

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

*Ex Parte:* In re: Rules Governing Settlement Agents

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CASE NO. INS-2015-00170

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COMMENTS AND STATEMENTS OF POSITION OF THE BUREAU OF INSURANCE

On November 9, 2015, the State Corporation Commission ("Commission") entered an Order to Take Notice of the Bureau of Insurance's ("Bureau") proposed amendments to the Commission's Rules Governing Settlement Agents, which are set forth in 14 VAC 5-395-10 *et seq.* of the Virginia Administrative Code ("Chapter 395").

The proposed changes to Chapter 395 seek to clarify the scope of the regulations, add definitions to align with Chapter 27.3 of Title 55, § 55-525.16 *et seq.* ("RESA"), of the Code of Virginia ("Code"), and enhance consumer protections.

The deadline to submit comments or request a hearing on the Bureau's proposed amendments to Chapter 395 was December 31, 2015. The Commission received several requests for an extension of the comment period due to the holidays and the October implementation of the Consumer Financial Protection Bureau's Integrated Mortgage Disclosures Rule. The comment period was extended to February 16, 2016.

The Commission received extensive comments from Virginia's largest title insurance trade association the Virginia Land Title Association ("VLTA"). It also received comments from three title insurance companies, ten title insurance agencies and agents, four attorneys, and one consultant covering nearly all aspects of the proposed regulations. Comments were submitted by 176 Notaries Public opposing the proposed changes to Chapter 395 insofar as they require a Notary Public to become licensed and registered as a title insurance settlement agent. The

Deputy Secretary of the Commonwealth also filed a comment requesting clarification that Notaries Public are exempt from the licensing and registration requirements of title insurance settlement agents. The Commission received no request for a hearing.

Below is a general summary of the comments received along with the Bureau's responses.

I. APPLICABILITY

The Bureau proposed corrective changes to the applicability of Chapter 395 (14 VAC 5-395-10). The proposal correctly identifies, pursuant to § 55-525.18, that the regulations apply to the provision of escrow, closing, or settlement services involving the purchase of or lending on the security of any real property in Virginia. Currently, 14 VAC 5-395-10 inaccurately states that the applicability of Chapter 395 is limited to one-to-four family residential dwelling units in Virginia.

The Bureau received comments in support and in opposition of its proposed change to 14 VAC 5-395-10, and comments that the regulation should specifically exclude attorneys.

The Commission regulates the business of insurance in Virginia and attorneys are regulated by the Virginia State Bar. Since Chapter 395 applies to title insurance agents, agencies, and companies that provide settlement services involving Virginia real estate, there is no need to specifically exclude attorneys. The Bureau's proposed change is appropriate as it clarifies that the applicability of Chapter 395 is consistent with RESA.

II. DEFINITIONS

The Bureau proposed the addition of several definitions to Chapter 395. Some of the defined words were previously found in the regulations with references to Code definitions, while other words and definitions were added for clarity. The definitions for: "agent" or

"insurance agent" and "business entity" were taken from § 38.2-1800 of the Code; "title insurance agency" or "title insurance agent" was taken from § 38.2-4601.1 of the Code; and "escrow, closing, or settlement services" and "settlement agent" were taken from § 55-525.16 of the Code. The definitions for "designated licensed producer" and "employee" were proposed to conform to the legislative changes to § 38.2-1820 B 2 of the Code (HB 393) that will be effective July 1, 2016.

The Bureau received comments that RESA applies to title insurance agents, not all lines of insurance, and, therefore, the definitions of "agent" or "insurance agent", "designated licensed producer", and "employee" should be narrowed to refer only to title insurance agents. Another comment suggested that the definition of "business entity" be amended because not all business entities (such as professional corporations and professional limited liability companies) are eligible to hold a title license.

The Bureau is amenable to amending the definitions of "agent" or "insurance agent", "business entity", "designated licensed producer", and "employee". The Bureau does not oppose the VLTA's suggested changes to "escrow, closing, or settlement services," but believes that the suggested changes go beyond what is currently required by § 55-525.16 of the Code.

The Bureau also received numerous comments on the definition of "settlement agent". Several commenters stated that the Bureau's proposal broadened the scope of who is a settlement agent, while others questioned who is permitted under the definition to conduct the settlement conference. Numerous Notaries Public objected to the definition arguing it will require Notaries Public who conduct settlement conferences to become licensed and registered as title insurance settlement agents.

The proposed definition of "settlement agent" was taken from § 55-525.16 of the Code. This definition is not new – it was enacted by the General Assembly in 2002 and has been in place 14 years. Under the definition, a settlement agent is a "person" other than a party to the real estate transaction. For purposes of Chapter 395, a "person" is, or based upon that person's actions should be, an individual title insurance agent, a title insurance agency, or a title insurance company. A settlement agent also must provide "escrow, closing, or settlement services" in connection with a transaction related to Virginia property. The activities that make up these services are defined in § 55-525.16 of the Code and in Chapter 395. And finally, the settlement agent must also be listed as the settlement agent on the settlement statement or Closing Disclosure for the transaction. If these factors are met, that person is the "settlement agent" for a given transaction under RESA and Chapter 395, and must be properly licensed and registered.

The inclusion of this definition in the proposed regulations prompted concerns that Notaries Public and other unregistered individuals who conduct settlement conferences would be required to become registered. The Bureau has long held the position that a properly licensed and registered title insurance agency may permit unlicensed and unregistered officers, directors, or employees of the agency to conduct settlement conferences, as long as that person's activities are supervised by the designated licensed producer or other licensed title insurance agent employed by the agency.<sup>1</sup> Under these scenarios, the title insurance agency is the "settlement agent" for the transaction. If the officer, director, or employee sells, solicits, or negotiates a contract of title insurance, that person must be licensed as a title insurance agent.

The last sentence of the definition for "settlement agent" provides, "[a]ny person, other than a party to the transaction, who conducts the settlement conference and receives or handles

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<sup>1</sup> Administrative Letter 1997-5.

money shall be deemed a 'settlement agent' subject to the applicable requirements of RESA." A Notary Public may obtain signatures on closing documents without a title insurance license or settlement agent registration when acting on behalf of a properly licensed and registered settlement agent provided that the Notary Public does not receive or handle money, and/or does not sell, solicit, or negotiate a contract of title insurance.

On a related note, the Bureau proposed in 14 VAC 5-395-75 a requirement that any person, other than a party to the transaction, who conducts the settlement conference and receives or handles money, including possessing *wire transfer authority*, shall be deemed a "settlement agent" subject to the applicable requirements of RESA and Chapter 395. Comments received were the same as those for the definition of "settlement agent", specifically, whether an individual who has wire transfer authority is a "settlement agent". The addition of this requirement is an attempt by the Bureau to clarify that receiving or handling of money includes the wire transfer of funds.

### III. CONSUMER PROTECTION

The Bureau proposed changes to registration, insurance and bonding, audits, reporting requirements, and operating requirements to enhance consumer protection.

#### A. Registration

The Bureau proposed that at the time of registration, a settlement agent will provide to the Bureau, among other things, the name of its designated licensed producer who will be responsible for the agency's compliance with insurance law and regulation. Additionally, within 30 days of registration, a settlement agent will provide to the Bureau any fictitious or assumed names, business locations, escrow accounts, an employee and independent contractor list, website(s), and affiliated entities for transactions involving Virginia real estate.

A commenter recommended replacing "designated licensed producer" with "name of designated licensed producer", and changing "any fictitious names" to "any fictitious or assumed names". The Bureau is amenable to the suggested changes.

#### B. Insurance and Bonding Requirements

The Bureau proposed a clarification in 14 VAC 5-395-40 that a deductible is permitted on the required errors and omissions insurance policy; however, payment on a bond claim shall not be prevented or delayed by the requirement that a settlement agent first pay a deductible. The Bureau struck the language "title insurance agent, title insurance agency, and title insurance company that acts as a" that appeared prior to the term "settlement agent", because a definition for "settlement agent" was included as part of the proposal. Several commenters stated that the striking of the aforementioned language resulted in the insurance requirements being overly broad, and that title insurance companies should be specifically excluded. The Bureau agrees that title insurance companies should be excluded from these insurance and bonding requirements which only apply to title insurance agents and agencies.

#### C. Audits

The Bureau's proposal added requirements that settlement agents escheat unclaimed funds yearly to the Virginia Department of the Treasury; comply with the Uniform Disposition of Unclaimed Property Act; and complete and file a close-out audit with the Bureau within 180 days from the cessation of conducting settlements.

As with the insurance requirements, several commenters offered that insurance companies should be exempt from the audit requirements. Additionally, one commenter expressed opposition to the close-out audit. The Bureau agrees that title insurance companies are exempt from the requirements of § 55.525.20 B of the Code, and that the accounting and

reporting requirements in § 55-525.29 of the Code are sufficient; therefore, title insurance companies will be excluded from the proposed audit requirements. Regarding close-out audits, § 55-525.24 A of the Code requires that all funds deposited with the settlement agent in connection with an escrow, settlement, or closing are handled in a fiduciary capacity. Upon the cessation of business, the Bureau confirms through the close-out audit that a settlement agent has properly disbursed or escheated all funds.

A few commenters felt that the yearly escheatment requirement is not consistent with The Uniform Disposition of Unclaimed Property Act (§§ 55-210.1 *et seq.*). The general rule for escheating property is found in § 55-210.2:1 of the Code which states, "[a]ll tangible and intangible property, including any income or increment thereon, less any lawful charges, that is held, issued or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than five years after it became payable is presumed abandoned, except as otherwise provided by this chapter."

A settlement agent, however, has a fiduciary duty to disburse funds in its possession and return funds to the rightful owner. If the settlement agent has unsuccessfully attempted to return funds to the rightful owner, § 55-210.10:2 of the Code is applicable, which provides "[a]ny holder of tangible or intangible personal property, the owner of which is unlocatable, may voluntarily report the property to the State Treasurer, prior to the statutory due dates, whereupon the property shall be presumed abandoned under this chapter." Accordingly, a yearly escheatment requirement for settlement agents is appropriate because it supports the settlement agent's fiduciary duty to disburse funds and is permitted by The Uniform Disposition of Unclaimed Property Act as voluntary reporting.

#### D. Reporting Requirements

The Bureau proposed new reporting requirements with the purpose of raising the Bureau's awareness when a settlement agent's financial health is potentially compromised. The reporting requirements include the events of bankruptcy, reorganization, or receivership; a governmental authority institutes or takes formal administrative, regulatory, or enforcement action against the settlement agent; license surrender or denial in another state; cessation of business; the settlement agent or its members, partners, directors, officers, principals, employees, or independent contractors is indicted or convicted of a felony; and seizure or forfeiture of funds.

All of the title insurance companies and several agencies commented that, because of the large size of their business entities, the reporting requirements are too burdensome. Chapter 395 applies only to title insurance agents, agencies and companies who provide escrow, closing or settlement services involving Virginia real estate. Accordingly, reporting is limited to events that pertain to transactions involving Virginia real estate.

Several title insurance companies also commented that funds are commonly escheated or surrendered to a court through an interpleader action, and that the requirement to report "forfeited" funds is likely too broad. The Bureau did not intend to capture these types of "forfeited" funds and will specifically exempt escheating funds or surrendering funds to a court through an interpleader action.

Commenters also voiced opposition to having to report alleged wrongdoing instead of final dispositions. The Bureau understands the concerns of reporting alleged violations of law and will tailor the reporting requirements in 14 VAC 5-395-60 to final dispositions.

### E. Operating Requirements

The Bureau proposed prohibitions against providing false, misleading or deceptive information to a consumer, and against charging duplicative or inflated fees for escrow, closing, or settlement services. The Bureau also added requirements (i) for reconciling escrow accounts monthly; (ii) for maintaining documentation that supports all entries on a settlement statement or Closing Disclosure; (iii) that an agency be appointed by the same title insurance company as its designated licensed producer; (iv) that a settlement agent only utilize a title insurance agent who is an independent contractor to conduct settlements if he is properly licensed, insured, and bonded; and (v) that records containing a consumer's personal financial information or copies of a consumer's identification documents be disposed of in a secure manner.

Commenters offered that the prohibition against charging duplicative or inflated fees for escrow, closing, or settlement services is unclear or is an impermissible attempt to control the price charged for settlement services. Two commenters suggested changing the word "inflated" to "padded".

The proposed change against charging duplicative or inflated fees is an attempt by the Bureau to clarify the prohibition in § 55-525.25 of the Code against materially false or misleading statements or entries on a settlement statement or Closing Disclosure. An example of a materially false entry on a settlement statement or Closing Disclosure would be charging a consumer twice for one survey. An example of an inflated or padded fee would be charging a consumer \$100 for a title abstract when the underlying receipt from a third party for the service shows a \$75 charge and there is no additional service provided by the settlement agent. The Bureau is agreeable to changing the prohibition from "inflated" to "padded" fees.

The Bureau proposed two new requirements for settlement agents who use independent contractors. These requirements are aimed at encouraging oversight by settlement agents of the activities of independent contractors, and at holding settlement agents liable in the regulatory context for the acts of their independent contractors to the same extent as they are liable for the acts of their employees.

Several commenters requested clarification of the term "title insurance independent contractor". The Bureau did not intend to create a new term with the proposal of the requirements, but was attempting to capture two types of independent contractors utilized by settlement agents. First, if a settlement agent uses a title insurance agent who is an independent contractor for the purchase the title insurance, the settlement agent should ensure that the independent contractor is licensed and appointed. Second, a settlement agent who uses an independent contractor to conduct one or more settlement conferences on behalf of the settlement agent should ensure that the independent contractor is properly insured and/or bonded as required by RESA and Chapter 395. Under the proposed changes, the settlement agent will be responsible for regulatory violations committed by these types of independent contractors while working for the settlement agent.

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Respectfully submitted,

The Bureau of Insurance

By: 

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April 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2016, I have mailed a copy by first-class mail of the foregoing "Comment and Statements of Position of the Bureau of Insurance" to: Kiva B. Pierce, Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219.

A handwritten signature in black ink, appearing to be "K. B. Pierce", written over a horizontal line.