

TITLE 13 INSURANCE
CHAPTER 14 TITLE INSURANCE
PART 4 ESCROW SERVICES

13.14.4.1 ISSUING AGENCY: Office of Superintendent of Insurance, Title Insurance Bureau.
[13.14.4.1 NMAC - Rp, 13.14.4.1 NMAC, 7-1-05; A, 3-1-16]

13.14.4.2 SCOPE: This rule applies to title insurers, title insurance agents, and their owners, officers, directors, partners or employees whose duties include or relate to the provision of escrow services.
[13.14.4.2 NMAC - Rp, 13.14.4.2 NMAC, 7-1-05]

13.14.4.3 STATUTORY AUTHORITY: NMSA 1978 Sections 59A-12-22 and 59A-30-4.
[13.14.4.3 NMAC - Rp, 13.14.4.3 NMAC, 7-1-05]

13.14.4.4 DURATION: Permanent.
[13.14.4.4 NMAC - Rp, 13.14.4.4 NMAC, 7-1-05]

13.14.4.5 EFFECTIVE DATE: July 1, 2005, unless a later date is cited at the end of a section.
[13.14.4.5 NMAC - Rp, 13.14.4.5 NMAC, 7-1-05]

13.14.4.6 OBJECTIVE: The purpose of this rule is to establish requirements for title insurers and title insurance agents who provide escrow services and to protect parties to transactions who deposit funds with title insurers or agents.
[13.14.4.6 NMAC - Rp, 13.14.4.6 NMAC, 7-1-05]

13.14.4.7 DEFINITIONS: See 13.14.1 NMAC.
[13.14.4.7 NMAC - Rp, 13.14.4.7 NMAC, 7-1-05]

13.14.4.8 REQUIREMENTS FOR PROVIDING SERVICES: A title insurer or title insurance agent providing escrow services shall:

- A.** only accept funds pursuant to escrow instructions;
- B.** not solicit or accept any material addition to, or alteration of, original, amended or supplemental escrow instructions, unless the addition or alteration is signed or initialed, or consented to in writing or by electronic transmission by the affected parties or their duly appointed agent or attorney in fact; minor additions or alterations to escrow instructions may be solicited or accepted if consented to by the affected parties, provided a written memorandum of instructions is prepared and maintained in the escrow file;
- C.** receive and handle all funds pursuant to the requirements of Sections 58-28-1 et seq. and 59A-12-22 NMSA 1978;
 - (1)** all escrow accounts shall be fiduciary accounts separate from all operating accounts, and shall be designated as a fiduciary account, an escrow account, a trust account, or a custodial account on the account signature card and in the books and records of the title insurer or title insurance agent;
 - (2)** title insurers and title insurance agents are prohibited from receiving for their own use interest from escrow accounts or money accepted for escrow, except that nothing herein shall preclude participation in the Land Title Trust Fund Act pursuant to Section 58-28-1 NMSA 1978 et seq.;
- D.** except as provided in this rule, disburse or deliver funds only in accordance with escrow instructions;
- E.** disburse funds out of an escrow account only if the funds are available funds;
- F.** interplead or hold any funds which are the subject of conflicting demands by the parties to an escrow until the title insurer or title insurance agent receives written instructions signed by all parties to the escrow which resolve the conflict or until a court of competent jurisdiction has determined the rights of all parties to the escrow or has ordered the funds released;
- G.** upon completion of an escrow, have delivered to each affected party a written statement of the escrow specifying all receipts and disbursements of funds made by or on behalf of each affected party to or from the escrow account, including from whom received and to whom made; and
- H.** not act with partiality toward any of the parties to an escrow as it relates to the disbursement of funds.

[13.14.4.8 NMAC - Rp, 13.14.4.8 NMAC, 7-1-05]

13.14.4.9 BOOKS AND RECORDS: In addition to the requirements of 13.14.16 NMAC, agent's statistical report, and 13.14.17 NMAC, underwriter's statistical report, a title insurer or title insurance agent shall, on a current basis and in accordance with accounting principles generally accepted in the United States of America:

- A.** establish and maintain a separate subsidiary ledger for each escrow;
- B.** post all receipts and disbursements from each subsidiary ledger to a control ledger and prepare a trial balance of all subsidiary ledgers at least once each calendar month;
- C.** at least once each calendar month, reconcile all bank accounts for escrowed funds to the appropriate control ledger and to the appropriate subsidiary ledger trial balance; and preserve and file in a logical sequence the trial balances and reconciliations necessary to trace an individual escrow in an examination;
- D.** maintain for each escrow file and record which meets the requirements of 1.13.70 NMAC, performance guidelines for the legal acceptance of public records produced by information technology systems and 1.12.7 NMAC, electronic authentication, copies of all receipts for escrowed funds and items, deposit slips, checks, and closing or settlement statements signed by the parties; and
- E.** preserve for at least fifteen years all escrow account bank statements and all books and records required by this section and 13.14.4.10 NMAC including copies of cancelled checks and wire transfer verifications, as evidence of insurability of title pursuant to NMSA 1978, Section 59A-30-11(B) (collectively "escrow records"). This fifteen year requirement for escrow records shall apply with respect to title policies issued on or after June 1, 2010.

[13.14.4.9 NMAC - Rp, 13.14.4.9 NMAC, 7-1-05; A, 3-1-16]

13.14.4.10 ACCOUNTING PROCEDURES AND INTERNAL CONTROLS: A title insurer or title insurance agent shall, on a current basis and in accordance with accounting principles generally accepted in the United States of America:

- A.** require each reconciliation to be approved by a manager, a supervisor, or, if neither of those managerial employees are available, another employee;
- B.** require each reconciliation to be prepared by someone not associated with the receipt and disbursement function; where size does not permit this, a manager or owner shall review each reconciliation;
- C.** require two signatures on all escrow checks; one signature must be that of a licensed agent or that of a person authorized by a licensed agent to sign escrow checks; this requirement is waived if an insurer or agent requires a manager, supervisor, or owner to review a list of monthly disbursements from escrow accounts; the manager, supervisor or owner must sign the list of monthly disbursements indicating his or her approval of the monthly disbursements;
- D.** assign each escrow file a unique number; name identification is not acceptable;
- E.** thoroughly investigate escrow accounts open for longer than six months and only allow disbursements from these accounts with management approval;
- F.** remove the signature blocks from voided checks or otherwise render them ineffective;
- G.** require management approval for any transfers of funds between escrow files or escrow accounts and document transfers between escrow files or accounts in both files;
- H.** notify the seller by written notice deposited in the mail and addressed to the seller's address as shown in the escrow file within seven (7) business days after an earnest money check deposited in the account is returned by the financial institution to the insurer or agent due to insufficient funds, unless the check is replaced by collected funds within the seven-day time period; the insurer or agent shall retain copies of written notices;
- I.** display related escrow file numbers directly on all escrow checks and deposit tickets to provide a clear and direct connection between the document and the related escrow file;
- J.** maintain in each escrow file a complete, current disbursement sheet that lists the date, source and type of all receipts; date, check number, item description, payee and amount of all checks; date, amount and type of any other disbursements (i.e.; outgoing wire-transfers) and any remaining balance; voided checks that have been canceled where funds have been credited back to the account shall be shown on the disbursement sheet;
- K.** keep invoices substantiating, or sufficient evidence to support, all disbursements in the escrow files;
- L.** require reimbursement of all escrow receivables and other shortages by the appropriate party or from the title insurer's or title agent's operating account within thirty (30) days from the closing date of the bank statement of the account that reflects the transaction creating the escrow receivable or shortage;

- M.** if a settlement statement requires changes, prepare a new statement or have all parties affected by the changes initial pen and ink changes, or maintain sufficient evidence to support the changes in the escrow file;
- N.** issue a signed, pre-numbered receipt for any escrow funds received in cash; and
- O.** if a bank does not return actual cancelled checks with bank statements, then copies of all checks must be available in agent's records, or the agent must obtain a signed acknowledgment from the bank that copies of checks will be provided upon request and will meet the following criteria:
 - (1) copies of checks must be clearly legible;
 - (2) both sides of every check will be copied so that endorsements can be verified; and
 - (3) front and back images of the checks will be copied and provided in a manner that makes it clear they belong together.

[13.14.4.10 NMAC - N, 7-1-05; A, 3-1-16]

13.14.4.11 INDEPENDENT ACCOUNTANT'S ANNUAL ESCROW COMPLIANCE

PROCEDURES: Title insurers and title insurance agents shall, at their own expense, have an independent certified public accountant perform the procedures in this section.

A. Minimum standards.

(1) The accountant shall perform the agreed-upon procedures to determine whether the title insurer or title agent maintains adequate escrow books and records and whether the title insurer or title agent is in compliance with the requirements of 59A-12-22 and 59A-30-4 NMSA 1978 and this rule. The accountant shall perform the agreed-upon procedures in accordance with attestation standards established by the American institute of certified public accountants and the requirements of this section.

(2) The accountant may use sampling procedures to examine the contents of escrow files. Based on the results of the examination of the sample, the accountant shall determine the number of files to be examined and the appropriate degree of detail to be used.

(3) The accountant shall confirm individual escrow funds, accounts where funds have not been fully disbursed, and escrow bank accounts. Since complete confirmation of all escrow accounts would be impractical, the accountant may adopt a spot-check system of confirmations, consider evidence generated by the title insurer or title agent, and use his or her judgment in accordance with sound attestation and auditing practices to determine the extent to which confirmations are needed. Although positive confirmations and specific replies are desirable, the accountant may use negative confirmations if, in the accountant's judgment, the circumstances warrant.

B. Instructions. The accountant shall:

(1) determine that available funds (as defined in Subsection D of 13.14.1.7 NMAC) for a transaction are received and deposited before any disbursements are made in accordance with 59A-30-5.1 NMSA 1978;

(2) closely scrutinize funds which remain in an escrow account in a dormant condition for a long period of time;

(a) title insurers and title agents must comply with the Uniform Unclaimed Property Act, 7-8A-1, et seq.;

(b) all credit balances open for three (3) years or longer as of December 31 of the year in question must be explained in detail on schedule B;

(3) carefully examine checks written from an escrow account to the agency's operating account or to another escrow account, especially if the checks appear to be disbursements for a purpose other than normal charges to a specific escrow;

(a) transfer of funds from one account to another is permissible providing both files contain proper authorization;

(b) the accountant shall examine a judgmentally determined number of cancelled checks to determine properly authorized signatures, payees and endorsements;

(4) itemize and thoroughly explain all escrow receivables in excess of two-hundred dollars (\$200.00) on schedule C and thoroughly explain any irregularities such as bank overdrafts on schedule D in light of the requirements of NMSA 1978, Sections 59A-12-22 and 59A-30-4;

(5) determine that support for each disbursement is in the escrow file and that disbursements were made to logical payees;

(a) if there are charges shown on the closing statement for overnight mail service, messenger service, copies of documents, recording fees or tax certificates, the accountant shall determine that these charges are actual charges or reasonable estimates of charges that must be made prior to closing;

(b) if there is evidence of a prior lien in the escrow file, such as a payoff statement from a lending institution, the accountant shall determine that a check was written for the payoff of the loan and a release was received; the accountant shall determine if there is a closing statement in the file and if the entries on the closing statement can be traced to the escrow accounting records; the accountant shall determine if the insurer's or agent's records include copies of all invoices, receipt items and disbursement checks; and

(6) inspect the monthly bank reconciliations on all escrow bank accounts to ensure compliance with the requirements of 13.14.4.9 NMAC.

C. Required report forms. Insurers and agents shall require the independent accountant to use the report forms prescribed in 13.14.4.13, 13.14.4.14, 13.14.4.15, and 13.14.4.16 NMAC when filing their report on applying agreed-upon procedures; facsimiles of the required report forms may be used, but the formats must be identical to the required report forms. The report shall include:

(1) schedule A: the form of opinion should be as set forth in schedule A unless circumstances dictate otherwise;

(a) the opinion letter must be signed by an independent certified public accountant or by a firm composed of independent certified public accountants;

(b) the firm name and address must be provided on schedule A;

(2) schedule B:

(a) schedule B requires detailed information regarding escrow files that have been open for three (3) years or longer, including the reason the file is still open, such as "disputed earnest money," "funds escrowed for repairs," "error at closing," etc. and the status of the file - active or inactive;

(b) if a file is inactive or has been dormant for more than three (3) years, the insurer or agent should consider clearing the file pursuant to the Unclaimed Property Act or through interpleader with the court;

(c) individual escrow files with dormant balances of two-hundred dollars (\$200.00) or less may be reported in the aggregate for each specific reason the balances remain in the files;

(3) schedule C:

(a) the accountant shall provide a detailed explanation of every debit balance or receivable in excess of two-hundred dollars (\$200.00) occurring throughout the year, even if cleared before the year's end; the explanation should include the date the shortages were created, the cause of the shortages, the date the shortages were cleared, and the method of clearance;

(b) schedule C provides columns for debit balances to be carried forward under each month they remained open; debit balances up to and including two-hundred dollars (\$200.00) should be included as a lump sum, without separate explanations;

(4) schedule D:

(a) Section A: the accountant shall provide detailed information regarding any overdrafts occurring during the fiscal year; the information should include the following: bank name and account number, related escrow file number, amount of overdraft, dates of origin and clearance, and an explanation that includes the method of disposition; if an overdraft situation was caused by an escrow receivable that has already been reported in schedule C, the accountant shall make reference to this explanation;

(b) Section B: the accountant shall provide a complete explanation of any irregularity discovered during the course of applying the agreed-upon procedures that has not been explained elsewhere in the report.

D. Negative reports. All reports or exhibits reflecting no activity shall be filed and noted as "none."

E. Filing reports. The accountant shall provide the title insurer or title agent with an adequate number of reports in sufficient time to allow the insurer or agent to review them and mail copies with cover letters to the title insurance bureau, by certified mail, within 180 days of the fiscal year end. In addition, each agent shall simultaneously mail, by certified mail, a copy of the report to each insurer that the agent represents. The title insurance bureau will not grant filing extensions.

[13.14.4.11 NMAC - Rp, 13.14.4.10 NMAC, 7-1-05; A, 3-1-16]

13.14.4.12 NOTICE TO THE SUPERINTENDENT:

A. A title insurer or title insurance agent shall notify the superintendent of:

(1) the entry of a judgment in any civil action against the title insurer or title insurance agent involving the misconduct or liability of the title insurer or title insurance agent concerning an escrow;

(2) the entry of a judgment in any civil action against an owner, officer, director, partner, or employee of the title insurer or title insurance agent involving the misconduct or liability of the owner, officer, director, partner, or employee concerning an escrow handled by the title insurer or title insurance agent;

(3) the entry of a judgment of conviction in any criminal proceeding involving the misconduct of the title insurer or title insurance agent or of any owner, officer, director, partner, or employee of the title insurer or title insurance agent concerning an escrow handled by the title insurer or title insurance agent; and

(4) any disciplinary action taken by the disciplinary board or the supreme court of New Mexico involving misconduct concerning an escrow by a title insurer or title insurance agent who is a licensed attorney.

B. Title insurers and title insurance agents who have actual knowledge of judgments entered or disciplinary actions taken after January 1, 2001, shall be required to notify the superintendent within ten (10) days after the date judgment is entered or disciplinary action taken, or within ten (10) days after acquiring actual knowledge thereof, whichever is later, by filing a written notice, which includes the names of the parties to the escrow, a brief description of the escrow, and a copy of the judgment entered or disciplinary action taken.

C. If a judgment or disciplinary action is appealed, each subsequent decision of an appellate court shall be subject to the notice requirements of this section.

D. If a title insurer or title insurance agent detects a defalcation regarding its escrow funds, the insurer or agent must file the following notice with the superintendent within forty-five (45) days of the end of the month in which the defalcation is detected: "We have detected circumstances regarding our escrow funds that may warrant an investigation by the title insurance bureau. The amount of funds involved is believed to be \$____." [13.14.4.12 NMAC - Rp, 13.14.4.11 NMAC, 7-1-05; A, 3-1-16]

13.14.4.13 SCHEDULE A - INDEPENDENT ACCOUNTANT'S REPORT ON APPLYING AGREED-UPON PROCEDURES:

[Print on CPA firm letterhead]

SCHEDULE A - INDEPENDENT ACCOUNTANT'S REPORT ON APPLYING AGREED-UPON PROCEDURES

To *[Name of agent]* and the Office of Superintendent of Insurance, Title Insurance Bureau:

We have performed the procedures required by 13.14.4.11 NMAC, which were agreed to by the office of superintendent of insurance, title insurance bureau, solely to assist the title insurance bureau in evaluating *[name of agent]*'s compliance with the provisions of Sections 59A-12-22 and 59A-30-4 NMSA 1978 and 13.14.4 NMAC relating to escrow services provided during the period of January 1, 20__ through December 31, 20__. Management is responsible for *[name of agent]*'s compliance with those requirements. This engagement, based on agreed-upon procedures, was conducted in accordance with attestation standards established by the American institute of certified public accountants. The sufficiency of these procedures is solely the responsibility of the parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures for either the purpose for which this report has been requested or for any other purpose. Any findings or other items requiring disclosure have been detailed on the schedules attached to this report.

We were not engaged to, and did not, conduct an examination, the objective of which would be the expression of an opinion on compliance. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of *[name of agent]* and the title insurance bureau and is not intended to be and should not be used by anyone other than these specified parties.

[Name of CPA firm]

[Date of Accountant's Report]

[13.14.4.13 NMAC - N, 7-1-05; A, 3-1-16]

