

What You Need To Know About
The Final “Rules Governing Settlement Agents”
Proposed by
State Corporation Commission, Bureau of Insurance

Background

- On November 9, 2015, the Bureau of Insurance, State Corporation Commission (“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](#).
- These regulations implement Real Estate Settlement Agents (RESA) found in Va. Code § 55-525.16 *et seq.* of the [Code of Virginia](#).
- The Bureau’s original filing invited public comment on or before December 31, 2015. Those public comments can be reviewed by clicking [here](#). Largely through the efforts of the [Virginia Land Title Association](#) (VLTA), that deadline was extended to February 16, 2016.
- The Bureau [responded](#) to all public comments on April 29, 2016.
- [Final regulations](#) were issued on June 7, 2016.
- **These new regulations are effective July 1, 2016.**

The scope of the regulations now applies to “any real property”.

Reference: 14VAC5-395-10

- RESA limits its applicability “only to transactions involving the purchase of or lending on the security of real estate located in the Commonwealth containing *not more than four residential dwelling units*.” Va. Code § 55-525.18(A). Yet RESA qualifies the above limitation by stating “[e]xcept as provided in subsection B,” which states that “[a] *lay real estate settlement agent* may provide escrow, closing, and settlement services for *any real property* located within the Commonwealth, and receive compensation for such services, provided he is registered pursuant to and is in compliance with the provision of this chapter” Va. Code § 55-525.18(B). Taken together, these provisions mean that RESA is limited to 1-4 residential transactions for attorneys, but expanded to all residential and commercial transactions for lay settlement agents. And so for the latter group, RESA applies to “any real property.”
- The former version of the regulations implementing RESA incorrectly limited their applicability to transactions “containing not more than four residential dwelling units.” Consequently, the new regulations now correctly state that “[t]his chapter . . . applies to . . . the purchase or lending on the security of *any real property* in the Commonwealth of Virginia.”

The definition of “agent” and “insurance agent” has been properly narrowed.

Reference: 14VAC5-395-20 (definition of “agent” or “insurance agent”)

- The former regulation stated that “agent” or “insurance agent” had the same meaning of Va. Code § 38.2-1800, which states that an “agent” or “insurance agent” means “an individual or business entity that sells, solicits, or negotiates contracts of insurance or annuity in the Commonwealth.” However,

Chapter 18 of Title 38.2, applying to all lines of insurance, is more expansive than RESA, applying only to title insurance agents. One who is an “agent” or “insurance agent” under RESA is not authorized to deal with *all* “contracts of insurance,” only contracts of *title* insurance. Likewise, such agents or insurance agents under RESA are not authorized to deal with “annuities”. Consequently, the Bureau has properly narrowed this definition by referring to “title insurance” and eliminated the reference to annuities.

A new definition of “business entity” has been created, which notably excludes “professional corporation” and “professional limited liability company”.

Reference: 14VAC5-395-20 (definition of “business entity”)

- This definition is important because it is part of the BOI’s preceding definition of “title insurance agency or agent,” which is defined as “any individual or business entity . . .” Taken together, these definitions mean that a title insurance agency can be a business entity, but be aware that not all business entities can be a title agency. Specifically excluded are sole proprietorships, professional corporations and professional limited liability companies.
- It is obvious why a sole proprietorship cannot be a business entity; a sole proprietorship is an individual, not an entity. But why are professional corporations and professional limited liability companies excluded? Professional corporations and professional limited liability companies are not eligible to hold a title license because to do so would be a violation of the “sole and specific purpose” requirements that such entities have. See, e.g., Va. Code § 13.1-543 (“professional corporation”) and § 13.1-1102 (“professional limited liability company”). Such sole and specific purpose requirements are not compatible with the purposes and services to which a “title insurance agency or agent” must attend, as enumerated in Va. Code § 38.2-4601.1.

A new definition of “designated license producer” has been created, which narrows the scope and qualifications of such an individual.

Reference: 14VAC5-395-20 (definition of “designated licensed producer”)

- According to Va. Code § 38.2-1820, designating an individual licensed producer is a necessary prerequisite to applying for an agency’s producer license. This “designated licensed producer” is “responsible for the business entity’s compliance with the insurance laws, rules and regulations of this Commonwealth.” Until now, the qualifications of that “designated licensed producer” have only been that such an individual be “licensed”.
- The new definition properly limits the scope of being “licensed” to possessing a “license to sell, solicit, or negotiate contracts of title insurance in the Commonwealth,” which is consistent with the changes made to the definitions of “agent” and “insurance agent” above.
- Consistent with recent statutory changes to Va. Code § 38.2-1820 (also effective July 1, 2016), this new definition also narrows the qualifications of a designated licensed producer to an “officer, director or employee of the business entity.” Heretofore, a business entity could rely upon a licensed, independent contractor to fulfill the requirement of a “designated licensed producer.” That is no longer the case.

A new definition of employee has been created, which affects the definition of “designated licensed producer.”

Reference: 14VAC5-395-20 (definition of “employee”)

- This new definition of “employee” seems largely influenced by the IRS publication defining the factors that the IRS uses in determining whether an individual is an employee or independent contractor. Reading this definition in conjunction with the definition of “designated licensed producer,” it is evident that the Bureau will not allow the industry to elevate form over substance when determining whether an individual is an employee that satisfies the designated licensed producer requirement. For example, merely issuing a W-2 does not make someone an employee.

The definition of “escrow, closing, or settlement service” has been modified to include a reference to the new Closing Disclosure.

Reference: 14VAC5-395-20 (definition of “escrow, closing, or settlement services”)

- This new definition is a *verbatim* recitation of Va. Code § 55-525.16, with the exception of the appropriate addition of a reference to “Closing Disclosures”.
- A new definition of “settlement agent” has been added, which mirrors the pre-existing definition found in RESA.
- Reference: 14VAC5-395-20 (definition of “settlement agent”)
- This new definition of “settlement agent” mirrors the pre-existing definition of “settlement agent” found in RESA at Va. Code § 55-525.16. Consistent with a recent change in that Code section, these regulations also include a reference to the new Closing Disclosure.
- While this definition is not new, many comments to the Bureau’s proposed regulation revealed significant misunderstanding among the title and settlement industry as to its meaning. Understanding the definition of “settlement agent” is critical because of its pervasive use throughout RESA and its regulations. And so it seems prudent to include a brief summary of that meaning here:
- The definition (again, taken from RESA and repeated in the regulations) reads as follows:

"Settlement agent" means 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 such 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 and this chapter.

- The first sentence in this definition functions like the general rule, while the second sentence functions like the exception to the general rule.
- As to the first sentence, three elements are necessary to constitute a settlement agent. The first is that the settlement agent must be a “title insurance agent, title insurance agency, title insurance company, or person, other than a party to the real estate transaction.” The second is that the settlement agent must provide “escrow, closing, or settlement services in connection with a transaction related to real estate in the Commonwealth.” The third is that the settlement agent “is listed as the settlement agent on the settlement statement or Closing Disclosure for the

transaction.” It is imperative to understand that *all three elements* must apply for a person or entity to be considered a settlement agent.

- As to the second sentence, note that it functions as an exception to the general rule set forth in the first sentence. Once again, for this exception to pertain, *three elements must apply*. The first is that we must be referring to a “person, other than a party to the transaction.” The second is that this person must “conduct the settlement conference.” And the third is that this person “receives or handles money.” If all of these three elements apply, this person shall also be considered a “settlement agent,” regardless of the first sentence.
- As to the third element of the second sentence (i.e., “receives or handles money”), many questions have been asked as to what constitutes “handling money”. Our understanding is that *any exertion of control whatsoever* satisfies this requirement, including but not limited to touching the money, touching an envelope that the money is in, taking the money in a stamped envelope to the mailbox, possessing wire transfer authority, and the like.
- With respect to the second sentence, what is mainly in view here is to prohibit so-called “notary closers” who are not RESA-registered from handling money or exerting control over money in any way whatsoever. Because such notary closers are generally not RESA-registered, the consumer would not be protected if a notary closer mishandled funds presented at closing because a notary does not typically have the surety bond, fidelity bond and \$250,000 or more E&O that a RESA-registered settlement agent has in place to protect the consumer.
- Conversely, note that this sentence is not intended to prohibit an employee or owner of a RESA-registered title agency from conducting a closing and handling money, even though such employee or owner does not possess an individual title license or individual RESA-registration. *It is the RESA-registration of the employing settlement agent, not the title license of the individual employee or owner, that protects the consumer in this instance.*

The content of information required by the Bureau within 30 days of registration as a settlement agent has been expanded.

Reference: 14VAC5-395-30(C)

- Some of this information is currently required by the Code; some are not. Specifically, note the addition of addresses of all other business locations, employee and independent contractor list, websites and affiliated entities.

Certain insurance and bonding requirements have been clarified.

Reference: 14VAC5-395-40

- To clarify, the Bureau will allow a deductible to E&O as long as it does not hinder or delay the payment of a claim. Furthermore, a fidelity bond must cover “persons employed by the settlement agent,” which brings us back to the definition above of what constitutes an “employee”.
- Title companies¹ are exempt from these requirements.

¹ As used in RESA and in its regulations, “title companies” refer to the title insurer that provides the product of title insurance to the local title agency.

Certain auditing procedures and standards have been clarified.

Reference: 14VAC5-395-50(A, B & C)

- To clarify, the Bureau determines the month that audits are due. Furthermore, auditing standards shall comply with AICPA Professional Standards, Volume 1, as of June 1, 2015, Special Considerations—Audits of Single Financial Statements and Specific Elements, Accounts, or Items of a Financial statement.”
- Title companies are exempt from these requirements.

The settlement agent’s duty of handling funds in a fiduciary manner has been clarified to include a yearly escheating requirement and close-out audit procedure.

Reference: 14VAC5-395-50(D) & (E)

- Va. Code § 55-525.20 requires settlement agents to exercise reasonable care and comply with all requirements relating to financial responsibility.
- Building on that general duty, the Bureau has instituted a yearly escheating requirement of funds for which the owner is unlocatable, consistent with Va. Code § 55-210.10:2.
- Building further on that general duty, the Bureau requires a close-out audit within 180 days of the settlement agent ceasing to conduct settlements.
- Title companies are exempt from these requirements.

Settlement agents now have expanded reporting requirements to aid the Bureau in monitoring and maintaining the health of our industry.

Reference: 14VAC5-395-70

- Providing information to the Bureau upon request is not a new requirement. Settlement agents are already under a duty to “make all escrow, closing, or settlement records available promptly upon request for examination by the Bureau without notice during normal business hours.” This requirement has been expanded to now include requests for information relating to the Bureau’s investigation, enforcement, or examination of the settlement agent’s compliance with applicable laws and regulations.
- Also not new is the notion that a settlement agent must support all entries on the Closing Disclosure or settlement statement with appropriate documentation, like invoices and payoff statements. This longstanding requirement has now been articulated in this Regulation.
- Another longstanding requirement is reporting to the Bureau certain telltale signs of the destabilization of our industry. See, e.g., Va. Code § 38.2-1826, which requires, among other things, reporting to the Bureau within 30 days felony convictions (of any nature whatsoever) and the “final disposition of the matter of any administrative action taken against [the licensed agent] in another jurisdiction or by another governmental agency in this Commonwealth.” Consistent with such statutory requirements, these new Regulations now require certain events to be reported within 30 days, and other items to be reported within 10 days.
- Within 30 days, a settlement agent is to report: 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.

- The 10 day reporting requirement is triggered when a 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. When that happens, the settlement agent must report within 10 days: names and other contact information for a point of contact; location of the settlement agent’s records; and any other information the Bureau may require. Current information with the Bureau must be maintained until all escrow funds are disbursed and all title policies are issued.
- It is important to note that, in contrast to the other reporting requirements of this section, which apply to all settlement agents, these reporting requirements do not apply to title companies.
- Another new reporting requirement imposed by this section is the duty to notify the Bureau “immediately” following the loss of a designated licensed producer, required insurance coverage, or required bond coverage.
- Finally, within 60 days prior to ceasing business, the settlement agent must provide notice to the Bureau of its intent to cease conducting settlements and the anticipated date of business termination.

Settlement agents now have expanded operating requirements.

Reference: 14VAC5-395-75

- While this section is largely new, many of the principles behind these operating requirements are not, such as maintaining licensure and registration; reconciling monthly; not providing any information to the Bureau that is false, misleading or deceptive; not charging fees that are duplicative or padded; disposing of sensitive records in a secure manner; and the like. Also not new is the idea that the settlement agent remains liable for its acts even after its license is surrendered, terminated, etc.
- A few requirements, however, are new and noteworthy:
- A settlement agent who employs the services of an independent contractor to conduct a settlement conference must ensure that such contractor is properly insured.
- If a settlement agent chooses to use a title insurance agent who is an independent contractor, the settlement agent will be held liable for the acts—even unintentional acts—of the contractor within the scope of engagement, just as if the settlement agent were the legal principle of the independent contractor.
- Perhaps a little out of place, once again in this section is articulated the “exception” to the general rule of what constitutes a settlement agent—namely, any individual who conducts a settlement conference and who handles the money, which includes possessing wiring authority. (See discussion above regarding the definition of settlement agent.)

Conclusion

The Final Regulations issued by the Bureau is the product of a robust dialogue between regulators and those regulated, and the Virginia Land Title Association played a critical part in facilitating that dialogue. On the whole, these new Regulations should result in a more stable land title industry and better protections for the consumer, but it cannot be denied that such benefits come at a cost.