

PROPOSED ADDITION TO RULES OF THE SUPREME COURT OF VIRGINIA

PART 6 SECTION IV, PARA 24.

Proposed, June 2020

Attorney Real Estate Settlement Agents Regulations

(a) Authority; Applicability; Scope. [formerly 15VAC5-80-10.]

This paragraph is issued by the Virginia State Bar pursuant to Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia. Chapter 27.3 does not apply to licensed attorneys who provide escrow, closing, or settlement services solely for public bodies as defined in § [2.2-4301](#) of the Code of Virginia; thus, such attorneys are exempt from the registration, certification, and separate fiduciary trust account requirements of this chapter.

Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia, and therefore this paragraph, 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, 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 §§ [55-525.17](#) and [55-525.18](#) of the Code of Virginia. Lawyer settlement agents are not required to register under Chapter 27.3 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.

(b) Definitions. [formerly 15VAC5-80-20.]

The following words and terms when used in this paragraph have the following meanings unless the context clearly indicates otherwise. Unless otherwise defined in this subparagraph, all terms in this paragraph have the meanings set forth in Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia.

"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 Supreme Court of Virginia.

"Bar" means the Virginia State Bar.

"Board" means the Virginia Real Estate Board.

"Disciplinary board" means the Virginia State Bar Disciplinary Board.

"First dollar coverage" means an insurance policy that 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.

"This paragraph" means Part 6, Section IV, Para. 24 of the Rules of the Supreme Court of Virginia, Attorney Real Estate Settlement Agents Regulations.

(c) Registration; Reregistration; Required Fee. [formerly 15VAC5-80-30.]

Every licensed attorney 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 must register with the Bar using the registration form available from the Bar for that purpose. Settlement agents beginning to provide or offer such services must register with the Bar prior to doing so. The registration requirement in this subparagraph does not apply to attorney settlement agents unless they provide or offer to provide escrow, settlement, and closing services for real estate subject to Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia, (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 this chapter. Every settlement agent must thereafter reregister after notice on a schedule established by the Bar, providing updated registration information. Every settlement agent has 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 is \$35 for an attorney settlement agent. The Bar reserves the right to adjust the fee as necessary within the statutory limit of \$100. The prescribed fee must 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 Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or regulations issued thereunder.

(d) Unauthorized Practice of Law Guidelines; Investigation of Complaints. [formerly 15VAC5-80-40.]

The Bar will issue guidelines 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 Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia, the rules of the Supreme Court of Virginia, and the Bar's unauthorized practice of law opinions, these guidelines will delineate activities that 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.

The guidelines will be available on the Bar's website and provided by the appropriate licensing authority to each registered settlement agent at the time of initial registration and at each reregistration. The guidelines will also be 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 subparagraph (c) of this paragraph, 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 30 days, the Bar will investigate the alleged violations pursuant to subparagraph (e) 4.

(e) Attorney Settlement Agent Compliance. [formerly 15VAC5-80-50.]

1. Attorney settlement agent certification. Each attorney settlement agent must, at the time of initial registration and of 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:
 - (A) 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.
 - (B) 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.
 - (C) 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 insurance and bond coverages listed in this subsection 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 than a licensed owner, partner, shareholder, or member of the legal entity in which the attorney settlement agent practices may apply to the Bar for a waiver of the coverage required in subdivision 2 of this subsection, using the form available from the Bar. Such waiver requests will be acted on by the Executive Committee of the Bar, whose decision will constitute final action by the agency.

2. Separate fiduciary trust account. Each attorney settlement agent must maintain one or more separate and distinct fiduciary trust accounts 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 Chapter 27.3 (§ 55-525.16 et seq.) of Title 55 of the Code of Virginia may also be deposited in and disbursed from such accounts. All funds received by an attorney settlement agent in connection with escrow, closing, or settlement services must be deposited in and disbursed from the separate fiduciary accounts in conformity with both the Bar's disciplinary rules and Chapter 27.3. These separate fiduciary trust accounts must 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 Chapter 27.3. One separate fiduciary trust account may be maintained and used by all attorney settlement agents practicing in the same firm or legal entity.
3. Settlement statements. All settlement statements for escrow, closing, and settlement services governed by Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia and this paragraph must be in writing and identify, by name and business address, the settlement agent.
4. Complaints against attorney settlement agents. The Bar will receive complaints or investigate alleged violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this paragraph by attorney settlement agents. If, after investigation, the Bar does not have reasonable cause to believe that one or more violations of Chapter 27.3 or this paragraph 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 will apply:

- (A) The attorney settlement agent will be notified in writing of the alleged violations.
- (B) The attorney settlement agent will have 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 Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this chapter have occurred, the Bar may dismiss the complaint as unfounded.
- (C) If the Bar believes the alleged violation presents or presented a risk to consumers protected under Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia, 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 or the 30-day response time period has lapsed.
- (D) In conducting investigations of alleged violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this paragraph by attorney settlement agents, the Bar, by Bar Counsel, will 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.
- (E) The following will be applicable to hearings on alleged violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this chapter:
 - i. Hearings will be held before the disciplinary board within 60 days of the issuance of the Bar's order to appear.
 - ii. The standard of proof of violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this chapter will be clear and convincing evidence.
 - iii. Hearings will be conducted in the same manner as attorney misconduct hearings as set out in Rules of Court, Part Six, Section IV, Paragraph 13.
 - iv. Agreed dispositions may be entered into in the same manner as agreed dispositions at the disciplinary board in attorney misconduct cases.
 - v. The attorney settlement agent's prior disciplinary record and prior record of violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this paragraph will be made available to the disciplinary board during the sanction stage of a hearing. The prior record of violations

of Chapter 27.3 or this chapter 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.

- vi. If the attorney settlement agent is found to have violated Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this chapter, 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 to practice law.

- (F) The disciplinary board will assess costs in accordance with the same rules and procedures that apply to the imposition of costs in attorney misconduct cases.
- (G) All matters and proceedings pertaining to alleged violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this chapter are public. Related attorney misconduct cases must be heard by the disciplinary board together with alleged violations of Chapter 27.3 or this paragraph. Any related disability issues will be heard by the disciplinary board separately.
- (H) The Clerk of the Disciplinary System will maintain files and records pertaining to ended cases involving alleged violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this paragraph. The clerk must follow the same file destruction policies that are utilized in attorney misconduct cases.
- (I) The Bar may proceed against an attorney settlement agent for alleged violations of Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this chapter notwithstanding that the attorney settlement agent has resigned from the practice of law, surrendered his license to practice law in the Commonwealth of Virginia or had his license to practice law in the Commonwealth of Virginia revoked.
- (J) An appeal from an order of the disciplinary board imposing sanctions under Chapter 27.3 (§ [55-525.16](#) et seq.) of Title 55 of the Code of Virginia or this chapter will be conducted

[PROPOSED]

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.