

**PROPOSED AMENDMENTS TO REGULATIONS UNDER THE
CONSUMER REAL ESTATE SETTLEMENT PRACTICES ACT ("CRESPA")**

COMMENTARY

The 2009 General Assembly amended §§ 6.1-2.26 and 6.1-2.27 of the Consumer Real Estate Settlement Protection Act, effective July 1, 2009. 2009 Va. Acts ch. 256. These proposed amendments are necessary to conform the VSB's CRESPA regulations to the legislation.

After July 1, non-lawyer settlement agents will no longer register with the Virginia State Bar. Instead, they will register with the appropriate licensing authority, either the Virginia Real Estate Board or the State Corporation Commission. Attorney settlement agents will continue to register with the Virginia State Bar and be governed by these regulations.

The proposed changes will be considered by the Council of the Virginia State Bar at its meeting on June 18, 2009.

PROPOSED CHANGES

15 VAC 5-80-10. Authority; Applicability, Scope.

These Regulations are issued, effective July 1, 1997, by the Virginia State Bar pursuant to and under the authority of the Virginia Consumer Real Estate Settlement Protection Act, Title 6.1, Chapter 1.3, *Code of Virginia*, as enacted by the 1997 session of the General Assembly of Virginia. The Act does not apply to licensed attorneys who provide escrow, closing or settlement services solely for public bodies, as defined in §§ 11-37, *Code of Virginia*; thus, such attorneys are exempt from the registration, certification and separate fiduciary trust account requirements set forth in these Regulations.

CRESPA, and therefore these Regulations, applies to transactions involving the purchase of or lending on the security of real estate located in Virginia containing not more than four residential units. In addition, effective July 1, 1999, a lay settlement agent may provide escrow, settlement and closing services for transactions involving any real property located in Virginia, provided the agent is registered under and in compliance with CRESPA. See the Real Estate Settlement Agent Registration Act, *Va. Code* §§ 6.1-2.30 through 6.1-2.32 (1999). Lawyer settlement agents are not required to register under CRESPA unless the transaction involves the purchase of or lending on the security of real estate located in Virginia containing not more than four residential dwelling units.

15 VAC 5-80-20. Definitions.

The following words and terms when used in these Regulations shall have the following meanings, unless the context clearly indicates otherwise.

“*Attorney*” means a person licensed as an attorney under Chapter 39 (§§ 54.1-3900 et. seq.), of Title 54.1 of the *Code of Virginia*, and who is an active member of the Virginia State Bar in good standing under the Rules of the Virginia Supreme Court.

“*Bar*” means the Virginia State Bar.

“*Board*” means the Virginia Real Estate Board.

“*CRESPA*” means the Virginia Consumer Real Estate Settlement Protection Act. Unless otherwise defined herein, all terms in these Regulations shall have the meanings set forth in CRESPA.

“*Disciplinary Board*” means the Virginia State Bar Disciplinary Board.

~~“*Financial Institution*” has the meaning set forth in § 6.1-2.1, *Code of Virginia*.~~

“*First dollar coverage*” means an insurance policy which obligates the company issuing the policy to pay covered claims in their entirety, up to the policy limits, regardless of the presence of a deductible amount to which the company may be entitled as a reimbursement from the insured.

“*SCC*” means the Virginia State Corporation Commission.

“*These regulations*” means 15 VAC 5-80-10 et seq., Regulations under the Virginia Consumer Real Estate Settlement Protection Act.

15 VAC 5-80-30. Registration; Reregistration; Required Fee.

~~Every licensed attorney, title insurance company, title insurance agent or real estate broker, as well as every financial institution authorized to do business in Virginia under any of the provisions of Title 6.1, *Code of Virginia*, or under federal law, and every subsidiary or affiliate of any such financial institution, now providing or offering, or intending to provide or offer, escrow, closing or settlement services as a settlement agent with respect to real estate transactions in Virginia shall register with the Bar on or before September 29, 1997, using the registration form available from the Bar for that purpose. Settlement agents beginning to provide or offer such services after July 1, 1997, shall register with the Bar prior to doing so. The registration requirement in this paragraph shall not apply to attorney settlement agents unless they provide or offer to provide escrow, settlement and closing services for real estate subject to CRESPA, i.e., real estate containing not more than four residential dwelling units. Thus, for example, attorneys who handle only commercial real estate transactions are not subject to these Regulations.~~

Every settlement agent shall thereafter reregister after notice on a schedule established by the Bar, providing updated registration information. Every settlement agent shall have a continuing

duty to advise the Bar of any change in name, address or other pertinent registration data that occurs between registrations.

The fee for each registration and reregistration shall be \$35 for an attorney individual settlement agent and \$100 for a settlement agent which is a corporation or other legal entity authorized to register in that capacity. The Bar reserves the right to adjust the fee as necessary within the statutory limit of \$100. The prescribed fee shall accompany each registration or reregistration in the form of a check made payable to the Treasurer of Virginia.

Registration is subject to revocation or suspension if the Bar or other appropriate licensing authority finds the settlement agent out of compliance with CRESPA or Regulations issued thereunder.

15 VAC 5-80-40. Unauthorized Practice of Law Guidelines; Investigation of Complaints.

The Bar will issue guidelines under CRESPA and in consultation with the SCC and the Board to assist settlement agents in avoiding and preventing the unauthorized practice of law in connection with the furnishing of escrow, closing or settlement services. In conformity with CRESPA, the Rules of the Virginia Supreme Court and the Bar's UPL opinions, these guidelines will delineate activities which can and cannot be carried out by registered non-attorney settlement agents in conducting settlements. The guidelines will be revised from time to time as necessary.

~~A copy of~~ The guidelines will be available on the Bar's website and provided by the appropriate licensing authority ~~Bar~~ to each registered settlement agent at the time of initial registration and at each reregistration. The guidelines will also be ~~published by the Bar in the Virginia Lawyer Register and~~ furnished to the SCC, the Board, and all other state and federal agencies that regulate financial institutions, as well as to members of the general public upon request. The guidelines may be photocopied as necessary.

The Bar will continue to receive and investigate unauthorized practice of law complaints in the real estate settlement area, as well as in other fields, under its unauthorized practice of law rules and procedures.

If the Bar receives complaints against non-attorney settlement agents that do not allege the unauthorized practice of law, it will refer the complaints to the appropriate licensing authority that has jurisdiction over the subject of the complaint. If the complaint involves an attorney settlement agent's noncompliance with 15 VAC 5-80-30 (Registration; Reregistration; Required Fee) of these Regulations, the Bar will conduct an informal investigation. If the Bar believes a violation has occurred, it will notify the attorney settlement agent in writing. If the apparent violation is not rectified within thirty (30) days, the Bar will investigate the alleged violations pursuant to 15 VAC 5-80-50(D). ~~refer the matter to the appropriate licensing authority for further enforcement action.~~

15 VAC 5-80-50. Attorney Settlement Agent Compliance.

A. Attorney Settlement Agent Certification.

Each attorney settlement agent shall, at the time of initial registration and each subsequent reregistration, certify on the form available from the Bar for that purpose, that the attorney settlement agent has in full force and effect the following insurance and bond coverages, and that such coverages will be maintained in full force and effect throughout the time the attorney settlement agent acts, offers or intends to act in that capacity:

1. A lawyer's professional liability insurance policy issued by a company authorized to write such insurance in Virginia providing first dollar coverage and limits of at least \$250,000 per claim covering the licensed attorney acting, offering or intending to act as a settlement agent. The policy may also cover other attorneys practicing in the same firm or legal entity.
2. A blanket fidelity bond or employee dishonesty insurance policy issued by a company authorized to write such bonds or insurance in Virginia providing limits of at least \$100,000 covering all other employees of the attorney settlement agent or the legal entity in which the attorney settlement agent practices.
3. A surety bond issued by a company authorized to write such bonds in Virginia, on a form approved by the Virginia State Bar, providing limits of at least \$200,000 covering the licensed attorney acting, offering or intending to act as a settlement agent. A copy of the approved bond form is available from the Bar. The bond may also cover other attorney settlement agents practicing in the same firm or legal entity. The original surety bond must be attached to the attorney settlement agent's certification form and furnished to the Bar; a surety bond on which a law firm is named as principal may be furnished by the firm or any one attorney settlement agent in the firm, with other such attorney settlement agents in the same firm attaching a copy to their forms.

The Bar reserves the right to require other evidence of the above insurance and bond coverages beyond the attorney's certification and surety bond, at its discretion.

An attorney settlement agent who has no employees other than the attorney settlement agent or other licensed owner(s), partner(s), shareholder(s), or member(s) of the legal entity in which the attorney settlement agent practices may apply to the Bar for a waiver of the coverage required in Section A.2. above, using the waiver request form available from the Bar. Such waiver requests will be acted on by the Executive Committee of the Bar, whose decision shall constitute final action by the agency.

B. Separate Fiduciary Trust Account.

Each attorney settlement agent shall maintain one or more separate and distinct fiduciary trust account(s) used only for the purpose of handling funds received in connection with escrow, closing or settlement services. Funds received in connection with real estate transactions not covered by CRESPA may also be deposited in and disbursed from such account(s). All funds received by an attorney settlement agent in connection with escrow, closing or settlement services shall be deposited in and disbursed from the separate fiduciary account(s) in conformity with both the Bar's disciplinary rules and CRESPA. These separate fiduciary trust accounts shall be maintained in the same manner and subject to the same rules as those promulgated by the Bar for other lawyer trust accounts, as well as in conformity with CRESPA. One separate fiduciary trust account may be maintained and used by all attorney settlement agents practicing in the same firm or legal entity.

C. Settlement Statements.

All settlement statements for escrow, closing and settlement services governed by CRESPA and these Regulations shall be in writing and identify, by name and business address, the settlement agent.

D. Complaints Against Attorney Settlement Agents.

The Bar shall receive complaints and investigate alleged violations of CRESPA and/or these Regulations by attorney settlement agents.

If, after investigation, the Bar does not have reasonable cause to believe that one or more violations of CRESPA and/or these Regulations have occurred, the Bar may dismiss the complaint as unfounded.

If, after investigation, the Bar has reasonable cause to believe that one or more violations have occurred, the following procedures shall apply:

1. The attorney settlement agent shall be notified in writing of the alleged violation(s).
2. The attorney settlement agent shall have thirty (30) days from the date of such notification to respond in writing to the alleged violations. If, after receipt of the response, the Bar no longer has reasonable cause to believe that one or more violations of CRESPA and/or these Regulations have occurred, the Bar may dismiss the complaint as unfounded.

3. If the Bar believes the alleged violation presents or presented a risk to consumers protected under CRESPA, the Bar may request a hearing and issue an order requiring the attorney settlement agent to appear at the hearing, whether or not the attorney settlement agent has responded in writing to the notice of alleged violation(s) or the thirty day time period has lapsed.
4. In conducting investigations of alleged violations of CRESPA and/or these Regulations by attorney settlement agents the Bar, by Bar Counsel, shall have the authority to issue summonses or subpoenas to compel the attendance of witnesses and the production of documents necessary and material to any inquiry.
5. The following shall be applicable to hearings on alleged violations of CRESPA and/or these Regulations:
 - a. Hearings shall be held before the Disciplinary Board within sixty (60) days of the issuance of the Bar's order to appear.
 - b. The standard of proof of violations of CRESPA or these regulations shall be clear and convincing evidence.
 - c. Hearings shall be conducted in the same manner as attorney misconduct hearings as set out in Rules of Court, Part Six, Section IV, Paragraph 13.
 - d. Agreed dispositions may be entered into in the same manner as agreed dispositions at the Disciplinary Board in attorney misconduct cases.
 - e. The attorney settlement agent's prior disciplinary record and prior record of violations of CRESPA and/or these Regulations shall be made available to the Disciplinary Board during the sanction stage of a hearing. The prior record of violations of CRESPA and/or these Regulations may be made available to Bar subcommittees, district committees, the Disciplinary Board or a three-judge circuit court prior to the imposition of any sanction for attorney misconduct.
 - f. If the attorney settlement agent is found to have violated CRESPA and/or these Regulations, the attorney settlement agent may be subject to the following penalties, at the Disciplinary Board's discretion:
 - (1) A penalty not exceeding \$5,000 for each violation;
 - (2) Revocation or suspension of the attorney settlement agent's registration; and

- (3) Any other sanction available to the Disciplinary Board in attorney disciplinary proceedings under the Rules of the Virginia Supreme Court, including, but not limited to, revocation or suspension of the attorney settlement agent's license practice law.
6. The Disciplinary Board shall assess costs in accordance with the same rules and procedures which apply to the imposition of costs in attorney misconduct cases.
7. All matters and proceedings pertaining to alleged violations of CRESPA and/or these Regulations are public. Related attorney misconduct cases shall be heard by the Disciplinary Board together with alleged violations of CRESPA and/or these Regulations. Any related disability issues shall be heard by the Disciplinary Board separately.
8. The Clerk of the Disciplinary System of the Bar shall maintain files and records pertaining to ended cases involving alleged violations of CRESPA and/or these Regulations. The Clerk shall follow the same file destruction policies which are utilized in attorney misconduct cases.
9. The Bar may proceed against an attorney settlement agent for alleged violations of CRESPA and/or these Regulations notwithstanding the attorney settlement agent has resigned from the practice of law, surrendered his or her license to practice law in the Commonwealth of Virginia or had his or her license to practice law in the Commonwealth of Virginia revoked.
10. An appeal from an order of the Disciplinary Board imposing sanctions under CRESPA and/or these Regulations shall be conducted in accordance with the provisions of Rules of Court, Part Six, Section IV, Paragraph 13 pertaining to an appeal of an order of the Disciplinary Board imposing sanctions upon findings of attorney misconduct.

FORMS

~~Settlement Agent Official Registration Form for a Corporation or Other Legal Entity (eff. 4/97).~~

~~Settlement Agent Official Registration Form for an Individual Attorney, Broker or Title Agent (eff. 1/98).~~

~~Settlement Agent Official ReRegistration Form for an Individual Attorney, Broker or Title Agent (eff. 2/98).~~

Virginia Attorney Real Estate Settlement Agent Financial Responsibility Certification (eff. 2/98).

Bond for Attorney Settlement Agents (eff. 5/97).

~~Settlement Agent Official Renewal Form for Corporation or Other Entity.~~