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Agency Bulletin: AGVA-2022-004

Date: February 7, 2022
To: All Virginia Agents
From: Agency Department
RE: **Revised Bulletin on Virginia Administrative Letter 2022-01**

Dear Agents,
This Revised Bulletin supersedes Agency Bulletin AGVA-2022-003 dated February 4, 2022.

BACKGROUND

On February 4, 2022, the Virginia Commissioner of Insurance ("Commissioner") issued Administrative Letter 2022-01 (the "AL") entitled "Split Settlements". The AL makes reference to the relatively common practice in Virginia of splitting "escrow, closing or settlement services" tasks between two or more individuals or entities. It notes that such closings arise based on a variety of factual scenarios, often including the following:

- **The buyer's settlement agent performs the following functions:**
  -Receives and issues receipts for funds;
  -Researches the title;
  - Secures title insurance;
  - Obtains the buyer's signatures;
  - Verifies documents;
  - Disburses funds.

- **The seller's settlement agent performs the following functions:**
  - Prepares the deed;
  - Obtains mortgage payoff figures;
  - Secures the seller's signatures;
  - Provides such information to the buyer's settlement agent.

Split settlements also occur when the seller is represented by an attorney, and the attorney enters into an agreement with the buyer's settlement agent to disburse funds for any mortgage payoff, and to the seller, through the seller's attorney as specified on the settlement documents.

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Citing to provisions of two statutes in the Code of Virginia ("Code"), i.e.:

1. **The Real Estate Settlements Act, §55.1-900, et seq. ("RES"); and**
2. **The Real Estate Settlement Agents Act, §55.1-1000, et seq. ("RESA"),**

as well as the Commission's Rules Governing Settlement Agents, 14 VAC 5-395-10, et seq., the AL concludes with the following:

> **"This means that the settlement agent, designated by the buyer and identified on the closing statement per §55.1-1000 of the Code, is responsible for all escrow, closing, or settlement services associated with the transaction, and for compliance with the Code and the Commission's Rules Governing Settlement Agents."**

In short, the AL appears to substantially change the way settlement services are provided in the Commonwealth of Virginia. As a practical matter, agents who provide settlement services to sellers are legitimately wondering whether the effect of the AL will be to deprive them of a significant source of revenue in future transactions.

RELEVANT PROVISIONS OF RESA

A purchaser or borrower in a transaction related to real estate in Virginia shall have the right to select the settlement agent to provide escrow, closing or settlement services in connection with that transaction. §55.1-1006.

All contracts involving the purchase of real estate containing no more than four residential dwelling units shall include a prominent notice stating that the purchaser or borrower has the right to select the settlement agent to handle the closing of that transaction. §55.1-1007.

Although attorneys commonly conduct closings, lay persons (non-attorneys) are specifically permitted to provide escrow, closing or settlement services. §55.1-1000.

The following persons may act as a settlement agent in Virginia:

1. **Licensed attorneys**
2. **Title companies**
3. **Title insurance agents**
4. **Real estate brokers**
5. **Financial institutions authorized to do business in Virginia**
6. **A subsidiary or affiliate of a financial institution**

Settlement agents who are not financial institutions or title insurance companies must maintain E & O insurance with a minimum coverage of $250,000, a fidelity bond of at least $100,000, and a surety bond of at least $200,000.

The terms "escrow, closing or settlement services" mean "the administrative and clerical services required to carry out the terms of contracts affecting real estate". These services include:

- **Placing orders for title insurance**
- **Receiving and issuing receipts for money received from the parties**
- **Ordering loan checks and payoffs**
- **Ordering surveys and inspections**
- **Preparing settlement statements or closing disclosures**
- **Determining that all closing documents confirm to the parties' contract requirements**
- **Setting the closing appointment**
- **Following up with the parties to ensure that the transactions progresses to closing**
- **Ascertaining that the lender's instructions have been satisfied**
- **Conducting a closing conference at which the documents are executed**
- **Receiving and disbursing funds**
- **Completing form documents and instruments selected by and in accordance with instructions of the parties to the transaction**
- **Handling or arranging for the recording of documents**
- **Sending recorded documents to the lender**
- **Sending the recorded deed and the title policy to the buyer**
- **Reporting federal income tax information for the real estate sale to the Internal Revenue Service §55.1-1000**

WHY WAS THE AL ISSUED?

Within the body of the AL, two reasons were given for issuing the new prohibition against split closings:

I. RES and RESA Contemplate Only One Settlement Agent to be Involved in the Settlement or Closing:

The Commissioner has determined that RES and RESA would have been clear if multiple settlement agents were contemplated by the statutory language of these statutes. The AL cites to various parts of RES and RESA which only mention one designated "settlement agent" (the term is used in the singular, and not in the plural), and does not reference the possibility of more than one agent being involved in any given closing. Further, there would be no need under the Code to designate the buyer as having the exclusive right to choose the settlement agent for the transaction if split closings were contemplated by the statute.

II. Split Closings Create Complicated Situations for Establishing Responsibility for Failed Disbursements:

Although this point was not explained in detail in the AL, the fear appears to be that with multiple parties ordering payoffs and making disbursements, finger-pointing between the settlement agents can result when disbursements are not timely made, or not made at all.
There may be a further factor at work, since settlement agents are regulated by different state agencies, i.e., the Virginia Bureau of Insurance, the Virginia Real Estate Board, and the Virginia State Bar. Confusion could result from requiring multiple state agencies to reach an agreement as to who acted wrongly in any given situation, and what the penalties might be.

IMPLICATIONS FOR VIRGINIA SETTLEMENT AGENTS WHO REPRESENT SELLERS

FNTI makes the following recommendations to its agents as a result of the AL:

1. The functions highlighted above, in red, should only be performed by the borrower or purchaser's settlement agent.
2. Lay settlement agents who formerly provided some of the services highlighted above, in red, <u>to sellers</u> should seek legal counsel before doing so in the future.
3. With respect to money-handling, the buyer's settlement agent should refrain from sending funds to any third party for disbursement.
4. There is nothing in the AL that prevents licensed Virginia attorneys from practicing law on behalf of any party to a real estate transaction.

It is likely that AL 2022-003 will be the subject of many questions to the Commissioner of Insurance and his staff in coming weeks and months. The AL may also eventually result in clarifying legislation as to the issue of multiple agents performing split closings.

For additional information about this Bulletin, please contact the undersigned:

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