GUIDANCE ON NMAC 13.14.4 SECTIONS 8–10 COMPLIANCE

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BACKGROUND

All title insurance agents licensed to operate in the State of New Mexico are required to comply with the regulations enumerated in 13.14.4 of the NMAC, which establishes requirements for title insurers and title insurance agencies and agents who provide escrow services and to protect parties to transactions who deposit funds with title insurers or agents. NMAC 13.14.4 was recently updated in December 2020, and the update was meant to provide clearer language of the actual requirements, while allowing individual agents the flexibility to implement their own processes and controls, as they see fit, to ensure compliance.

PURPOSE

The purpose of the guidance below is to provide examples and clarification related to NMAC 13.14.4 Sections 8 through 10, which cover the requirements for providing escrow services, books and records, and accounting procedures and internal controls. The purpose of the guidance is to support agents in establishing internal controls, processes, supporting policies, and procedures related to the handling of escrow accounts/funds.

GUIDANCE

Those sections of NMAC 13.14.4 (the Code) where the New Mexico Office of Superintendent of Insurance believed that additional recommendations or suggested application may be beneficial to title insurers and title insurance agencies and agents are included below; therefore, all sections of the Code are not included. The “Guidance/Examples of Application” below are simply suggested practices and examples of application and are therefore not required. Users of this guidance should tailor their internal controls, processes, policies, and procedures based on their specific situation, organizational structure, and operations.

All title insurers and title insurance agencies and agents who provide escrow services should have comprehensive policies and procedures enumerating their processes and controls in place to support compliance with all applicable components of NMAC 13.14.4.

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13.14.4.8 Requirements for Providing Escrow Services	
A. "only accept funds pursuant to escrow instructions"	Funds should not be accepted prior to the receipt of escrow instructions. Agents and insurers should have procedures in place to ensure that funds are not accepted without related written escrow instructions. Written escrow instructions present the mutual agreement of parties involved; therefore, any related funds should not be accepted until such agreement/instructions are received. If funds are received prior to the receipt of the related escrow instructions, the agency should make every attempt to obtain the escrow instructions on the same date the funds are received. This may happen in cases where funds are received via wire transfer, prior to the actual Purchase Agreement or other written instructions being received. In all cases, every effort should be made to obtain the instructions timely and those efforts should be documented. If escrow instructions are not obtained timely, the funds must be returned to the sender in order to comply with this requirement and to mitigate the associated risk to the agency.
B. "not make changes to escrow instructions without the consent of all parties in the manner specified by the escrow instructions"	Changes to escrow instructions can occur for a variety of reasons such as an amendment to a purchase agreement, changes in terms and conditions, a change to the holding of funds for a specific purpose, etc. For any change that occurs, the written consent of both parties (i.e., buyer and seller) must be obtained. All changes to the escrow instructions, along with the approval by both parties, must be documented, and that documentation should be maintained as support in the related escrow file. If escrow instructions are received via email, or via a phone call, the information should be authenticated prior to carrying out the instructions. For example, if escrow instructions are received via email, the Agent should call the related Escrow Officer or Closer to verify the instructions verbally. Alternatively, if the escrow instructions are received via phone, the discussions should be documented, and the phone number should be verified (called back) for confirmation of authenticity prior to processing. Authentication procedures should be documented, and that documentation should be retained. Refer to previous guidance issued at: https://www.osi.state.nm.us/index.php/departments/title/.
E. "disburse funds only out of an escrow account deposited for that transaction"	Escrow accounts must be maintained separately from all operating accounts and must be designated as such. Each escrow account balance and activity must be separately tracked, and funds cannot be disbursed from an escrow account unless a deposit is in that account to cover it. Agents/insurers should ensure controls are in place to ensure

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	disbursements are not processed without the related deposit in the account. Transfers between escrow funds is strictly prohibited. If there is a situation where a disbursement in excess of an escrow account deposit balance is made, a transfer could be made from the agent's/insurer's operating account (not another escrow account) to temporarily cover the deficit. An example of how this could inadvertently occur would be if a data entry error was made related to property taxes. As a result, the check deposited to cover the tax payment is short and when the related disbursement is processed, it creates a deficit in the escrow account. These situations should be rare, and the situation and remediation should be adequately documented to demonstrate compliance.
F. “interplead or hold any funds that 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 transaction which resolve the conflict or until a final court order”	A “conflicting demand” could be created when a cancellation or termination occurs and earnest money is held in the related escrow account. If there is disagreement about who will receive the earnest money, a written agreement signed by both parties must be obtained instructing who the funds will go to, or a written final court order must be received. Until written instructions are received that meet one of these criteria, the funds must be interpleaded or held.
G. “upon completion of an escrow transaction, deliver to each party a written statement of the escrow specifying all receipts and disbursements of funds made by or on behalf of each party to the escrow, whether disbursed to or from the escrow account, including from whom received and to whom made”	Typically, a Closing Disclosure or a Settlement Statement is sufficient to fulfill the requirement of providing each affected party a "written statement of the escrow specifying all receipts and disbursements of funds". In some cases, it may be appropriate to maintain a separate listing or spreadsheet detailing all receipts/disbursements from an escrow account to track and present the activity. This is often referred to as a “Disbursement Worksheet” and should be considered as a standard practice, if deemed appropriate/necessary.
I. “comply with all escrow audits ordered by OSI and make available to OSI all information requested by the superintendent”	Title insurance insurers and agencies are strongly encouraged to maintain current, comprehensive policies and procedures covering the internal processes and controls for handling escrow accounts and ensuring compliance with NMAC regulations. Supporting documentation should be maintained, in separate escrow files, to support all activity and to demonstrate compliance. Escrow files should be kept organized, maintained consistently, and reviewed internally for completeness. If a complaint or suspected wrongdoing is identified, the OSI may order an audit to be conducted.

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13.14.4.9 Books and Records	
A. “establish and maintain a separate subsidiary ledger for each escrow transaction” B. “post all receipts and disbursements from each subsidiary ledger to a control ledger daily and at least monthly, prepare a trial balance of all subsidiary ledgers. The monthly trial balance reconciliation shall be performed by a person who did not perform the receipt and disbursement function”	Typically, software is utilized to maintain the required subsidiary ledgers required for escrow transactions. Within the software, an escrow accounting feature typically allows for separate control ledgers for receipts and disbursements to be maintained. Whenever possible, the individual processing receipts and disbursements should be separate from the individual performing the monthly trial balance reconciliation. However, in small offices where this may not be possible and there are instances where the same individual performs both duties, all supporting documentation and the reconciliation should be thoroughly reviewed by a separate designated individual, and that review and the related approval should be documented with support being maintained. Designation of these responsibilities should be included in internal policies and procedures, including the alternate process required when compliance is not reasonable and a defined timeline for the independent review to occur.
C. “on a daily basis, reconcile the book balance and escrow account balance”	This requirement stipulates that disbursements cannot be made from an escrow account unless the related deposit has been made to that escrow account to cover the funds. Reconciling on a daily basis ensures that no individual escrow account balances is negative; however, this reconciliation should be confirmed on each individual transaction to ensure funds are available in the account before a disbursement is processed.
D. “At least once each calendar month, prepare a three-way reconciliation for each escrow account. Each three-way reconciliation is required to be prepared within 10 business days of the closing date of the bank statement and to be approved by a title insurance agent who did not perform the reconciliation. The reconciliation shall include at a minimum as of the reconcile date: i. the bank statement; ii. reconciliation sheet or summary page with book balance; iii. outstanding deposits list and list of deposits in transit; iv. open escrow file listing or trial balance; and v. outstanding disbursements list, all as of the reconciliation date.”	Within ten business days of the closing date of the bank statement (i.e., date of the bank statement), you must reconcile the account activity. The three-way reconciliation performed is between the bank statement balance, book balance, and the balance by escrow account. Policies and procedures should be in place detailing the responsibilities for performing the monthly reconciliation, the supporting documentation maintained to ensure compliance with all reconciliation requirements, and the approval process and responsibility. Agencies should ensure adequate documentation is on file to show who performed the reconciliation, who reviewed/approved it, and the dates in which both occurred. The five key items listed here should be maintained in a reconciliation package, by month (chronological order), along with documentation of the preparer and approver, as they would be the supporting documentation requested in the event of an audit performed by OSI.

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13.14.4.10 Accounting Procedures and Internal Controls	
A. “require two signatures on all escrow checks; one signature of which shall be a title insurance agent”	This requirement can be difficult for smaller agencies to address. Consider implementing the following mitigating controls to ensure compliance when two physical signatures are not reasonable: 1. Implement a policy for the use of a signature stamp for one of the designated signers. To adequately control its use, require a Signature Stamp Log be maintained noting the date of use, person using, purpose, and check information. 2. Require the log be reviewed by someone independent of the initial signer on a monthly basis to ensure the reasonableness of all uses. Document this review via signature/date on the log. 3. During the bank reconciliation process, incorporate a control where endorsements on all checks are reviewed for reasonableness and all uses of the signature stamp are appropriately included on the Signature Stamp Log. This review should be documented. If a signature stamp is implemented, all three of the mitigating controls listed above, or similar alternatives, should be implemented.
B. “assign each escrow file a unique number; name identification is not acceptable”	Each file must be identified by a unique number. The easiest way to accomplish this is via an electronic system which is preset and more rigid in controlling file numbers issued. However, if a manual system must be used, consider keeping one single listing (i.e., spreadsheet or log) of all escrow files, in numerical order, to track the usage of each number.
C. “on a monthly basis, an owner, officer or director shall review and approve the reconciliation for escrow accounts open for longer six months”	When escrow accounts are open for extended periods of time, it is typically as a result of uncashed checks or is related to earnest money that has not been cleared out due to the parties not being in agreement on who gets the money. The review, performed on a monthly basis, should be documented. Specifically, consider implementing procedures where the reviewer documents the date the review occurred and the results of the review (i.e., the reason for the open accounts and any follow-up performed) and the signature/sign-off of the reviewer. Reports produced/run to perform the review should be maintained to support the reconciliation and review. Reports used for this review can include an escrow aging report or similar report and an annual escheat report. The goal of the report review documentation is to support that the agency is working on the old balances and attempting to get them cleared out.

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E. “require management approval for any transfers of funds between escrow accounts”	Given that transfers between escrow accounts are typically prohibited, when there are circumstances when it is required, there should be thorough documentation to show the justification and appropriateness of the transfer. For example, a transfer between escrow accounts could occur if a seller on an escrow file is using proceeds to purchase property which relates to a second escrow file. Controls that should be considered for implementation include: • Documented policy for controlling and adequately documenting transfers between escrow files. • Issue a physical check to/from the accounts and maintain copies of the checks showing the audit trail. • Implement controls in the software restricting transfers without the required "management" approval. If a system is not used, document this approval manually on the supporting documentation for the transfer and maintain the documentation in both escrow files.
F. “Notify the seller within one day after receiving notice an earnest money check deposited in the account is returned by the financial institution to the title insurer or agency due to insufficient funds, unless the check is replaced by available funds within the one day time period; the insurer or agency shall retain a copy of written notices”	Notification to the seller within one day after receiving notice of an earnest money check being returned must be documented. Consider the following for implementation: • Issue a manual/written notice that can be easily stored in the related escrow file. Ensure the date/time is written on the notification and signed/initialed by the person who processed the notification. • If the notification is done via email, print a copy of the email, showing the date/time, and maintain the copy in the related escrow file. • If notifications are done via phone, implement a form or other standard means of documenting the phone call. Document all details, including the date, time, notifying person, the person who was given the notification, and any key points from the discussion. This documentation should be maintained in the escrow file.
I. “keep invoices substantiating, or sufficient evidence to support, all disbursements in the escrow files”	Ensure that copies of all support documents (such as copies of invoices for property tax assessments, survey services, repairs performed, inspection fees, etc.) are maintained to support each file disbursement. Ensure a process is in place to file all disbursement supporting documentation in the applicable escrow files.
J. “require reimbursement of all shortages from the title insurer’s or agency’s operating account within three days that reflects the transaction creating the escrow receivable or shortage, unless the shortage is the result of fraud or suspected fraud, in which case the shortage shall be cured within 45 days,	The 45-day requirement for reimbursing all receivables and other shortages allows for flexibility to ensure these can be identified and resolved. At times, they may not be identified immediately; however, documentation should be made of an identification as soon as it is made, as well as any subsequent actions to work towards a resolution. Accounts should not be left out of balance once identified; therefore, a

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unless otherwise ordered by the superintendent"	transfer from the operating account may be appropriate until a formal resolution can be reached. Any correspondence related to the reimbursement should be adequately documented. Ideally, agencies should aim to reconcile the account within three days of discovering the variance, even if that means utilizing internal funds (i.e., the operating account) until a final resolution can be made.