SELECTED ISSUES CONCERNING
TITLE AND SETTLEMENT AGENTS

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Introduction

The Bureau of Insurance (BOI) has proposed amendments to the regulations that implement Real Estate Settlement Agents (RESA), Va. Code § 55-525.16 et seq. These regulations may become final as early as mid-April of this year. A copy of what the BOI has proposed can be found in Appendix A.

Many of those in the industry, including Old Republic and the Virginia Land Title Association, have submitted comments to what the BOI has proposed. A copy of VLTA’s comments can be found in Appendix B. All such responses can be reviewed by clicking here.

Overall, public comments to these proposed regulations have revealed that much confusion persists in our industry as to what RESA, its regulations and related statutes currently require. Consequently, in order to be prepared for possible changes to the regulations that implement RESA, we need to enhance our understanding of what RESA, its existing regulations and related statutes mean for us today. The purpose of this presentation is to do just that by focusing on selected issues concerning title and settlement agents. The focus here is on what the law says now so that we can better cope with the changes to come.

1. **RESA and its regulations apply to both residential and commercial real property, but care must be taken to distinguish between attorneys and lay settlement agents when determining RESA’s applicability.**

   - 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.”
2. RESA applies to title agents, title agencies, title companies and “persons.” All may qualify as a “settlement agent.” It is important to keep this terminology straight when looking at various provisions.

- RESA does not only apply to those who possess a title license of RESA registration. It applies to title agents, title agencies, title companies and “persons.”
- 14VAC5-395-20 defines “title insurance agent” as set forth in Va. Code § 38.2-1800, defining such as “an agent licensed in the Commonwealth to sell, solicit, or negotiate title insurance, and performing all of the services set forth in § 38.2-4601.1, on behalf of title insurance companies licensed under Chapter 46 (§ 38.2-4600 et seq.).”
- 14VAC5-395-20 defines “title insurance agency” as “a business entity licensed in this Commonwealth as a title insurance agent.” This is what we commonly refer to as the local title agent.
- 14VAC5-395-20 defines “title insurance company” as “any company licensed to transact, or transacting, title insurance in this Commonwealth.” This is what we commonly refer to as the national or regional underwriter.
- Such references to “title insurance agent,” “title insurance agency” and “title insurance company” abound:
  - 14VAC5-395-30: “Every title insurance agent, title insurance agency and title insurance company that acts as a settlement agent shall be required to be registered . . . .”
  - 14VAC5-395-40: “At the time of registration, every title insurance agent and title insurance agency acting as a settlement agent shall file a certification form [evidencing requisite E&O, surety bond and fidelity bond].” Note the absence of “title insurance company” from this requirement.
  - 14VAC5-395-50: “Every title insurance agent and title insurance agency that acts as a settlement agent . . . shall . . . have an audit . . . .” Note the absence of “title insurance company” from this requirement.
  - 14VAC5-395-60: “Every title insurance agent, title insurance agency and title insurance company that acts as a settlement agent . . . shall maintain a separate fiduciary trust account . . . .”
  - 14VAC5-395-70: “Every title insurance agent, title insurance agency and title insurance company that acts as a settlement agent . . . shall make all escrow, closing, or settlement records available . . . .”
- In contrast to the above, “person” is not specifically defined in RESA, nor in its regulations. However, the context of various provisions makes clear that “person” can
have the common meaning of a living and breathing person, as well as the corporate meaning of an entity, like a title agency or title company. Such references to “person” in RESA abound:

- “Person” as an individual:
  - “A person shall not act in the capacity of a settlement agent . . . unless the person has not been convicted of a felony . . . .” Va. Code § 55-525.19.
  - “A person who has been convicted of a felony . . . shall not assist a settlement agent . . . .” Va. Code § 55-525.21(A).
  - “A settlement agent shall not employ a person who has been convicted of a felony . . . .” Va. Code § 55-525.21(B).

- “Person” as an entity, as well as an individual:
  - Va. Code § 55-525.31 (appropriate licensing authority may issue a restraining order, require restitution or impose a fine against any person who violates RESA)
  - “‘Settlement agent’ means a person . . . who provides escrow, closing, or settlement services . . . . Any person . . . who conducts the settlement conference and receives or handles money shall be deemed a ‘settlement agent’ . . . .” Va. Code § 55-525-16.

- In recognition of the above, 14VAC5-395-10 states that “This Chapter applies to all title insurance agents, title insurance agencies and title insurance companies providing escrow, closing or settlement services . . . .” Oddly, “person” is missing here, even though it is present in Va. Code § 55-525-16, which defines a settlement agent.

- In apparent recognition of this incongruity and the various meanings ascribed to “person” by the context of the Code sections cited above, proposed section 14VAC5-395-20 defines “settlement agent” as any “title insurance agents, title insurance agency, title insurance company, or person . . . who provides escrow, closing, or settlement services . . . .”

3. **Do not be confused by the definition of “agent” and “insurance agent” in the regulations: it is a distinction without a difference.**

- 14VAC5-395-20 states that “agent” or “insurance agent” has the same meaning of Va. Code § 38.2-1800, which in turn states that “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.” And so must conclude that 14VAC5-395-20 is overbroad.

- But we must also conclude that 14VAC5-395-20 is irrelevant. “Title insurance agent” and “settlement agent” are defined terms that are used throughout RESA and its regulations. However, nowhere in RESA or its regulations are the terms “agent” (by itself) or “insurance agent” (by itself) used at all.
4. While a title agency can be any of a variety of business entities, a law firm cannot be a title agency.

- 14VAC5-395-20 defines “title insurance agency” as “a business entity licensed in this Commonwealth as a title insurance agent.”
- “Business entity” is currently undefined by RESA or its regulations.
- However, not all business entities are authorized to be a title agency. Some business entities providing legal services, such as 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.
- In practice, it seems that a few law firms or professional companies have “slipped through the cracks” and have obtained title licenses.

5. A designated licensed producer is responsible for a title agency’s compliance with all insurance laws, which is a much greater role than your token commitment/policy producer.

- Va. Code § 38.2-1820 states that before the Commission approves a business entity’s application for an insurance producer license, the Commission must find that the “business entity has designated a licensed producer responsible for the business entity’s compliance with the insurance laws, rules and regulations of this Commonwealth.”
- The Virginia Code does not currently define whether a designated licensed producer must be an employee, owner or independent contractor, so presumably all are currently acceptable. And yet with respect to the independent contractor, in practice it seems unlikely that such individual realizes that he or she is responsible for the business entity’s compliance with all the insurance laws, rules and regulations. In practice, the scope of such an individual’s engagement is often limited to commitment and policy production.

6. Understanding the definition of “settlement agent” is critical for understanding some of RESA’s implications.

- The definition of “settlement agent” is found in Va. Code § 55-525.16.
- 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 “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 for such transaction.” It is imperative to understand that all
three elements must apply for a person or entity to be considered a settlement agent. And yet confusion in our industry about this first sentence persists.

- As to the second sentence, as stated above 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. And yet like the first sentence, confusion in our industry about this second sentence persists.

- As stated earlier in this outline, the context of this definition requires that the term “person” include not only a living and breathing person but also an entity.

- With respect to the second sentence, what is 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 not generally RESA-registered, the consumer would not be protected if a notary closer mishandled funds presented at closing. Conversely, 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 a title license. It is the RESA-registration of the settlement agent, not the title license of the employee or owner, that protects the consumer in this instance. Unlike notary closers, if an employee or owner of a RESA-registered settlement agent mishandled funds, the consumer would be protected by the fidelity and surety bonds of the settlement agent. As illustrated in many of the public comments from notaries on the BOI’s proposed regulation, there seems to be confusion in our industry on this matter.

7. The Commission must be notified if any individual or business entity uses an assumed or fictitious name.

- Often overlooked, Va. Code § 38.2-1822 requires disclosure of an assumed or fictitious name (individual or entity) at the time of license application or within 30 days such name was adopted or ceased being used.

8. Abandoned property may be escheated earlier than 5 years.

- The general “5 year rule” for escheating property is as follows: “All 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.” Va. Code § 55-210.2:1.

- And yet the Code does provide the following exception: “Any 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.” Va. Code § 55-210.10:2.
• This exception can also be evidenced by the Virginia Department of the Treasury website. Click [here](#) to visit the site.

9. **The BOI monitors the integrity of our industry.**

• Va. Code § 38.2-1826 requires, among other things, reporting to the BOI 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.”

• This section is very broad in scope. On its face, the licensed title agent who fights a traffic ticket in D.C. and loses would have to report that to the BOI.

• It is significant to note that this Code section is limited to “licensed agents” unlike other Code sections which pertain to “persons.”

• Note further that this Code section is limited to the “final disposition” of matters adverse to the licensed agent, which is consistent with other Code sections. See, e.g., Va. Code § 38.2-1831 (Commission may impose penalties for “violating” insurance laws; “having admitted or been found to have committed any insurance unfair trade practice or fraud”; “having been convicted of a felony”; “having an insurance producer license, or its equivalent, denied, suspended or revoked in any other state”).