requires the use of information not contained in the types of records covered by an enhanced AOL. For example, no public records search will find proof that there are any currently due and payable dues, assessments and penalties that could constitute a superpriority lien against the property. The only way to obtain that information is from the common interest community or other third-party data aggregator. Title insurance policies offer specific endorsements to address these issues.

[7] "U.S. National Data", Foundation for Community Association Research, last modified 2021, https://foundation.caionline.org/

[8] See footnote 50 of Blank Rome, *Making the Old New Again: The Resurgement of Attorney Opinion Letters as an Alternative to Tilte Insurance* Published October 16, 2023.

Additionally, an estimated 17.5 million Americans live in manufactured homes[9]. Manufactured homes account for over half of all owner-occupied housing units less than $50,000[10].

d. What does it mean to "be insured against malpractice in rendering opinions of title in an amount commonly prevailing in the jurisdiction, taking into account the volume of opinions rendered by the attorney"?

In general, attorneys are required to have malpractice or errors and omissions (E&O) insurance, which covers the attorney in the event of a third-party claim for negligence. Given the limitations of malpractice coverage, there are three key questions lenders should ask before engaging an attorney for an AOL.

First, lenders should ask about the aggregate cap on malpractice coverage. Most malpractice policies provide both a per incident and aggregate policy limit for a calendar year. Once that limit is met, an attorney's E&O insurance policy no longer provides coverage.

Second, lenders should ask about whether the policy is "claims made" vs "claims incurred". Claims made policies only provide coverage if they are in force when the claim is presented to the attorney. If the transaction closes in one year and the attorney switches insurers or dies later, the matter may not be covered when it arises down the road. If it is a claims incurred policy, you will want to examine any tail coverage endorsements which help extend the policy typically based on state statute of limitations for bringing suits against attorneys. Note that in some states the statute of limitations for a suit for negligence against an attorney is very short. For example, in Kentucky, where AOLs are common in some areas, the statute of limitations for a professional malpractice claim is one year from the date of the occurrence[11]. Unless the title defect is discovered within one year, the Kentucky statute would bar a claim against the attorney under the AOL.

Third, lenders will need to be made a third-party beneficiary of any policy. This will allow the lender to have direct access to make a claim with the insurer rather than having to sue the attorney and only obtain indemnity payment when the attorney is found negligent. In a 2011 report, Lawyer's Mutual Insurance Co. of Kentucky noted that while AOLs were responsible for **4.46%** of all attorney malpractice claims nationwide, in

[9] Consumer Financial Protection Bureau, "Manufactured Housing Finance: New Insights from the Home Mortgage Disclosure Act Data", May 2021, ep8, https://files.consumerfinance.gov/f/documents/cfpb_manufactured-housing-finance-new-insights-hmda_report_2021-05.pdf

[10] Park, Kevin. "Real and Personal: The Effect of Land in Manufactured Housing Loan Default Risk", City Scape, The United States Department of Housing and Urban Development, 1 March, 2022, Volume 24, ep399, https://www.huduser.gov/portal/periodicals/cityscape/vol24num3/ch14.pdf

[11] KY. REV. STAT. ANN. § 413.245

Kentucky where AOLs are more commonly used in residential deals, they represent **15%** of all malpractice claims[12].

2. Differences in Coverages

a. Is coverage equivalent to title insurance?

No. Despite claims that certain attorney opinion letters provide a "full coverage" alternative[13], there are several major risk areas where an AOL (including those enhanced by a transactional liability policy) do not provide coverage that would normally be available with title insurance.

b. What are the main areas that title insurance covers that AOLs do not?

The main area of difference is in the category of unknowable risks or items that cannot be discovered through a diligent public land records search. This includes fraud and forgery in the chain of title, unrecorded liens like recent mechanics liens, lower dollar tax liens, liens of delinquent HOA dues and heirs or probate issues. Beyond this, there are also issues when documents are not properly executed, indexed or recorded by public officials.

Fraud and forgery are a major source of claims paid by title insurance representing roughly 20% of the over $4.4 billion paid out in losses by title insurers since 2013[14]. In their most recent public reporting on the topic, one national title insurer found that over half of all claims could not be traced to an error, making them uncovered if the insured had gotten an AOL instead of title insurance.

c. What about closing protection?

A closing protection letter (CPL) or insured closing letter indemnifies lenders and purchasers for loss caused by a settlement agent's fraud or dishonesty in handling funds and documents, as well as a failure to follow the lender's written closing instructions when they impact the title[15]. The NAIC Title Insurers Model Act Section 6 permits title insurers to issue closing protection letters, and some state laws bring these products within the monoline aspects of the statute. Given these laws, it is likely that a company that is not a licensed title insurance company cannot issue a CPL or provide closing protection insurance to a third-party lender or consumer.

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[12] Prather, John. "A Letter to the Members of the Kentucky Bar Association", Lawyers Mutual, Winter 2013, Vol 24, issue 1, ep 12, https://www.lmick.com/index.php?option=com_zoo&Itemid=116&element=cf99848a-40b1-40f9-ab59-7e2b352ae854&format=raw&item_id=76&lang=en&method=download&task=callelement

[13] "Voxtur AOL", Full Coverage Title Insurance Alternative, Voxtur, last updated 2023, https://www.voxtur.com/aol/

[14] American Land Title Association, "2022 Year-end Industry Composite Financial Statement",https://www.alta.org/business-operations/research-and-benchmarking/industry-financial-data/22-04/american-land-title-association-industry-2022.pdf

[15] BARLOW BURKE, LAW OF TITLE INSURANCE § 13.10 at 13-102 (3d ed. 2000)

d. Does a CPL signed by the settlement agent provide additional protection beyond a standard indemnity in closing instructions?

Not likely. Certain AOL programs offer lenders a version of a closing protection letter that copies much of the same language as a standard ALTA CPL. However, there is one key difference. A standard CPL is issued by a third-party title insurer and is backed by their assets. The quasi-CPL or closing indemnification letters offered by AOL providers are only backed by the assets of the settlement attorney/agent and potentially its E&O insurance.

From a lender's perspective, the main purpose of a CPL is to obtain the financial backing of the third-party insurer for the actions of the settlement agent that impact the title or funds. This makes it easier to work with local agents or attorneys that have been selected by the consumer, thus aiding consumer shopping. It also reduces due diligence expense since they do not need to review the financial capacity of each agent or attorney that does a closing.

The quasi-CPLs issued on certain AOLs loans do not achieve this goal. They do not provide the lender with any additional protection or financial capacity when dealing with issues involving closing attorneys. Further, the settlement attorney would likely incur no additional responsibility since its responsibilities and indemnities are outlined in the written closing insurance. Lastly, a lender would likely want to do a financial review of the settlement agent, since the settlement agent is the only source of recoupment if funds are managed incorrectly.

e. What are the key differences in the claims process between an AOL and title insurance?

There are three main ways the claims process differs between AOLs and title insurance. First, AOLs have a weaker duty to defend the lender in the event of claim. Second, under an AOL a claim does not ripen until the lender attempts to foreclose or writes off the loan. Third, unlike title insurance, an AOL is third-party insurance meaning it insures against liability incurred by the attorney for injuries caused to the lender's title.

A typical attorney opinion letter does not provide any duty to defend[16]. A lender's only recourse is to sue the attorney for negligence and hope that the attorney's malpractice insurance and net worth is sufficient to pay monetary damages awarded by the court. The malpractice insurer might have some obligation to pay the defense of the attorney in defending themselves from malpractice claims but not the lender in bringing the claim. Further, some E&O policies are classified as "wasting" policies, which means the cost of defense is deducted from the amount of coverage provided, further limiting the available recovery.

The enhanced AOLs being offered by companies in the market claim to provide a level of defense for lenders from claims brought by third parties. Under the enhanced AOL profiled in the Blank Rome report, the amount of defense is capped at $50,000. As Blank

[16] Watson v. Muirhead, 57 Pa. 161 (1868)

Rome notes, that amount is likely insufficient because, "in our experience, the litigation of title issues can often become complicated and take several months, and sometimes years, to resolve, depending on the jurisdiction."

Under a standard title insurance policy, the cost of defense is separate from the amount of coverage provided. Defense costs do not reduce coverage. Further, the duty to defend an insured is considered to be broader than the duty to indemnify. This means that if liability under the policy is unclear, the insurer will likely still need to defend the insured lender until coverage can be determined. This becomes critical for residential lenders when lending against properties that can have compound reasons for a claim or default such as with mechanics liens and tax liens.

A core condition of the enhanced AOL to trigger coverage is an attempt (successful or not) to foreclose the loan. Specifically, the AOL policy states that a condition of coverage is a successful foreclosure by the mortgagee; an attempt to foreclose the mortgage but the attempt was unsuccessful because of a title issue; a determination by the mortgagee that it was not economical to foreclose and the lender charged off the loan; a repurchase demand from a third-party purchaser and the loan is resold in an arms-length transaction or the lender was required to renegotiate the terms of the loan purchase agreement. All these conditions require a number of subsequent steps to be taken by the lender after it becomes aware of the title issue.

By contrast, under a title insurance policy the insured lender can make a claim as soon as they become of aware of a covered matter[17]. At that same time, the duty to defend can be triggered[18]. While foreclosure helps in determining the amount of loss suffered by the insured lender, it is not a predicate to obtaining coverage or defense[19]. An owner's policy does not utilize foreclosure for a determination of the amount of loss. While an enhanced AOL purports to cover owners along with lenders, it seems axiomatic to require foreclosure as a condition of obtaining coverage given that many title claims can be resolved through the duty to defend.

Lastly, under a standard ALTA title insurance policy, the insured lender and any successors (or buyer under an owner's policy) is a direct insured[20] making title insurance a first-party insurance product. Conversely, under the enhanced AOL reviewed by Blank Rome, the attorney agrees to indemnify the lender and borrower (and their successors) and the policy names the lender as a third-party beneficiary. While a claimant able to submit a claim to the insurer includes third-party beneficiaries according to Blank Rome,

[17] American Land Title Association, "2021 Loan Policy", Condition 3, July 1, 2021, https://www.alta.org/policies-and-standards/policy-forms/download.cfm?formID=602&type=word
[18] American Land Title Association, "2021 Loan Policy", Condition 7, July 1, 2021, https://www.alta.org/policies-and-standards/policy-forms/download.cfm?formID=602&type=word
[19] American Land Title Association "2021 Loan Policy", Condition 8(b), July 1, 2021, https://www.alta.org/policies-and-standards/policy-forms/download.cfm?formID=602&type=word
[20] American Land Title Association, "2021 Loan Policy", Condition 1(j), July 1, 2021, https://www.alta.org/policies-and-standards/policy-forms/download.cfm?formID=602&type=word

they still conclude, "the above coverage language could be read as requiring the Insured to suffer Damages from other Claimants before the insurer is obligated to make a payment in connection with a Claim." This issue is most acutely described by the scenario where a neighbor claims to have an easement across the property. The owner, aka the claimant under the AOL, may not be able to trigger the duty to defend or indemnify because they may not incur financial damages under the AOL until after a court determines the status of the easement. Thus, instead of having a first-party claim as a direct insured, a lender under an AOL likely has a third-party claim requiring them to bring a successful suit against the insured attorney before obtaining claims payment.

f. **Who are the insurers that are backing these enhanced AOLs?**
Given the lack of transparency around the enhanced AOL products, the insurers providing the transactional liability policy are not publicly known however they are believed to be surplus, errors and omissions or non-admitted insurers. The Blank Rome report (or any other public piece of information) does not name these insurers or provide any information on their licensing and financial capacity. When asked by state insurance regulators at the NAIC, the leading enhanced AOL provider refused to provide the names of their insurer[21].

g. What is a surplus line insurer?
According the NAIC, "The surplus lines market is a unique segment of the property & casualty industry consisting of non-admitted specialized insurers covering risks not available within the admitted market[22]." One of the key requirements of state laws authorizing surplus lines is that this "type of insurance cannot be obtained from insurers who are admitted to do business in this state[23]." Given the similarity between the coverages of an enhanced AOL and the coverages of title insurance it raises questions about whether these policies are legally sold by a surplus line insurer.

Additionally, surplus or non-admitted insurers are not licensed by the state insurance department in which they operate and do not have to comply with the same consumer protections as admitted insurers (like a requirement to file rates and forms and have them reviewed by the state). Lastly, surplus line insurers do not follow the same financial reserve rules as admitted markets to cover financial losses.

h. What rules are in place to ensure an insurer has adequate reserves to pay claims?
Most surplus line insurance policies are single-year policies requiring renewal each year. Because of this, state laws do not require similar long term reserving requirements and

[21] National Association of Insurance Commissioners, Title Insurance (C) Task Force, Dec. 14, 2022, Minutes, https://content.naic.org/sites/default/files/national_meeting/Title%20TF-2022%20Fall%20National%20Meeting.pdf
[22] "Surplus Lines", Center for Insurance Policy and Research, National Association of Insurance Commissioners, Last updated September 22, 2023, https://content.naic.org/cipr-topics/surplus-lines
[23] National Association of Insurance Commissioners, "NAIC Model Laws, Regulation, Guidelines, and Other Resources", Nonadmitted Insurance Model Act, Summer 2023, ep 870-4, https://content.naic.org/sites/default/files/inline-files/MDL-870.pdf

instead rely on minimum capital requirements. Further given the financial risks of these transactions, these products are not available for coverage from a state's guaranty association. Lenders reviewing an enhanced AOL should consult counsel to review the financial stability of the insurer and ask what metrics are used in the determination of a financial rating by a rating agency.

Title insurance is different because an insured pays a one-time premium at closing with no renewals and with coverage continuing through the life of the loan or ownership. Given the long loss tail of title insurance, it will take four years or more for title companies to see 50% or more of their expected claims from a given policy year.

i. **Is this a lender-only product?**
The AOL product offered by United Wholesale Mortgage does not include any consumer coverage. Borrowers must obtain their own separate title insurance coverage if they wish protection. Blank Rome notes that the Voxtur enhanced AOL appears to include the buyer as a beneficiary that the attorney agrees to indemnify but they are not a named insured that can make first-party claims under the policy. Additionally, the coverages of the enhanced AOL are geared toward lender-specific risks such as lien priority.

3. Cost

a. **Can attorneys charge additional fees beyond the reported price of the AOL?**
Yes. Nothing prohibits an attorney from charging additional fees beyond the reported price of the AOL such as a title search or closing fee. According to Fannie Mae's analysis of Uniform Closing Data, the median cost of title insurance plus settlement charges is 0.67% of the purchase price[24]. Lenders will need to look beyond the sticker price of the AOL and examine all potentially regulated and unregulated fees to verify the reality of any advertised cost savings.

AOLs currently in the market specifically expect attorneys to charge additional fees for the services as a settlement agent. In most states, the premium for title insurance is regulated, either promulgated or filed with state regulators. Additionally, in many states, the price is inclusive of all or most of the services performed by a title agent in the transaction, including the cost of a title search.

Further, on the TILA-RESPA Integrated Disclosure Rule, any charges associated with title services are specifically listed on services the consumer could or could not shop for and must include the prefix "Title –.[25]" Any charge for issuing an AOL, whether conducted by a staff attorney or outside lawyer should be listed in this manner even if the pricing model is a specified number of basis points.

[24]Federal National Mortgage Association, "Barriers to Entry: Closing Costs for First-Time and Low-Income Homebuyers", Research and Insights, December 2, 2021, https://www.fanniemae.com/research-and-insights/publications/barriers-entry-closing-costs-first-time-and-low-income-homebuyers
[25] 12 CFR § 1026.37(f)(1)(i)

b. **If my consumer is buying an owner's policy (or the seller is paying for an owner's policy) can I still get AOL coverage?**
Yes, however an AOL is likely to be more expensive than buying a lender's title insurance policy. Under most state laws and company rate filings, if a loan and owner's policy are bought at the same time for the same property, the title company will provide a significant discount on the premium for the loan policy. This is called simultaneous issue pricing.

In a significant number of states, it is common for the seller to buy the owner's policy for the benefit of the buyer. Some of these states include Alaska, Alabama, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, Wisconsin, and Wyoming. In such states, it would make little sense to use an AOL since they will likely be more expensive than the simultaneous issue rate for a loan policy. In the rest of the county, roughly 75% of purchasers buy an owner's title insurance policy, so a simultaneously issued loan policy would be available at a discount as well.

If you take the example of a $349,000 loan, the simultaneous issue rate for the loan policy is $325 in Ohio, $595 in New York, $100 in Arizona, $100 in Texas, $550 in Colorado and $400 in Florida[26].

c. **If this is a refinance transaction or a purchase transaction where the home was recently sold, are there discounts for title insurance that are available to my customer and how do I help make sure I get those discounts?**
Yes. Under most state laws and company rate filings, if a buyer refinances their loan within a set number of years after purchasing the home and obtains title insurance from the same insurer, they will be entitled to a reissue credit to reduce their title premiums. Additionally, many insurers have special rates with lender customers integrated with the title company that ensures those customers get the reissue rate even if the insurance is not placed with the same company.

4. Representation and Warranty Concerns
   a. **Does the use of an AOL increase my representation and warranty risk when selling to the GSEs?**
   Most likely. At a May 2023 House Financial Services Committee hearing, the Director of the Federal Housing Finance Agency said, "the enterprises require that the seller, whoever is selling the loans to them, that the lender that they represent that the home that's being purchased, has a first lien that there's no superior liens and that the title is clean, is clear. And the lender has to represent that that is true[27]." Given the coverage gaps in an AOL relative to title insurance, a lender using an AOL is taking on additional risk when making those representations and warranties. Further, given the vague

[26] Based on title insurer national rate calculator such as https://ratecalculator.fnf.com/
[27] House Financial Services Committee, "Hearing entitled: FHFA Oversight: Protecting Homeowners and Taxpayers." May 23, 2023, Available at https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=408797

geographic limitations and the restrictions as to the types of properties described in the GSE guides, a lender is taking on significant fundamental risk using an AOL If it is determined that property or location does not fit the GSE guides. In that case, the lender will be responsible to buy back that loan. The main way to reduce a lender's representation and warranty liability for title matters is through a lender title insurance policy.

b. **Will this increased risk be covered by my representation and warranty insurer?**
If a lender purchased representation and warranty insurance, they should pay attention to exclusions from coverage. Most representation and warranty insurance will exclude losses arising from facts and circumstances known to the insured. If the lender has not disclosed this additional business risk to the insurer, it may find coverage lacking in the event of a putback.

c. **If I service my loans or buy servicing rights, will using an AOL make it more difficult or costly to obtain default title services during a modification or foreclosure?**
Likely yes. When servicing a loan in default, a servicer will commonly need to purchase default title products including searches, modification products and trustee sales guarantees. Those products often will rely on the prior title work and indemnification agreements between title insurers to help reduce the costs in line with the reimbursement limits allowed by the GSEs. Since individual attorneys and the providers of the AOLs are not party to those agreements, the cost savings may not be available making it more costly and difficult to produce default title work on those properties. At the point a loan is in default, in a workout, or in foreclosure, it is unlikely any title insurer will be willing to take on the heightened risk of insuring title.

5. Legal concerns
   a. **Do these products violate state insurance law?**
   Most likely. As noted above, state insurance laws define title insurance to mean "guaranteeing, warranting or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units and proprietary leases and for all liens or charges affecting the same[28]." These laws also have a catch-all provision stating that, "doing or proposing to do any business substantially equivalent to any of the activities listed in this subsection in a manner designed to evade the provisions of this Act" is also the business of title insurance. It is likely that a state could find that offering certain AOLs is conducting the business of title insurance without a license[29].

[28] National Association of Insurance Commissioners, "NAIC Model Laws, Regulation, Guidelines, and Other Resources", Title Insurers Model Act April 1996, 682-3, https://content.naic.org/sites/default/files/model-law-628.pdf
[29] Norwest v Nebraska, 571 N.W.2d 628 (1997)

One state that has statutory language similar to above is Texas. As of October 2023, the Texas Department of Insurance has referred one provider of enhanced AOLs to the enforcement division for violations of the state's insurance code[30].

In April 2002, the North Carolina Commissioner of Insurance issued Bulletin 2002-B-3 in which it specifically warned insurers that it was "grossly improper" to incorporate title insurance coverage into surplus lines products. The Commissioner confirmed that "[a]ny product that, in essence, insures against loss by reason of defective title or incorrect title searches is title insurance, regardless of the semantics employed[31]."

b. If a state found these products to violate insurance law how could a cease-and-desist order impact outstanding AOLs?

If a state found an insurer that provided coverage for enhanced AOLs violates state insurance law, they will likely be issued a cease-and-desist order that prohibits the further action that is unlicensed title insurance.

One example is the California Department of Insurance's case against Radian[32] in the early 2000s for offering unlicensed title insurance. In that case, Radian was issued a cease-and-desist order that limited their ability to continue selling products but also from having contact with any other person for soliciting, negotiating, arranging, discussing or otherwise transacting title insurance in any manner. This would likely limit the ability to pay or service claims under this broad of an order.

c. Could encouraging these products increase a lender's Unfair Deceptive and Abusive Acts and Practices (UDAAP) risk?

Potentially. According to the CFPB's supervision guide[33] a practice is unfair if it presents a risk of substantial harm to consumers that the consumer cannot reasonably avoid. As noted in the Blank Rome paper, while one leading enhanced AOL provider markets their product as a full coverage title alternative, the coverage is not the same. Additionally, as Blank Rome notes, the ability of consumers to make claims directly to the AOL insurer is not clear. This opens the possibility that a consumer would face a substantial risk of harm because they thought they were protected when they did not have direct coverage and would have no ability to avoid that risk.

Under the CFPB's guidelines, an act is deceptive if a statement is made to the consumer that includes material representations or omissions that are likely to mislead a reasonable consumer. How would a consumer protection regulator look at the marketing of a product to a consumer that 1) may not provide coverage to them, 2)

[30] "Insurance Complaints", Texas Department of Insurance, Complaint ID 342089, last updated October 23, 2024, https://www.tdi.texas.gov/consumer/complaint-data.html

[31] NC Bulletin No. 2002-B-3 (NC INS BUL), 2002 WL 33820310 (NC INS BUL) (April 17, 2002)

[32] Radian v Garamendi 127 Cal.App.4th 1280 (Cal. Ct. App. 2005)

[33] Consumer Financial Protection Bureau, "Unfair, Deceptive, or Abusive Acts or Practices", CFPB Supervision Examination Manuel, March 2022, ep 1749, https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf

does not provide equivalent protection despite marketing assertations that an AOL is a full coverage alternative to title insurance and 3) that the product may not even be legal to issue in the state?

An act is abusive according to the CFPB if it takes unreasonable advantage of a consumer's reasonable reliance that a covered person is acting in the consumer's interest. If a lender (who is a covered person) has reason to suspect that title insurance provides more comprehensive coverage at a lower cost (which is almost always true in the seller pay states, including those listed above) would encouraging a consumer to purchase an AOL be abusive?

d. **How can a mortgage banker manage their service provider risk when using an AOL?** Under the CFPB's guidance, "The CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships." Under these guidelines, the CFPB expects lenders to conduct due diligence to verify the provider's ability to comply with consumer financial protection laws like RESPA and UDAAP and review their policies and procedures and other controls. While lenders have built processes to do this with title agents and insurers over the past decade, including use of the ALTA Best Practices, the different risks presented by AOLs to consumers and lender operations would likely require different due diligence procedures.

This set of Frequently Asked Questions is not meant to be comprehensive or all-encompassing. Lenders considering using these attorney opinion letter products should consult with counsel to determine the additional risks they present to their business. As lenders consider programs to help with housing equity and affordability, we encourage you to reach out to your title insurance partners to hear about different programs they have developed.