

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 7, 2016

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COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

CASE NO. INS-2015-00170

Ex Parte: In re: Rules Governing Settlement Agents

ORDER ADOPTING REGULATIONS

On November 9, 2015, the State Corporation Commission ("Commission") entered an Order to Take Notice of a proposal by the Bureau of Insurance ("Bureau") to amend the Commission's regulations governing settlement agents, which are set forth in Chapter 395 of Title 14 of the Virginia Administrative Code, 14 VAC 5-395-10 *et seq.*¹ The Order to Take Notice and proposed regulations were published in the *Virginia Register of Regulations* on November 30, 2015, posted on the Commission's website, and sent to all licensed title insurance agents, agencies, and companies who are registered settlement agents, and other interested parties. Registrants and other interested parties were afforded the opportunity to file written comments or request a hearing on or before February 16, 2016.

Comments addressing nearly all aspects of the proposed regulations were filed by Virginia's largest title insurance trade association, the Virginia Land Title Association, as well as three title insurance companies, ten title insurance agencies or agents, four attorneys, and one consultant. Comments were also submitted by the Deputy Secretary of the Commonwealth and 176 Notaries Public.

¹ The amendments to the regulations were proposed in response to the legislative changes to §§ 38.2-1820, 55-525.16, 55-525.24, 55-525.25, and 55-525.26 of the Code of Virginia that will be effective July 1, 2016; to clarify the scope of the regulations; and to enhance consumer protections.

The Bureau's proposed amendments added several definitions to the regulations, as well as numerous consumer protection provisions relating to, among other things, insurance and bonding requirements, escheatment of funds, audits, reporting requirements, and the use of independent contractors. The addition of the definition of "settlement agent" prompted the Deputy Secretary of the Commonwealth and Notaries Public to file comments expressing concerns that the proposed regulations would require a Notary Public who conducts settlement conferences without handling funds to become licensed and registered. General concerns were raised, as well as requests for clarification, with respect to other of the proposed amendments. The Commission did not receive any requests for a hearing.

The Bureau considered the comments filed and responded to them in its Statements of Position, which the Bureau filed with the Clerk of the Commission on April 29, 2016. The Bureau made changes to several of the definitions and consumer protection provisions in response to the comments. The Bureau also clarified that a Notary Public acting on behalf of a settlement agent may obtain signatures on closing documents without being licensed or registered provided that the Notary Public does not receive or handle money, and/or does not sell, solicit, or negotiate a contract of title insurance. The Bureau recommended that the Commission adopt the proposed regulations as modified.

NOW THE COMMISSION, having considered the proposed regulations, the comments filed, the Bureau's Statements of Position, the record herein, and applicable law, concludes that the proposed regulations should be modified to incorporate certain suggestions that were made by commenters and the Bureau. The Commission further concludes that the proposed regulations, as modified, should be adopted with an effective date of July 1, 2016.

Accordingly, IT IS ORDERED THAT:

- (1) The proposed regulations, as modified herein and attached hereto, are adopted effective July 1, 2016.
- (2) This Order and the attached regulations shall be posted on the Commission's website at: <http://www.scc.virginia.gov/case>.
- (3) The Commission's Division of Information Resources shall provide a copy of this Order, including a copy of the attached regulations, to the Virginia Registrar of Regulations for publication in the *Virginia Register of Regulations*.
- (4) This case is dismissed, and the papers filed herein shall be placed in the Commission's file for ended causes.

AN ATTESTED COPY hereof, together with a copy of the attached regulations, shall be sent by the Clerk of the Commission to the Commission's Office of General Counsel and the Commissioner of Insurance, who shall forthwith send by e-mail or U.S. mail a copy of this Order, together with a copy of the attached regulations, to all licensed and registered title insurance agents, title insurance agencies and title insurance companies providing escrow, closing or settlement services involving real property located in Virginia, and such other interested parties as she may designate.

STATE CORPORATION COMMISSION, BUREAU OF INSURANCE

Rules Governing Settlement Agents

14VAC5-395-10. Purpose Applicability.

~~A. The purpose of this~~ This chapter is to implement implements Chapter 27.3 (§ 55-525.16 et seq.) of Title 55 of the Code of Virginia ~~B. This chapter~~ and applies to all title insurance agents, title insurance agencies, and title insurance companies providing escrow, closing, or settlement services involving the purchase of or lending on the security of any real estate ~~containing not more than four residential dwelling units~~ property in the Commonwealth of Virginia.

~~C. The Bureau of Insurance shall issue the necessary forms to carry out the provisions of Chapter 27.3 (§ 55-525.16 et seq.) of Title 55 of the Code of Virginia and this chapter.~~

14VAC5-395-20. Definitions.

~~Unless otherwise defined herein, all~~ The following words and terms when used in this chapter shall have the meaning as set forth in Chapter 27.3 (§ 55-525.16 et seq.) of Title 55 of the Code of Virginia following meanings unless the context clearly indicates otherwise:

"Agent" or "insurance agent" ~~shall have the same meaning as set forth in § 38.2-1800 of the Code of Virginia~~ means an individual or business entity that sells, solicits, or negotiates contracts of [title] insurance [~~or annuity~~] in the Commonwealth.

"Bureau" means the State Corporation Commission Bureau of Insurance.

"Business entity" means a partnership, limited partnership, limited liability company, corporation, or other legal entity other than a sole proprietorship [, professional corporation, or professional limited liability company] .

["Chapter 27.3" means Chapter 27.3 (§ 55-525.16 et seq.) of Title 55 of the Code of Virginia.]

"Designated licensed producer" means an individual who (i) possesses a valid [Virginia title] license to sell, solicit, or negotiate contracts of [title] insurance [or annuity] in the Commonwealth; (ii) is appointed; (iii) is an [officer, director, or] employee of the business entity; and (iv) is responsible for the business [entity entity's] compliance with the insurance laws, rules, and regulations of this Commonwealth.

"Employee" means an individual (i) whose manner and means of performance of work are subject to the right of control of, or are controlled by, a [business entity person] and (ii) whose compensation for federal income tax purposes is reported, or required to be reported, on a W-2 form issued by the controlling [business entity person].

"Escrow, closing, or settlement services" means the administrative and clerical services required to carry out the terms of contracts affecting real estate. These services include (i) placing orders for title insurance; (ii) receiving and issuing receipts for money received from the parties; (iii) ordering loan checks and payoffs; (iv) ordering surveys and inspections; (v) preparing settlement statements or Closing Disclosure forms; (vi) determining that all closing documents conform to the parties' contract requirements; (vii) setting the closing appointment; (viii) following up with the parties to ensure that the transaction progresses to closing; (ix) ascertaining that the lenders' instructions have been satisfied; (x) conducting a closing conference at which the documents are executed; (xi) receiving and disbursing funds; (xii) completing form documents and instruments selected by and in accordance with instructions of the parties to the transaction; (xiii) handling or arranging for the recording of documents; (xiv) sending recorded documents to the lender; (xv) sending the recorded deed and the title policy to the buyer; and (xvi) reporting federal income tax information for the real estate sale to the Internal Revenue Service.

"Lay real estate settlement agent" means a person who (i) is not licensed as an attorney under Chapter 39 (§ 54.1-3900 et seq.) of Title 54.1 of the Code of Virginia, (ii) is not a party to the real estate transaction, (iii) provides escrow, closing or settlement services in connection with a transaction related to any real estate in this Commonwealth, and (iv) is listed as the settlement agent on the settlement statement or Closing Disclosure for such the transaction.

~~"Settlement agent" shall have the same meaning as set forth in § 55-525.16 of the Code of Virginia means [any title insurance agent, title insurance agency, title insurance company, or a] person, other than a party to the real estate transaction, who provides escrow, closing, or settlement services in connection with a transaction related to real estate in the Commonwealth and who is listed as the settlement agent on the settlement statement or Closing Disclosure for the transaction. Any person, other than a party to the transaction, who conducts the settlement conference and receives or handles money shall be deemed a "settlement agent" subject to the applicable requirements of Chapter 27.3 [(§ 55-525.16 et seq.) of the Code of Virginia] and this chapter.~~

~~"Title insurance agency" means a business entity licensed in this Commonwealth as a title insurance agent.~~

~~"Title insurance agent" shall have the same meaning as set forth in § 38.2-1800 of the Code of Virginia.~~

"Title insurance agency" or "title insurance agent" means any individual or business entity licensed in the Commonwealth, pursuant to Chapter 18 (§ 38.2-1800 et seq.) of Title 38.2 of the Code of Virginia, as a title insurance agent and appointed by a title insurance company licensed in the Commonwealth who shall perform all of the following services (for which liability arises) relevant to the issuance of title insurance policies, subject to the underwriting directives and guidelines of the agent's title insurance company. These services shall include (i) the evaluation of the title search to determine the insurability of the title; (ii) a determination of whether or not

underwriting objections have been cleared; (iii) the actual issuance of a title commitment or binder and endorsements; and (iv) the actual issuance of the policy or policies and endorsements on behalf of the title insurance company. A title insurance agent holding funds in escrow shall promptly deposit the funds in a trust account in a financial institution authorized to do business in this Commonwealth. This trust account shall be separate from all other accounts held by the agent.

"Title insurance company" means any company licensed to transact, or transacting, title insurance in this Commonwealth.

14VAC5-395-25. ~~Lay real estate settlement agents. (Repealed.)~~

~~Notwithstanding any provision of this chapter to the contrary, and pursuant to § 55-525.18 of the Code of Virginia, a lay real estate settlement agent shall be required to comply with the provisions of this chapter, except as specifically set forth in 14VAC5-395-60.~~

14VAC5-395-30. Registration.

~~A. Every title insurance agent, title insurance agency and title insurance company that acts as a settlement agent shall be required to be registered~~ register with the bureau in accordance with the provisions of § 55-525.30 of the Code of Virginia.

B. At the time of application for registration, a settlement agent [other than a title insurance company] shall provide to the bureau (i) its certificate of authorization or charter of a domestic limited liability company or corporation, or certificate of registration or certificate of authority of a foreign limited liability company or corporation, as applicable; (ii) an original surety bond; and (iii) [a the name of the] designated licensed producer.

C. Within 30 days of registration a settlement agent shall furnish to the bureau:

1. Legal name;

2. Any fictitious [or assumed] names;
3. Principal place of business address;
4. Addresses of all other business locations;
5. Telephone numbers;
6. Escrow account numbers and financial institution addresses;
7. Employee and independent contractor list;
8. Website or websites;
9. Affiliated entities; and
10. Such other information as the bureau may require.

14VAC5-395-40. Insurance and bonding requirements.

A. At the time of registration, every ~~title insurance agent and title insurance agency acting as~~ a settlement agent [other than a title insurance company] shall file a certification on a form prescribed by the bureau, that the settlement agent has, and thereafter shall keep in force for as long as they are acting as a settlement agent, the following:

1. An errors and omissions insurance policy providing limits of at least \$250,000 per occurrence or per claim and issued by an insurer authorized to do business in the Commonwealth of Virginia. A deductible is permitted but shall not hinder or delay the payment of a claim.
2. A blanket fidelity bond or employee dishonesty insurance policy covering persons employed by the settlement agent providing limits of at least \$100,000 per occurrence or per claim and issued by an insurer authorized to do business in the Commonwealth of Virginia. Settlement agents that have no employees except the owners, partners,

shareholders, or members may request apply for a waiver of this requirement on their certification form.

B. Every ~~title insurance agent and title insurance agency that acts as a~~ settlement agent [in the Commonwealth of Virginia other than a title insurance company] shall file an original surety bond in an amount not less than \$200,000 on a form prescribed by the bureau at the time of application for registration and, if such bond is canceled, at the time a replacement bond is issued.

14VAC5-395-50. Audits.

A. Every ~~title insurance agent and title insurance agency that acts as a~~ settlement agent [in the Commonwealth of Virginia other than a title insurance company] shall, at its expense, have an audit of its escrow accounts conducted by an independent certified public accountant at least once each consecutive 12-month period. The audit month shall be prescribed by the bureau. Such audit shall conform with the standards established by the American Institute of Certified Public Accountants, Statement on Auditing AICPA Professional Standards, Volume 1, as of June 1, 2015, Special Reports Considerations - Audits of Single Financial Statements and Specific Elements, Accounts, or Items of a Financial Statement, and shall be filed by the settlement agent with the bureau no later than 60 days after the date on which the audit is completed. A title insurance company shall be subject to the requirements of this subsection unless such company's financial statements are audited annually by an independent certified public accountant.

B. Every ~~title insurance agent or title insurance agency acting as a~~ settlement agent [other than a title insurance company] shall file a copy of its audit report with each title insurance company it represents.

C. In lieu of an audit conducted by a certified public accountant, ~~a title insurance agent or title insurance agency acting as~~ a settlement agent [other than a title insurance company] shall allow each title insurance company for which it has an appointment to conduct an analysis of its escrow accounts at least once each consecutive 12-month period. The form of ~~such~~ the analysis and the analysis month shall be prescribed by the bureau. The title insurance company shall submit a copy of its analysis to the bureau no later than 60 days after the date on which the analysis is completed. With the consent of the title insurance agent or agency, a title insurance company may share the results of its analysis with other title insurance companies that will accept the same in lieu of conducting a separate analysis.

D. Every settlement agent shall [(i)] make a good faith effort to disburse funds in its possession and return the funds to the rightful owner [; (ii) , and] escheat [unclaimed funds yearly annually] to the Virginia Department of the Treasury [; and (iii) comply with The Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) of Title 55 of the Code of Virginia those funds for which the owner is unlocatable] .

E. A settlement agent [other than a title insurance company] shall complete and file a close-out audit with the bureau in conformance with this chapter and the bureau's instructions within 180 days from the date the settlement agent ceases conducting settlements.

14VAC5-395-60. Separate fiduciary trust account.

A. Every title insurance agent, title insurance agency and title insurance company that acts as a settlement agent in the Commonwealth of Virginia shall maintain a separate fiduciary trust account for the purpose of handling funds received in connection with escrow, closing, or settlement services involving real estate located only in this Commonwealth. No other funds may be included in this escrow account except funds deposited to guarantee the adequacy of the account. Such trust account shall be with a financial institution authorized to do business in the Commonwealth of Virginia.

B. If the agent, agency, or company acting as a lay real estate settlement agent provides escrow, closing, or settlement services in transactions involving multiple parcels or tracts of real estate and any one of those tracts or parcels is located wholly or partially outside of this Commonwealth, that the settlement agent, agency, or company shall maintain another separate fiduciary trust account for the purpose of handling funds received in connection with such transactions.

C. A settlement agent may utilize a general escrow account for the purpose of receiving funds in connection with an escrow, closing, or settlement involving real estate located in the Commonwealth, provided that the settlement agent (i) handles the funds in a fiduciary capacity and (ii) deposits the funds in a separate fiduciary trust account in compliance with subsection A of this section no later than the close of the second business day after receipt of the funds.

14VAC5-395-70. Access to records Reporting requirements.

A. Every title insurance agent, title insurance agency and title insurance company that acts as a settlement agent in the Commonwealth of Virginia shall make all escrow, closing, or settlement records available promptly upon request for examination by the bureau without notice during normal business hours.

B. A settlement agent shall maintain documentation that supports all entries on the settlement statement or Closing Disclosure.

C. A settlement agent shall promptly respond to a bureau request for books, records, documentation, or other information in connection with the bureau's investigation, enforcement, or examination of the settlement agent's compliance with applicable laws and regulations. If no time period is specified by the bureau, a written response as well as any requested books, records, documentation, or information shall be delivered by the settlement agent to the bureau not later than 30 days from the date of such request.

D. Within 30 days following the occurrence of any of the following events, a settlement agent [other than a title insurance company] shall report to the bureau if:

1. Any bankruptcy, reorganization, or receivership proceedings are filed by or against the settlement agent.

2. Any [~~local, state, or federal~~] governmental authority [~~institutes revocation, suspension, or other formal administrative,~~ enters a final disposition in a] regulatory, [administrative,] or enforcement [~~proceedings action~~] against the settlement agent.

3. Any [~~local, state, or federal~~] governmental authority [~~(i)~~] revokes or suspends the settlement agent's registration, license, or other license for a similar business [~~;(ii) takes formal administrative, regulatory, or enforcement action against the settlement agent relating to its business; or (iii) takes any other action against the settlement agent relating to its business where the total amount of restitution or other payment from the settlement agent exceeds \$2,500~~] .

4. Based on allegations by any [~~local, state, or federal~~] governmental authority that the settlement agent violated any law or regulation applicable to the conduct of its licensed business, the settlement agent enters into, or otherwise agrees to the entry of, a settlement or consent order, decree, or agreement with or by such governmental authority.

5. The settlement agent surrenders its license in another state [~~in lieu of threatened or pending license revocation; license suspension; or other administrative, regulatory, or enforcement action~~] .

6. The settlement agent is denied a license in another state.

7. The settlement agent or any of its members, partners, directors, officers, principals, employees, or independent contractors is [~~indicted or~~] convicted of a felony.

8. Any funds held by the settlement agent are (i) seized by or on behalf of any court or governmental instrumentality or (ii) forfeited to or on behalf of any court or governmental instrumentality. [The term "forfeited" shall not include the escheatment of funds in accordance with The Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) of Title 55 of the Code of Virginia or the interpleading of funds to a court of competent jurisdiction.]

E. A settlement agent shall immediately notify the bureau following the loss of (i) a designated licensed producer, (ii) required insurance coverage, or (iii) required bond coverage.

F. A settlement agent or former settlement agent [other than a title insurance company] shall provide the following information to the bureau within 10 days after such person's [title insurance] license is surrendered, terminated, suspended, or revoked or has lapsed by operation of law, or the licensed and registered business is otherwise closed: (i) the names, addresses, telephone numbers, fax numbers, and email addresses of a designated contact person; (ii) the location of the settlement agent's or former settlement agent's records; and (iii) any additional information that the bureau may reasonably require. A settlement agent or former settlement agent [other than a title insurance company] shall maintain current information with the bureau until all escrow funds are disbursed and all title policies are issued.

G. Sixty days prior to ceasing business, a settlement agent shall provide notice to the bureau of its intent to cease conducting settlements and the anticipated date of business termination.

H. The reports required by this section shall be in the format and contain such additional information as the bureau may reasonably require. The bureau may also require additional reports that it deems necessary.

14VAC5-395-75. Operating requirements.

A settlement agent shall comply with the following requirements:

1. A settlement agent shall continuously maintain the requirements and standards for licensure and registration.
2. A settlement agent shall reconcile its escrow accounts monthly.
3. A settlement agent shall not provide any information to the bureau or a consumer that is false, misleading, or deceptive.
4. A settlement agent shall not charge duplicative or [inflated padded] fees for escrow, closing, or settlement services.
5. A settlement agent shall not engage in any activity that directly or indirectly results in an evasion of the provisions of Chapter 27.3 [~~(§ 55-525.16 et seq.)~~ of the Code of Virginia] or this chapter.
6. 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 [~~properly licensed and shall be~~] deemed a "settlement agent" subject to the applicable requirements of Chapter 27.3 and this chapter.
7. A designated licensed producer shall be appointed by the same title insurance company as its employer settlement agent.
8. A settlement agent [~~may shall~~] not use or accept the services of a title insurance agent [~~who is an~~] independent contractor unless the title insurance agent [~~(i) holds a title insurance license, (ii) is appointed, (iii) is registered, and (iv) maintains the insurance or bond coverages~~] is licensed and appointed. A settlement agent that permits an independent contractor to conduct one or more settlement conferences on behalf of the

settlement agent shall ensure that the independent contractor is properly insured and/or bonded as] required by Chapter 27.3 and this chapter.

9. A settlement agent that uses the services of a title insurance agent [who is an] independent contractor shall be [(i) considered] the legal principal of the [title insurance agent] independent contractor [,] and [(ii) shall be] liable for [all actions of the title insurance agent any violations of Chapter 27.3 or this chapter committed by the] independent contractor, including unintentional conduct [, that occurs during the period services are utilized, within the scope of engagement] .

10. A former settlement agent shall remain subject to the provisions of Chapter 27.3 and this chapter in connection with all settlements that the settlement agent performed while licensed and registered, notwithstanding the occurrence of any of the following events:

- a. The settlement agent's license is surrendered, terminated, suspended, or revoked or has lapsed by operation of law; or
- b. The settlement agent ceases conducting settlements.

11. If a settlement agent or former settlement agent disposes of records containing a consumer's personal financial information or copies of a consumer's identification documents, such records and copies shall be disposed of in a secure manner.

14VAC5-395-80. Violations Enforcement.

Any violation of Failure to comply with any provision of Chapter 27.3 [(~~§ 55-525-16 et seq. of the Code of Virginia~~)] or this chapter shall be punished as provided for in Chapter 27.3 (~~§ 55-525-16 et seq.~~) of Title 55 of the Code of Virginia may result in penalties, license revocation or suspension, the entry of a cease and desist order, restitution, or other enforcement action.

14VAC5-395-100. Commission authority.

The commission may, at its discretion, waive or grant exceptions to any provision of this chapter for good cause shown.

FORMS (14VAC5-395)

Settlement Agent Official Registration Form for a Title Agent (eff. 3/2012)

Settlement Agent Official Registration Form for Licensed Title Insurance Company or Agency (eff. 3/2012)

Title Settlement Agency/Agency Financial Responsibility Certification (undated, filed 11/2015)

Waiver of Blanket Fidelity Bond or Employee Dishonesty Insurance Policy for Title Insurance Settlement Agents (undated, filed 11/2015)

Bond for Title Insurance Settlement Agent (undated, filed 11/2015)

Standard Report of Escrow Accounts Maintained by Title Insurance Agents (eff. 10/2010)

DOCUMENTS INCORPORATED BY REFERENCE (14VAC5-395)

~~Statement on Auditing Standards, Special Reports, July 1, 1989, American Institute of Certified Public Accountants.~~

AICPA Professional Standards, Volume 1, as of June 1, 2015, American Institute of Certified Public Accountants, New York, New York 10036-8775, <http://www.aicpa.org>

AICPA Professional Standards, Volume 2, as of June 1, 2015, American Institute of Certified Public Accountants, New York, New York 10036-8775, <http://www.aicpa.org>