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SENATE BILL NO. 554

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Commerce and Labor
on February 9, 1998)

(Patron Prior to Substitute—Senator Barry)

*A BILL to amend and reenact §§ 6.1-2.19, 6.1-2.20, 6.1-2.21, 6.1-2.23 and 6.1-330.72 of the Code of Virginia, relating to settlement agents.***Be it enacted by the General Assembly of Virginia:****1. That §§ 6.1-2.19, 6.1-2.20, 6.1-2.21, 6.1-2.23 and 6.1-330.72 of the Code of Virginia are amended and reenacted as follows:**

§ 6.1-2.19. Title, purpose and applicability.

A. This chapter shall be known as the Consumer Real Estate Settlement Protection Act.

B. The purpose of this chapter is to authorize existing licensing authorities in the Commonwealth of Virginia to require persons performing escrow, closing or settlement services to comply with certain consumer protection safeguards relating to licensing, financial responsibility and the handling of settlement funds.

C. This chapter applies only to transactions involving the purchase of or ~~financing of~~ *lending on the security of* real estate located in this Commonwealth containing not more than four residential dwelling units.*D. Nothing in this chapter shall be construed to prevent a person licensed under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or such licensee's employees or independent contractors, from performing escrow, closing or settlement services, as defined by this chapter, to facilitate the settlement of a transaction in which the licensee is involved without complying with the provisions of this chapter, so long as the licensee, the licensee's employees or independent contractors, are not named as the settlement agent on the settlement and the licensee is otherwise not prohibited from performing such services by law or regulation.*

§ 6.1-2.20. Definitions.

"Escrow" means written instruments, money or other items deposited by ~~one~~ a party with a settlement agent for delivery to ~~another party~~ *other persons* upon the performance of a specified ~~condition~~ *condition* or the happening of a certain event.

"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, but are not limited to, 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, determining that all closing documents conform to the parties' contract requirements, setting the closing appointment, following up with the parties to ensure that the transaction progresses to closing, ascertaining that the lenders' 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, and reporting federal income tax information for the real estate sale to the Internal Revenue Service.

"Licensing authority" shall mean the (i) State Corporation Commission acting pursuant to this chapter, Title 6.1 or Title 38.2; (ii) the Virginia State Bar acting pursuant to this chapter or Chapter 39 (§ 54.1-3900 et seq.) of Title 54.1; or (iii) the Virginia Real Estate Board acting pursuant to this chapter or Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1.

"Party to the real estate transaction" means a lender, seller, purchaser or borrower with respect to that real estate transaction.

"Person" means a natural person, partnership, association, cooperative, corporation, limited liability company, trust or other legal entity.

"Settlement agent" means a person other than a party to the real estate transaction who provides ~~any~~ *escrow, closing or settlement service services* in connection with a transaction related to real estate in this Commonwealth *and who is listed as the settlement agent on the settlement statement for such transaction.**"Settlement statement" means the statement of receipts and disbursements for a transaction related to real estate including, but not limited to, a statement prescribed under the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2601, et seq., as amended, and the regulations thereunder.*

§ 6.1-2.21. Licensing requirements, standards and financial responsibility.

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A. A person shall not act in the capacity of a settlement agent, and a lender, seller, purchaser or borrower may not contract with any person to act in the capacity of a settlement agent with respect to real estate settlements in this Commonwealth unless the person is licensed as an attorney under Chapter 39 (§ 54.1-3900 et seq.) of Title 54.1, a title insurance company or title insurance agent under Title 38.2, a real estate broker under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or unless the person is a financial institution authorized to do business in this Commonwealth under any of the provisions of Title 6.1 or under federal law, or is a subsidiary or affiliate of such financial institution. Any such person, not acting in the capacity of a settlement agent, shall not be subject to the provisions of this chapter.

B. Notwithstanding any rule of court to the contrary, a settlement agent operating in compliance with the requirements of this chapter or a party to the real estate transaction may provide escrow, closing or settlement services and receive compensation for such services.

C. A settlement agent shall exercise reasonable care and comply with all applicable requirements of this chapter and its licensing authority regarding licensing, financial responsibility, errors and omissions or malpractice insurance policies, fidelity bonds, employee dishonesty insurance policies, audits, *escrow account analyses* and record retention.

D. A settlement agent other than a financial institution described in subsection A or title insurance company as defined in § 38.2-4601, shall maintain the following to the satisfaction of the appropriate licensing authority:

1. An errors and omissions or malpractice insurance policy providing a minimum of \$250,000 in coverage;

2. A blanket fidelity bond or employee dishonesty insurance policy covering persons employed by the settlement agent providing a minimum of \$100,000 in coverage. When the settlement agent has no employees except the owners, partners, shareholders or members, the settlement agent may apply to the appropriate licensing authority for a waiver of this fidelity bond or employee dishonesty requirement; and

3. A surety bond of not less than \$100,000.

E. 1. A settlement agent, other than an attorney, shall, at its expense, have an ~~annual~~ audit of its escrow accounts conducted by an independent certified public accountant ~~on a calendar year basis by not later than six months after the close of the previous calendar year at least once each consecutive twelve-month period~~. The appropriate licensing authority shall require the settlement agent to provide a copy of its audit report to the licensing authority *no later than sixty days after the date on which the audit is completed*. A settlement agent that is a licensed title insurance agent under Title 38.2 shall also provide a copy of the audit report to each title insurance company which it represents.

2. In lieu of such annual audit, a settlement agent that is licensed as a title insurance agent under Title 38.2 shall allow each title insurance company for which it has an appointment to conduct an ~~annual audit analysis~~ of its escrow accounts ~~on a calendar year basis by not later than six months after the close of the previous calendar year~~. *The in accordance with regulations or guidelines promulgated or adopted by the State Corporation Commission or the Bureau of Insurance of the State Corporation Commission, as appropriate, at least once each consecutive twelve-month period and each title insurance company conducting such analysis shall submit a copy of its audit analysis report to the appropriate licensing authority no later than sixty days after the date on which the analysis is completed*. With the consent of the title insurance agent, a title insurance company may share the results of its ~~audit analysis~~ with other title insurance companies that will accept the same in lieu of conducting a separate ~~audit analysis~~.

3. A title insurance company shall retain a copy of the ~~audit analysis or audit report, as applicable~~, for each title insurance agent it has appointed and such reports and other records of the insurance company's activities as a settlement agent shall be made available to the appropriate licensing authority when examinations are conducted pursuant to provisions in Title 38.2.

§ 6.1-2.23. Conditions for providing escrow, closing, or settlement services and for maintaining escrow accounts.

A. All funds deposited with the settlement agent in connection with an escrow, settlement or closing shall be handled in a fiduciary capacity and submitted for collection to or deposited in a separate fiduciary trust account or accounts in a financial institution licensed to do business in this Commonwealth no later than the close of the next business day, in accordance with the following requirements:

1. The funds shall be the property of the person or persons entitled to them under the provisions of the escrow, settlement, or closing agreement and shall be segregated for each depository by escrow, settlement, or closing in the records of the settlement agent in a manner that permits the funds to be identified on an individual basis; and

2. The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.

B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or

agreement specifying how and to whom such funds may be disbursed *and, if applicable, in accordance with § 6.1-2.13*. A settlement statement ~~in the form prescribed under the federal Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.)~~ which has been signed by the seller and the purchaser or borrower shall be deemed sufficient to satisfy the requirement of this subsection.

C. A settlement agent may not retain any interest received on funds deposited in connection with any escrow, settlement, or closing; provided, however, that an attorney settlement agent shall maintain escrow accounts in accordance with applicable rules of the Virginia State Bar and the Supreme Court of Virginia.

D. Nothing in this chapter shall be deemed to prohibit the recording of documents prior to the time funds are available for disbursement with respect to a transaction, provided all parties consent to such recordation.

E. *All settlement statements for transactions related to real estate governed by this chapter shall be in writing and identify, by name and business address, the settlement agent.*

F. Nothing in this section is intended to amend, alter or supersede other sections of this chapter, or the laws of this Commonwealth or the United States, regarding the duties and obligations of the settlement agent in maintaining escrow accounts.

§ 6.1-330.72. Loans secured by subordinate mortgage; charges allowed; requirements relating to insurance.

A. Any lender making a loan secured by a subordinate mortgage or deed of trust may require the borrower to pay, in addition to the loan fee and interest permitted by § 6.1-330.71, the actual cost of a credit report, title examination, title insurance, mortgage guaranty insurance, recording fees, surveys, attorney's fees, and appraisal fees. No other charges of any kind shall be imposed on or be payable by the borrower either to the lender or any other party in connection with such loan *other than a fee charged by the settlement agent as defined in § 6.1-2.20*; provided, late charges in the amount specified in § 6.1-330.80 may be made and, upon default, the borrower may be subject to court costs, attorney's fees, trustee's commission and other expenses of collection as otherwise permitted by law. Broker's or finder's fees may be paid by the lender from the loan fee or interest permitted under § 6.1-330.71. A broker's fee, finder's fee or commission may be paid by the borrower not to exceed five percent of the principal amount of the loan if the total of the loan fee permitted under § 6.1-330.71 and broker's fees, finder's fees or commissions does not exceed five percent of the principal amount of the loan.

B. Evidence of fire and extended coverage insurance may be required by the lender of the borrower and the premium shall not be considered as a charge. Decreasing term life insurance, in an amount not exceeding the amount of the loan and for a period not exceeding the term of the loan, may also be required by the lender of the borrower and the premium shall not be considered as a charge. At the option of the borrower, accident and health insurance and involuntary unemployment insurance may be provided by the lender, and the premium therefor shall not be considered a charge. Proof of all insurance issued in connection with loans subject to this chapter shall be furnished to the borrower within ten days from the date the loan is closed.

C. No charge may be imposed or collected, except as permitted by § 6.1-330.71, if the loan is not made.

D. This section shall not apply to any loan made by any lender enumerated in § 6.1-330.73.