

**PROPOSED REGULATION OF
THE COMMISSIONER OF MORTGAGE LENDING**

LCB File No. R143-08

February 17, 2009

EXPLANATION – Matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: §§1-3 and 5-8, NRS 645A.050; §§4 and 9-11, NRS 645A.050 and 645A.070.

A REGULATION relating to escrow; revising provisions relating to the maintenance of surety bonds; authorizing an escrow agency to retain certain records in electronic format under certain circumstances; requiring an escrow agency to notify the Commissioner of Mortgage Lending upon the occurrence of certain events; setting forth certain requirements for a transfer of funds between escrow accounts; mandating certain disclosures to be made by an escrow agency or agent of certain relationships and affiliations; establishing a rating scale for reporting by an examiner after an examination of an escrow agency; revising provisions relating to money held in trust and preparation of records; revising provisions relating to the format of an annual financial statement; revising provisions relating to standards of practice for an escrow agent or agency; and providing other matters properly relating thereto.

Section 1. Chapter 645A of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 8, inclusive, of this regulation.

Sec. 2. 1. *Except as otherwise provided in subsection 2, unless a surety bond is cancelled in accordance with the provisions of NRS 645A.043, or the surety bond or substitute form of security is otherwise extinguished by an action at law, an escrow agency shall maintain the surety bond or substitute form of security for a period of 3 years after expiration of the license of the escrow agency.*

2. An escrow agency may maintain the surety bond or substitute form of security for a period shorter than the period set forth in subsection 1 upon a showing of proof satisfactory to the Commissioner that the escrow agency has no outstanding liabilities or claims against it

which, if valid, could be satisfied in whole or in part from the proceeds of the bond or substitute form of security.

Sec. 3. A surety bond required pursuant to NRS 645A.041 may contain a deductible if the escrow agency deposits with the Commissioner a surety bond or substitute form of security satisfactory to the Commissioner in the amount of the deductible.

Sec. 4. The records required pursuant to NAC 645A.030 may be maintained by an escrow agency pursuant to NAC 645A.030 and provided to the Commissioner in an electronic format if:

1. The records are maintained and provided in a software format acceptable to the Commissioner that allows the Commissioner or his authorized representative complete access to all records;

2. The escrow agency ensures that the Commissioner or his authorized representative has the ability to download and print any or all of the records maintained in an electronic format;

3. The escrow agency provides in printed form any or all of the records maintained in an electronic format:

(a) If the electronic records are not maintained in a format that enables the Commissioner or his authorized representative to determine if the escrow agency is complying with the provisions of chapter 645A of NRS or the regulations adopted pursuant thereto; or

(b) Upon the request of the Commissioner or his authorized representative; and

4. The records are maintained on a media that:

(a) Is not erasable;

(b) Does not allow changes to a document stored on the media;

(c) Is consistent with the minimum standards of quality approved by either the National Institute of Standards and Technology or the Association for Information and Image Management; and

(d) Contains written authentication identifying the electronic record as an exact, unaltered copy of the document which the record purports to be.

Sec. 5. *An escrow agency shall notify the Commissioner in writing immediately after:*

- 1. The filing of a claim upon the surety bond required pursuant to NRS 645A.041.*
- 2. The entry of a money judgment in a civil action against the escrow agency or any of its escrow agents.*
- 3. The filing of a criminal complaint against the escrow agency, an escrow agent, or any officer, director or employee of the escrow agency.*
- 4. The entry of a judgment in a criminal action against the escrow agency, an escrow agent, or any officer, director or employee of the escrow agency.*

Sec. 6. *1. A transfer of funds between escrow accounts may not be accomplished by the making of book entries alone, but must be accomplished by:*

- (a) The wire transfer or writing of a check from one escrow account to the other; and*
- (b) The deposit of a check or wire transfer for the account of, and the writing or electronic generation of a receipt for, the escrow account to which the funds are being transferred.*

2. A transfer between escrow accounts must be properly supported and documented in the escrow records including, without limitation, the reasons for, and the appropriate approval of the transfer.

Sec. 7. *1. If an escrow agency, escrow agent, relative of an escrow agent or a company related to or affiliated with either the escrow agency or the escrow agent is a principal to an*

escrow transaction or is acting or has acted as a contractor, mortgage broker, mortgage agent, real estate broker or real estate salesman in relation to an escrow transaction, the escrow agency or escrow agent must, before being employed as the escrow agency or escrow agent in connection with the transaction, disclose in writing to all parties to the escrow transaction that relationship or affiliation. That disclosure must be on a separate document, printed in at least 10-point bold type.

2. For purposes of this section, “relative” means a spouse or any other person who is related by blood, adoption or marriage, within the second degree of consanguinity or affinity.

Sec. 8. *Upon completion of an examination of an escrow agency pursuant to paragraph (b) of subsection 2 of NRS 645A.050, the examiner shall, in a report of his findings, rate the escrow agency on a scale of “1” to “5,” as follows:*

1. A rating of “1” indicates that the escrow agency and the management of the escrow agency have demonstrated a high degree of compliance with applicable laws and regulations. A rating of “1” may be given if there is a minor violation or deficiency, but only if:

(a) The escrow agency acted to correct the violation or deficiency immediately; and

(b) The remedial action taken by the escrow agency is likely to prevent future violations or deficiencies.

2. A rating of “2” indicates that the escrow agency and the management of the escrow agency have demonstrated substantial compliance with applicable laws and regulations and that the escrow agency can correct any violations or deficiencies noted in the report made by the examiner with a minimum of regulatory supervision. A rating of “2” may be given if there is more than one minor violation or deficiency, but only if:

(a) The escrow agency acted to correct the violations or deficiencies immediately; and

(b) The remedial action taken by the escrow agency is likely to prevent future violations or deficiencies.

3. A rating of “3” indicates that the escrow agency and the management of the escrow agency have demonstrated less than satisfactory compliance with applicable laws and regulations. A rating of “3” may result in regulatory supervision for the correction of the violations and deficiencies noted in the report made by the examiner. A rating of “3” may be given if there were minor violations or deficiencies from a previous examination that were not corrected.

4. A rating of “4” indicates that the escrow agency and the management of the escrow agency have demonstrated a substantial lack of compliance with applicable laws and regulations and that immediate remedial action is required for the correction of the violations and deficiencies noted in the report made by the examiner. A rating of “4” may result in the escrow agency being subject to close regulatory supervision. Disciplinary action may be warranted to cause remedial action pursuant to NRS 645A.090.

5. A rating of “5” indicates that the escrow agency and the management of the escrow agency have demonstrated a serious and material lack of compliance with applicable laws and regulations. A rating of “5” may result in immediate remedial action for the correction of the violations and deficiencies noted in the report made by the examiner. Remedies may include:

(a) Action by the Commissioner to take possession of the property, business and assets of the escrow agency pursuant to NRS 645A.140; and

(b) Disciplinary action pursuant to NRS 645A.090.

Sec. 9. NAC 645A.030 is hereby amended to read as follows:

645A.030 1. Each escrow agency shall:

(a) Deposit all money held in trust by the escrow agency into a trust account in a financial institution pursuant to NRS 645A.160; ~~and~~

(b) *Deposit all money held in trust by the escrow agency into the trust account on or before the close of the next business day after receipt of that money;*

(c) Inform the financial institution of the purpose of the trust account ~~and~~; *and*

(d) *Verify with the financial institution that the money deposited in the trust account is insured to the maximum amount permitted by federal law.*

2. Pursuant to NRS 645A.070, each escrow agency shall maintain, for a period of at least 6 years after final disposition of an escrow transaction:

(a) All records of the transaction, including, without limitation, checkbooks, cancelled checks, check stubs, vouchers, ledgers, journals, closing statements, accountings and other statements of disbursements rendered to a client or other party with regard to the trust account; and

(b) Any records that are related to the trust account which clearly reflect the date, amount, source and explanation for any receipt, withdrawal, delivery or disbursement of the funds or other property of a client with regard to the trust account.

3. The records maintained pursuant to subsection 2 must be ~~available~~ :

(a) *Prepared in accordance with generally accepted accounting principles; and*

(b) *Available* for inspection by the Division, upon its request.

4. For the purposes of this section, “financial institution” includes any federally insured bank, savings and loan association, credit union, savings bank and any other federally insured institution located in this State that accepts for deposit funds held in trust by escrow agents and agencies.

Sec. 10. NAC 645A.040 is hereby amended to read as follows:

645A.040 1. Except as otherwise provided in this section, an escrow agency shall submit to the Commissioner, not later than 120 days after the last day of each fiscal year of the escrow agency, a financial statement that:

(a) Is dated not earlier than the last day of the fiscal year of the escrow agency; and

(b) Has been prepared based on the books and records of the escrow agency by an independent public accountant who has a valid permit to engage in the practice of public accounting in this State.

2. The Commissioner may grant a reasonable extension of time for the submission of a financial statement required pursuant to this section if an escrow agency requests an extension not later than 120 days after the last day of the fiscal year of the escrow agency.

3. If an escrow agency maintains a trust account pursuant to NRS 645A.160, the financial statement submitted pursuant to this section must:

(a) If the trust account has an average monthly balance of \$250,000 or less, be reviewed by an independent public accountant before it is submitted to the Commissioner. The review must be consistent with the standards set out in sections 400 to 408, inclusive, of the *Statements on Standards for Accounting and Review Services* published by the American Institute of Certified Public Accountants.

(b) If the trust account has an average monthly balance that exceeds \$250,000, be audited before it is submitted to the Commissioner. The escrow agency shall ensure that the public accountant who prepares the report of an audit submits a copy of the report to the Commissioner and the escrow agency at the same time.

4. The Commissioner may make available an approved format and sample content for the financial statement required pursuant to this section. If the Commissioner makes available such an approved format, an escrow agency must submit the financial statement in substantially the same format as that made available by the Commissioner.

Sec. 11. NAC 645A.050 is hereby amended to read as follows:

645A.050 1. Each escrow agent and agency shall conduct the business of the escrow agency openly, fairly and honestly, and shall at all times conform to the accepted business ethics and practices of the escrow agency business.

2. Each escrow agent and agency shall act without partiality to any of the parties to an escrow transaction.

3. If an escrow agency performs services as a third party in the collection of payments in connection with a loan secured by real property ~~[, unless]~~ :

(a) Unless otherwise agreed between the parties, the escrow agency must remit the payment to the person who is entitled to receive the payment not later than 30 days after the last day of the month in which the escrow agency collected the payment ~~[]~~ ; *and*

(b) The escrow agency shall not make payments in a manner that causes a policy of insurance to be cancelled or causes property taxes or similar payments to become delinquent.

~~[3.]~~ 4. If an escrow agency maintains a trust account, the trust account must at all times contain sufficient money to pay all money due or owing to all clients. An escrow agency shall not make a disbursement from the account unless authorized to make a disbursement by:

- (a) Escrow instructions;
- (b) A servicing agreement; or

(c) An agreement between the parties to the transaction that the escrow agency may periodically withdraw money from the account to pay for services performed for the client.

~~[4.]~~ **5.** Each escrow agency that maintains a trust account shall keep a record of all money deposited in the account. These records are subject to inspection by the Commissioner or his authorized representative and must include, without limitation:

(a) The name of the person who sent the money to the escrow agency;

(b) The account in which the money was deposited;

(c) The name of the person to whom the money belongs;

(d) The date the money was received;

(e) The date the money was deposited into the account;

(f) The date of each withdrawal from the account; ~~[and]~~

(g) *The name of each person to whom money was disbursed; and*

(h) Any other pertinent information concerning the account, including, without limitation, escrow instructions and servicing agreements.

~~[5.]~~ **6.** *If an escrow for the sale of real property is established, the holder of the escrow must, on the date of establishment of the escrow, record in writing the number and the date of expiration of the license issued pursuant to chapter 624 of NRS of any contractor who will be paid from money held in the escrow. The holder of the escrow is not required to verify independently the validity of the number of the license.*

7. *An escrow agency shall not withdraw, pay out or transfer money from an escrow account in excess of the amount to the credit of that account at the time of that withdrawal, payment or transfer. An escrow agency shall not draw, execute or date a check before the*

existence, in the escrow account against which the check is drawn, executed or dated, of a sufficient credit balance to cover that check.

8. An escrow agency or agent shall post in the records of the escrow any receipt or disbursement of money as of the date of that receipt or disbursement, regardless of the date of the act of posting.

9. An escrow agency shall issue consecutively numbered receipts for all escrow money or wire transfers received, or for checks deposited with or mailed to the escrow agency. A copy of an original receipt must be clearly identified as such. An escrow agency shall retain copies of those receipts in a separate file.

10. Upon receipt of a request in writing from the Commissioner or from a person who deposited a document, money or property into escrow, an escrow agency shall account to the requestor for that document, money or property held in trust.

11. All written escrow instructions and all escrow instructions transmitted electronically via the Internet must be dated.

12. An escrow agency shall not accept any change to escrow instructions, or to amended or supplemental escrow instructions, unless the change is signed or initialed by all persons who had signed or initialed the escrow instructions before the change was presented.

13. An escrow agency shall deliver a copy of the escrow instructions or a change to the escrow instructions to the person executing the instructions or change to the instructions at the time of execution.

14. An escrow agency shall use documents, money or other property deposited in escrow only in accordance with the written escrow instructions of the principals to the escrow or, if

not otherwise directed by written or electronically executed instructions, in accordance with sound escrow practice, or pursuant to an order of a court of competent jurisdiction.

15. An escrow agency shall not record or deliver for recording any instrument which purports to transfer a person's title to or interest in real property without first obtaining that person's written consent to the recording or delivery.

16. Upon close of escrow, an escrow agency shall deliver to each principal in the transaction a written statement of all receipts and disbursements, identifying the person to whom any such disbursement was made.

17. An escrow agency shall file with the Commissioner a copy of any document:

(a) Affecting the escrow agency; and

(b) Filed by the escrow agency with the Secretary of State,

↪ which has not been previously filed with the Commissioner.

18. If the Commissioner determines that an escrow agency has not complied with ~~[subsection]~~ the provisions of subsections 2 ~~[, 3 or 4,]~~ to 17, inclusive, he may require the escrow agency to deliver an audited financial statement that is prepared, using the records of the escrow agency, by a certified public accountant who holds a certificate to engage in the practice of public accounting in this State. Except as otherwise provided in this subsection, the financial statement must be submitted to the Commissioner not later than 60 days after the Commissioner requests the financial statement from the escrow agency. The Commissioner may grant a reasonable extension for the submission of the financial statement if an extension is requested not later than 60 days after the Commissioner requests the financial statement from the escrow agency.