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BULLETIN

FLORIDA BULLETIN 07-07

To: All Old Republic National Title Agents and Offices

From: Underwriting Department

Re: Electronic Funds Transfers and the Good Funds Rule

Date: September 6, 2007

The recent flurry of Alerts regarding the numerous lender difficulties has no doubt left many of you looking for additional clarification. The purpose of this memo is to discuss wire transfers, checks, the “Good Funds” rule and how to avoid unnecessary liability when a lender goes under.

Most lenders now fund closings by electronically transferring funds to the title agent’s escrow account, typically on the closing date for purchases and loans on investment property, or following the expiration of the rescission period for a loan on residential property. Some people mistakenly refer to all electronic funds transfers as “wires,” but this generalization is misleading.

There are two popular methods of electronically transferring funds between financial institutions. These are wire transfers through the Federal Reserve Banks using a system known as Fedwire®, and electronic transfer through an automated clearinghouse (ACH) network. Although an ACH transfer is quite often used for direct deposit of payroll, benefits, e-checks and online bill payments, lenders, particularly subprime lenders, have used this method to fund mortgage loans as well. A third method, the Clearinghouse Interbank Payment System (CHIPS), also exists, but is not used as often as Fedwire® and ACH.

The term “wire transfer” generally refers to an electronic transfer using Fedwire®. Although the funds transfer through the Fed quite rapidly, it can still take several business hours for the funds to post to their final destination due to the fact that the

originating and receiving institutions must verify and authenticate the transaction and post it to the proper recipient account. If either the originator or receiver is not directly connected to the Fed, extra time must be allowed for an intermediary bank to process its portion of the transaction as well.

According to the Federal Reserve's website, Fedwire® funds are "immediate, final, and irrevocable when processed." However, the instructions for using Fedwire® provide a code for recalling a sent wire. Therefore, it should not be assumed that funds sent via Fedwire® are **never** subject to reversal. A wire can also present a problem if initiated late in the day and not posted to your escrow account prior to the time the receiving bank's wire department shuts down for the day. A California lender can initiate a wire as late as 3pm PT. By this time, a Florida bank's wire department is likely closed. Thus, the wire may not post to the agent's account until the next business morning. You should **never** rely on a lender's representation that "the wire has been sent" to disburse checks at an after-hours closing on belief that the wire will properly post first thing in the morning.

A cheaper, albeit slower, alternative to Fedwire® is the ACH system. One of the most important differences between Fedwire® and ACH is the time is takes to "settle" the transaction. Final settlement of ACH transfers can take between one and three days, making the transfer more susceptible to reversal, so it is imperative that you understand the means of funding as it is pivotal to how and when the funds are, in fact, finally settled and credited to your account.

One of the best things you can do to protect your escrow account is to talk with a knowledgeable person at their bank about electronic funds transfers and how their bank processes them. It may be possible to set up a separate escrow account to receive wires and then immediately transfer them to your main escrow account so that there are no funds in the listed destination account to recall. It is important that such an account not be directly linked to your regular escrow account and that you not order any checks for this "wires only" account. Old Republic strongly recommends that this option be discussed with your financial institution and implemented.

Our preference for wired funds over checks for loan proceeds, as expressed in our Alerts, is basically driven by the "Good Funds" rule governing disbursements from a title company's escrow account. The "Good Funds" rule is set forth in *69O-186.008* of the *Florida Administrative Code*, a copy of which is attached to this memo. Rule 5-1.1(j) of the Florida Bar Integration Rule is also attached. Basically, for Licensed Agencies, these rules prohibit agents from disbursing funds from their escrow accounts unless such funds are "collected funds." The rule defines collected funds as funds that are "deposited, finally settled and credited" to the title insurance agent's or attorney's

account. This would mean many purchase transactions would never disburse on the same day if any of the funds are being delivered other than by irreversible wire transfer because the title agent would have to wait for any other funds, such as checks (even cashier's checks) to be posted and finally settled in their account before disbursing any of those funds to anyone. However, the rule permits the agent to disburse without the deposited funds being "finally settled and credited to the account" in the situations set forth in *69O-186.008(1)(a)-(g)*. Attorney Agents have similar rules. All of these cases involve funding by check and most require that the title agent or attorney have "**reasonable and prudent grounds to believe the instrument will clear and constitute collected funds in the title insurance agent's . . . trust account within a reasonable period of time.**" (*Emphasis added)*

When we receive information that a lender or other entity may not be able to fund or close transactions or has attempted to recall electronic funds, we no longer have "reasonable and prudent grounds to believe" that funds will constitute "collected funds" within a reasonable time. Once the Alert is issued, we can no longer assume that certain types of funds sent by that institution constitute "good funds" and you should determine that the funds have been "finally settled" before disbursing on a transaction involving that institution.

As always, if you have questions, please contact the underwriting department.

APPENDIX "A"

69O-186.008 Escrow Requirements.

(1) A title insurance agent or title insurer may not use, endanger, or encumber money held in trust without the permission of the owner of such money, given after full disclosure of the circumstances. Accordingly, except as hereinafter provided, a title insurance agent or title insurer may not disburse funds unless the funds are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled and credited to the title insurance agent's or title insurer's trust account. Notwithstanding that a deposit made by a title insurance agent or title insurer to the trust account has not been finally settled and credited to the account, the title insurance agent or title insurer may disburse funds from the trust account in reliance on such deposits under any of the following circumstances:

(a) The deposit is made by a certified check, cashier's check, or money order;

(b) The deposit is made by a check representing loan proceeds issued by a federally- or state-chartered bank, savings bank, savings and loan association, credit union, mortgage broker licensed under Chapter 494, Florida Statutes, or other duly licensed or chartered lender;

(c) The deposit is made by a bank check, cashier's check, official check, treasurer's check, or other such official instrument issued by a bank, savings and loan association, or credit union when the instrument is drawn by the bank on itself, or on another bank whether or not the check is "payable through" or "payable at" a bank and the title insurance agent or title insurer has reasonable and prudent grounds to believe the instrument will clear and constitute collected funds in the title insurance agent's or title insurer's trust account within a reasonable period of time. Such instruments are considered by the Federal Reserve Board, under Federal Regulation CC, otherwise cited as 12 C.F.R. 229, to be "next day" payable items. A check drawn by a corporation on a bank or a draft drawn by a corporation on itself whether or not the check or draft is "payable at" or "payable through" a bank and is not a "next day" payable item under Regulation CC unless the depository bank chooses to treat it as such, and may not be disbursed on until collected.

(d) The deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the State of Florida or on the escrow or trust account of a real estate broker licensed under Chapter 475, Florida Statutes, or on the account of a mortgage broker licensed under Chapter 494, Florida Statutes, or on the escrow trust account of a title insurance agent or title insurer licensed under the Florida Insurance Code, when the title insurance agent or title insurer has a reasonable or prudent belief that the deposit will clear and constitute collected funds in the trust account within a reasonable period of time;

(e) The deposit is made by a check issued by the United States Government, the State of Florida or any agency or political subdivision of the State of Florida;

(f) The deposit is made by a check issued by an insurance company authorized to do business in the State of Florida and the title insurance agent or title insurer has a reasonable and prudent belief that the instrument will clear and constitute collected funds in the trust account within a reasonable period of time;

(g) The deposit is made by a personal check in an amount not to exceed $500 when the title insurance agent or title insurer has a reasonable and prudent belief that the instrument will clear and constitute collected funds in the trust account within a reasonable period of time.

(2) For purposes of this provision, disbursement of funds shall only be made on such negotiable instruments as enumerated above which contain the following elements:

(a) Are signed by the drawer; and

(b) Contain an unconditional order to pay; and

(c) Are payable on demand; and

(d) Are payable to order or to bearer.

(3) Funds received by a licensed title insurance agent or insurer pursuant to a real estate closing transaction involving the issuance of a title insurance binder, commitment, policy of title insurance, or guaranty of title shall not be deposited or transferred to an interest-bearing trust account without the written consent of the buyer and seller.

(4) Funds received from depositors in excess of the insured amount must be deposited in a financial institution that has a rating not less than the minimum standards established by Government National Mortgage Association (GNMA).

Specific Authority 624.308 FS. Law Implemented 624.307(1), 626.8473, 628.151 FS. History–New 6-25-86, Amended 2-26-90, Formerly 4-21.010, Amended 2-13-95, 1-27-02, Formerly 4-186.008.

Rules Regulating The Florida Bar: RULE 5-1.1 TRUST ACCOUNTS

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(j) Disbursement Against Uncollected Funds. A lawyer generally may not use, endanger, or encumber money held in trust for a client for purposes of carrying out the business of another client without the permission of the owner given after full disclosure of the circumstances. However, certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Except for disbursements based upon any of the 6 categories of limited-risk uncollected deposits enumerated below, a lawyer may not disburse funds held for a client or on behalf of that client unless the funds held for that client are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit:

(1) when the deposit is made by certified check or cashier's check;
(2) when the deposit is made by a check or draft representing loan proceeds issued by a federally or state-chartered bank, savings bank, savings and loan association, credit union, or other duly licensed or chartered institutional lender;
(3) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument issued by a bank, savings and loan association, or credit union when the lawyer has reasonable and prudent grounds to believe the instrument will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;
(4) when the deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the state of Florida or on the escrow or trust account of a real estate broker licensed under applicable Florida law when the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;
(5) when the deposit is made by a check issued by the United States, the State of Florida, or any agency or political subdivision of the State of Florida;
(6) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Florida and the lawyer has a reasonable and prudent belief that the instrument will clear and constitute collected funds in the trust account within a reasonable period of time.

A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those set forth above, when it results in funds of other clients being used, endangered, or encumbered without authorization, may be grounds for a finding of professional misconduct. In any event, such a disbursement is at the risk of the lawyer making the disbursement. If any of the deposits fail, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's other clients. However, if the lawyer accepting any such check personally pays the amount of any failed deposit or secures or arranges payment from sources available

to the lawyer other than trust account funds of other clients, the lawyer shall not be considered guilty of professional misconduct.