

1 **CONTROLLED BUSINESS IN TITLE INSURANCE REPEAL**

2 2019 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Daniel Hemmert**

5 House Sponsor: Mike Schultz

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies provisions related to title insurance.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ defines terms;
- 13 ▶ enacts provisions that govern affiliated business arrangements involving a title
- 14 entity;
- 15 ▶ with certain exceptions, adopts the federal Real Estate Settlement Procedures Act as
- 16 the state law governing affiliated business arrangements involving a title entity;
- 17 ▶ provides that the Division of Real Estate shall enforce the provisions of the bill;
- 18 ▶ requires a title entity to submit an annual report to the Division of Real Estate
- 19 related to the title entity's affiliated business arrangements and capitalization during
- 20 the previous calendar year;
- 21 ▶ allows the Division of Real Estate to enforce certain provisions of the federal Real
- 22 Estate Settlement Procedures Act against real estate licensees;
- 23 ▶ repeals existing provisions governing controlled business relationships in the title
- 24 industry; and
- 25 ▶ makes technical changes.

26 **Money Appropriated in this Bill:**

27 None

28 **Other Special Clauses:**

29 None

30 **Utah Code Sections Affected:**

31 AMENDS:

32 **31A-23a-504**, as last amended by Laws of Utah 2015, Chapter 330

33 **61-2f-401**, as last amended by Laws of Utah 2018, Chapter 213

34 ENACTS:

35 **31A-23a-1101**, Utah Code Annotated 1953

36 **31A-23a-1102**, Utah Code Annotated 1953

37 **31A-23a-1103**, Utah Code Annotated 1953

38 **31A-23a-1104**, Utah Code Annotated 1953

39 **31A-23a-1105**, Utah Code Annotated 1953

40 **31A-23a-1106**, Utah Code Annotated 1953

41 **31A-23a-1107**, Utah Code Annotated 1953

42 REPEALS:

43 **31A-23a-503**, as last amended by Laws of Utah 2013, Chapter 319

44

45 *Be it enacted by the Legislature of the state of Utah:*

46 Section 1. Section **31A-23a-504** is amended to read:

47 **31A-23a-504. Sharing commissions.**

48 (1) (a) Except as provided in Subsection 31A-15-103(3), a licensee under this chapter
49 or an insurer may only pay consideration or reimburse out-of-pocket expenses to a person if the
50 licensee knows that the person is licensed under this chapter as to the particular type of
51 insurance to act in Utah as:

52 (i) a producer;

53 (ii) a limited line producer;

54 (iii) a consultant;

55 (iv) a managing general agent; or

56 (v) a reinsurance intermediary.

57 (b) A person may only accept commission compensation or other compensation as a

58 person described in Subsections (1)(a)(i) through (v) that is directly or indirectly the result of
59 an insurance transaction if that person is licensed under this chapter to act as described in
60 Subsection (1)(a).

61 (2) (a) Except as provided in Section 31A-23a-501, a consultant may not pay or receive
62 a commission or other compensation that is directly or indirectly the result of an insurance
63 transaction.

64 (b) A consultant may share a consultant fee or other compensation received for
65 consulting services performed within Utah only:

- 66 (i) with another consultant licensed under this chapter; and
- 67 (ii) to the extent that the other consultant contributed to the services performed.

68 (3) This section does not prohibit:

69 (a) the payment of renewal commissions to former licensees under this chapter, former
70 Title 31, Chapter 17, or their successors in interest under a deferred compensation or agency
71 sales agreement;

72 (b) compensation paid to or received by a person for referral of a potential customer
73 that seeks to purchase or obtain an opinion or advice on an insurance product if:

- 74 (i) the person is not licensed to sell insurance;
- 75 (ii) the person does not sell or provide opinions or advice on the product; and
- 76 (iii) the compensation does not depend on whether the referral results in a purchase or
77 sale; or

78 (c) the payment or assignment of a commission, service fee, brokerage, or other
79 valuable consideration to an agency or a person who does not sell, solicit, or negotiate
80 insurance in this state, unless the payment would constitute an inducement or commission
81 rebate under Section 31A-23a-402 or 31A-23a-402.5.

82 (4) (a) In selling a policy of title insurance, sharing of commissions under Subsection
83 (1) may not occur if it will result in:

- 84 (i) an unlawful rebate; or
- 85 [~~(ii) compensation in connection with controlled business; or~~]

- 114 (d) on February 1, 2023, through January 31, 2024, 2%;
- 115 (e) on February 1, 2024, through January 31, 2025, 2.5%;
- 116 (f) on February 1, 2025, through January 31, 2026, 3%;
- 117 (g) on February 1, 2026, through January 31, 2027, 3.5%;
- 118 (h) on February 1, 2027, through January 31, 2028, 4%; and
- 119 (i) on February 1, 2028, through January 31, 2029, 4.5%.
- 120 (4) "Associate" means the same as that term is defined in 12 U.S.C. Sec. 2602.
- 121 (5) "Division" means the Division of Real Estate created in Section 61-2-201.
- 122 (6) "Essential function" means:
- 123 (a) examining and evaluating, based on relevant law and title insurance underwriting
- 124 principles and guidelines, title evidence to determine the insurability of a title and which items
- 125 to include or exclude in a title commitment or title insurance policy to be issued;
- 126 (b) preparing and issuing a title commitment or other document that:
- 127 (i) discloses the status of the title as the title is proposed to be insured;
- 128 (ii) identifies the conditions that must be met before a title insurance policy will be
- 129 issued; and
- 130 (iii) obligates the insurer to issue a title insurance policy if the conditions described in
- 131 Subsection (6)(b)(ii) are met;
- 132 (c) clearing underwriting objections and taking the necessary steps to satisfy any
- 133 conditions to the issuance of a title insurance policy;
- 134 (d) preparing the issuance of a title insurance policy; or
- 135 (e) handling the closing or settlement of a real estate transaction when:
- 136 (i) it is customary for a title entity to handle the closing or settlement; and
- 137 (ii) the title entity's compensation for handling the closing or settlement is customarily
- 138 part of the payment or retention from the insurer.
- 139 (7) "New or newly affiliated title entity" means a title entity that:
- 140 (a) is licensed as a title entity for the first time on or after May 14, 2019; or
- 141 (b) (i) is licensed as a title entity before May 14, 2019; and

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142 (ii) enters into an affiliated business arrangement for the first time on or after May 14,
143 2019.

144 (8) "Ownership affiliated business arrangement" means an affiliated business
145 arrangement based on a person or a person's affiliate having a direct or beneficial ownership
146 interest of more than 1% in a title entity.

147 (9) "RESPA" means the federal Real Estate Settlement Procedures Act, 12 U.S.C. Sec.
148 2601 et seq. and any rules made thereunder.

149 (10) "Section 8 of RESPA" means 12 U.S.C. Sec. 2607 and any rules promulgated
150 thereunder.

151 (11) "Sufficient capital and net worth" means:

152 (a) for a new or newly affiliated title entity:

153 (i) \$100,000 for the first five years after becoming a new or newly affiliated title entity;
154 or

155 (ii) after the first five years after becoming a new or newly affiliated title entity, the
156 greater of:

157 (A) \$50,000; or

158 (B) on February 1 of each year, an amount equal to 5% of the title entity's average
159 annual gross revenue over the preceding two calendar years, up to \$150,000; or

160 (b) for a title entity licensed before May 14, 2019, who is not a new or newly affiliated
161 title entity:

162 (i) for the time period beginning on February 1, 2020, and ending on January 31, 2029,
163 the lesser of:

164 (A) an amount equal to the applicable percentage of the title entity's average annual
165 gross revenue over the two calendar years immediately preceding the February 1 on which the
166 applicable percentage first applies; or

167 (B) \$150,000; and

168 (ii) beginning on February 1, 2029, the greater of:

169 (A) \$50,000; or

170 (B) an amount equal to 5% of the title entity's average annual gross revenue over the
171 preceding two calendar years, up to \$150,000.

172 (12) "Title entity" means:

173 (a) a title licensee as defined in Section 31A-2-402; or

174 (b) a title insurer as defined in Section 31A-23a-415.

175 (13) (a) "Title evidence" means a written or electronic document that identifies and
176 describes or compiles the documents, records, judgments, liens, and other information from the
177 public records relevant to the history and current condition of a title to be insured.

178 (b) "Title evidence" does not include a pro forma commitment.

179 Section 3. Section **31A-23a-1102** is enacted to read:

180 **31A-23a-1102. Regulation of affiliated business -- Applicable law.**

181 (1) Except as provided in this part, for purposes of state law, Section 8 of RESPA
182 governs an affiliated business arrangement involving a title entity.

183 (2) The division shall enforce the provisions of this part, including Section 8 of
184 RESPA.

185 (3) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
186 division may make rules necessary to implement the provisions of this part.

187 Section 4. Section **31A-23a-1103** is enacted to read:

188 **31A-23a-1103. Affiliated business arrangements.**

189 (1) An affiliated business arrangement between a person and a title entity violates
190 Section 8 of RESPA for purposes of state law if:

191 (a) the title entity does not have sufficient capital and net worth in a reserve account in
192 the title entity's name; or

193 (b) more than 70% of the title entity's annual title insurance business is affiliated
194 business on or after the later of:

195 (i) two years after a title entity begins an affiliated business arrangement; or

196 (ii) June 1, 2021.

197 (2) In addition to Subsection (1), the division may find that an affiliated business

198 arrangement between a person and a title entity violates Section 8 of RESPA after evaluating
199 and weighing the following factors in light of the specific facts before the division:

200 (a) whether the title entity:

201 (i) is staffed with its own employees to conduct title insurance business;

202 (ii) manages its own business affairs;

203 (iii) has a physical office for business that is separate from any associate's office and
204 pays market rent;

205 (iv) provides the essential functions of title insurance business for a fee, including
206 incurring the risks and receiving the rewards of any comparable title entity; and

207 (v) performs the essential functions of title insurance business itself;

208 (b) if the title entity contracts with another person to perform a portion of the title
209 entity's title insurance business, whether the contract:

210 (i) is with an independent third party; and

211 (ii) provides payment for the services that bears a reasonable relationship to the value
212 of the services or goods received; and

213 (c) whether the person from whom the title entity receives referrals under the affiliated
214 business arrangement also sends title insurance business to other title entities.

215 Section 5. Section **31A-23a-1104** is enacted to read:

216 **31A-23a-1104. Annual affiliated business report.**

217 Before March 1 each year, each title entity shall submit a report to the division that:

218 (1) contains the following for the preceding calendar year:

219 (a) the name and address of any associate that owns a financial interest in the title
220 entity;

221 (b) for each associate identified under Subsection (1)(a), the percentage of the title
222 entity's affiliated business that is the result of an affiliated business arrangement with the
223 associate;

224 (c) a description of any affiliated business arrangement the title entity has with a person
225 other than an associate identified under Subsection (1)(a);

226 (d) the percentage of the title entity's annual title insurance business that is affiliated
227 business;

228 (e) proof of sufficient capital and net worth; and

229 (f) any other information required by the division by rule;

230 (2) is certified by an officer of the title entity that the information contained in the
231 report is true to the best of the officer's knowledge, information, and belief.

232 Section 6. Section **31A-23a-1105** is enacted to read:

233 **31A-23a-1105. Investigations.**

234 (1) To enforce the provisions of this part, including Section 8 of RESPA, the division
235 may conduct a public or private investigation within or outside of the state as the division
236 considers necessary to determine whether a person has violated a provision of this part,
237 including Section 8 of RESPA.

238 (2) For the purpose of an investigation described in Subsection (1), the division may:

239 (a) administer an oath or affirmation;

240 (b) issue a subpoena that requires:

241 (i) the attendance and testimony of a witness; or

242 (ii) the production of evidence;

243 (c) take evidence;

244 (d) require the production of a book, paper, contract, record, other document, or
245 information relevant to the investigation; and

246 (e) serve a subpoena by certified mail.

247 (3) (a) A court of competent jurisdiction shall enforce, according to the practice and
248 procedure of the court, a subpoena issued by the division.

249 (b) The division shall pay any witness fee, travel expense, mileage, or any other fee
250 required by the service statutes of the state where the witness or evidence is located.

251 Section 7. Section **31A-23a-1106** is enacted to read:

252 **31A-23a-1106. Disciplinary action.**

253 (1) Subject to the requirements of Section 31A-23a-1107, the division may impose a

254 sanction described in Subsection (2) against a person if the person is:

255 (a) a title entity or a person previously licensed as a title entity for an act the person
256 committed while licensed; and

257 (b) violates a provision of this part, including Section 8 of RESPA.

258 (2) The division may, against a person described in Subsection (1):

259 (a) impose an educational requirement;

260 (b) impose a civil penalty in an amount not to exceed \$5,000 for each violation;

261 (c) do any of the following to a title entity:

262 (i) suspend;

263 (ii) revoke; or

264 (iii) place on probation;

265 (d) issue a cease and desist order; and

266 (e) impose any combination of sanctions described in this Subsection (2).

267 (3) (a) If the presiding officer in a disciplinary action under this part issues an order

268 that orders a fine as part of a disciplinary action against a person, including a stipulation and

269 order, the presiding officer shall state in the order the deadline, that is no more than one year

270 after the day on which the presiding officer issues the order, by which the person shall comply

271 with the fine.

272 (b) If a person fails to comply with a stated deadline:

273 (i) the person's license is automatically suspended:

274 (A) beginning the day specified in the order as the deadline for compliance; and

275 (B) ending the day on which the person complies in full with the order; and

276 (ii) if the person fails to pay a fine required by an order, the division may begin a

277 collection process:

278 (A) established by the division by rule made in accordance with Title 63G, Chapter 3,

279 Utah Administrative Rulemaking Act; and

280 (B) subject to Title 63A, Chapter 3, Part 5, Office of State Debt Collection.

281 (4) The division may delegate to an administrative law judge the authority to conduct a

282 hearing under this part.

283 Section 8. Section **31A-23a-1107** is enacted to read:

284 **31A-23a-1107. Adjudicative proceedings -- Review -- Coordination with**
285 **department.**

286 (1) (a) Before an action described in Section 31A-23a-1106 may be taken, the division
287 shall:

288 (i) give notice to the person against whom the action is brought; and

289 (ii) commence an adjudicative proceeding.

290 (b) If after the adjudicative proceeding is commenced under Subsection (1)(a) the
291 presiding officer determines that a title entity has violated a provision of this part, including
292 Section 8 of RESPA, the division may take an action described in Section 31A-23a-1106 by
293 written order.

294 (2) In accordance with Title 63G, Chapter 4, Administrative Procedures Act, a person
295 against whom action is taken under this part may seek review of the action by the executive
296 director of the Department of Commerce.

297 (3) If a person prevails in a judicial appeal and the court finds that the state action was
298 undertaken without substantial justification, the court may award reasonable litigation expenses
299 to that individual or entity as provided under Title 78B, Chapter 8, Part 5, Small Business
300 Equal Access to Justice Act.

301 (4) (a) An order issued under this section takes effect 30 days after the service of the
302 order unless otherwise provided in the order.

303 (b) If a person appeals an order issued under this section, the division may stay
304 enforcement of the order in accordance with Section 63G-4-405.

305 (5) (a) Except as provided in Subsection (5)(b), the division shall commence a
306 disciplinary action under this chapter no later than the earlier of the following:

307 (i) four years after the day on which the violation is reported to the division; or

308 (ii) 10 years after the day on which the violation occurred.

309 (b) The division may commence a disciplinary action under this part after the time

310 period described in Subsection (5)(a) expires if:

311 (i) (A) the disciplinary action is in response to a civil or criminal judgment or
312 settlement; and

313 (B) the division initiates the disciplinary action no later than one year after the day on
314 which the judgment is issued or the settlement is final; or

315 (ii) the division and the person subject to a disciplinary action enter into a written
316 stipulation to extend the time period described in Subsection (5)(a).

317 (6) (a) Within two business days after the day on which a presiding officer issues an
318 order under this part that suspends or revokes a title entity's license, the division shall deliver
319 written notice to the department that states the action the presiding officer ordered against the
320 title entity's license.

321 (b) Upon receipt of the notice described in Subsection (6)(a), the department shall
322 implement the action ordered against the title entity's license.

323 (7) Upon receipt of a notice described in Subsection (6), the department shall take the
324 action described in the notice upon the title entity's license.

325 Section 9. Section **61-2f-401** is amended to read:

326 **61-2f-401. Grounds for disciplinary action.**

327 The following acts are unlawful for a person licensed or required to be licensed under
328 this chapter:

329 (1) (a) making a substantial misrepresentation, including in a licensure statement;

330 (b) making an intentional misrepresentation;

331 (c) pursuing a continued and flagrant course of misrepresentation;

332 (d) making a false representation or promise through an agent, sales agent, advertising,
333 or otherwise; or

334 (e) making a false representation or promise of a character likely to influence,
335 persuade, or induce;

336 (2) acting for more than one party in a transaction without the informed consent of the
337 parties;

338 (3) (a) acting as an associate broker or sales agent while not affiliated with a principal
339 broker;

340 (b) representing or attempting to represent a principal broker other than the principal
341 broker with whom the person is affiliated; or

342 (c) representing as sales agent or having a contractual relationship similar to that of
343 sales agent with a person other than a principal broker;

344 (4) (a) failing, within a reasonable time, to account for or to remit money that belongs
345 to another and comes into the person's possession;

346 (b) commingling money described in Subsection (4)(a) with the person's own money;
347 or

348 (c) diverting money described in Subsection (4)(a) from the purpose for which the
349 money is received;

350 (5) paying or offering to pay valuable consideration, as defined by the commission, to a
351 person not licensed under this chapter, except that valuable consideration may be shared:

352 (a) with a principal broker of another jurisdiction; or

353 (b) as provided under:

354 (i) Title 16, Chapter 10a, Utah Revised Business Corporation Act;

355 (ii) Title 16, Chapter 11, Professional Corporation Act; or

356 (iii) Title 48, Chapter 3a, Utah Revised Uniform Limited Liability Company Act, as
357 appropriate pursuant to Section 48-3a-1405;

358 (6) for a principal broker, paying or offering to pay a sales agent or associate broker
359 who is not affiliated with the principal broker at the time the sales agent or associate broker
360 earned the compensation;

361 (7) being incompetent to act as a principal broker, associate broker, or sales agent in
362 such manner as to safeguard the interests of the public;

363 (8) failing to voluntarily furnish a copy of a document to the parties before and after the
364 execution of a document;

365 (9) failing to keep and make available for inspection by the division a record of each

- 366 transaction, including:
- 367 (a) the names of buyers and sellers or lessees and lessors;
 - 368 (b) the identification of real estate;
 - 369 (c) the sale or rental price;
 - 370 (d) money received in trust;
 - 371 (e) agreements or instructions from buyers and sellers or lessees and lessors; and
 - 372 (f) any other information required by rule;
- 373 (10) failing to disclose, in writing, in the purchase, sale, or rental of real estate, whether
- 374 the purchase, sale, or rental is made for that person or for an undisclosed principal;
- 375 (11) being convicted, within five years of the most recent application for licensure, of a
- 376 criminal offense involving moral turpitude regardless of whether:
- 377 (a) the criminal offense is related to real estate; or
 - 378 (b) the conviction is based upon a plea of nolo contendere;
- 379 (12) having, within five years of the most recent application for a license under this
- 380 chapter, entered any of the following related to a criminal offense involving moral turpitude:
- 381 (a) a plea in abeyance agreement;
 - 382 (b) a diversion agreement;
 - 383 (c) a withheld judgment; or
 - 384 (d) an agreement in which a charge was held in suspense during a period of time when
 - 385 the licensee was on probation or was obligated to comply with conditions outlined by a court;
- 386 (13) advertising the availability of real estate or the services of a licensee in a false,
- 387 misleading, or deceptive manner;
- 388 (14) in the case of a principal broker or a branch broker, failing to exercise reasonable
- 389 supervision over the activities of the principal broker's or branch broker's licensed or
- 390 unlicensed staff;
- 391 (15) violating or disregarding:
 - 392 (a) this chapter;
 - 393 (b) an order of the commission; or

- 394 (c) the rules adopted by the commission and the division;
- 395 (16) breaching a fiduciary duty owed by a licensee to the licensee's principal in a real
- 396 estate transaction;
- 397 (17) any other conduct which constitutes dishonest dealing;
- 398 (18) unprofessional conduct as defined by statute or rule;
- 399 (19) having one of the following suspended, revoked, surrendered, or cancelled on the
- 400 basis of misconduct in a professional capacity that relates to character, honesty, integrity, or
- 401 truthfulness:
 - 402 (a) a real estate license, registration, or certificate issued by another jurisdiction; or
 - 403 (b) another license, registration, or certificate to engage in an occupation or profession
 - 404 issued by this state or another jurisdiction;
 - 405 (20) failing to respond to a request by the division in an investigation authorized under
 - 406 this chapter within 10 days after the day on which the request is served, including:
 - 407 (a) failing to respond to a subpoena;
 - 408 (b) withholding evidence; or
 - 409 (c) failing to produce documents or records;
 - 410 (21) in the case of a dual licensed title licensee as defined in Section 31A-2-402:
 - 411 (a) providing a title insurance product or service without the approval required by
 - 412 Section 31A-2-405; or
 - 413 (b) knowingly providing false or misleading information in the statement required by
 - 414 Subsection 31A-2-405(2);
 - 415 (22) violating an independent contractor agreement between a principal broker and a
 - 416 sales agent or associate broker as evidenced by a final judgment of a court;
 - 417 (23) (a) engaging in an act of loan modification assistance that requires licensure as a
 - 418 mortgage officer under Chapter 2c, Utah Residential Mortgage Practices and Licensing Act,
 - 419 without being licensed under that chapter;
 - 420 (b) engaging in an act of foreclosure rescue without entering into a written agreement
 - 421 specifying what one or more acts of foreclosure rescue will be completed;

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422 (c) inducing a person who is at risk of foreclosure to hire the licensee to engage in an
423 act of foreclosure rescue by:

424 (i) suggesting to the person that the licensee has a special relationship with the person's
425 lender or loan servicer; or

426 (ii) falsely representing or advertising that the licensee is acting on behalf of:

427 (A) a government agency;

428 (B) the person's lender or loan servicer; or

429 (C) a nonprofit or charitable institution; or

430 (d) recommending or participating in a foreclosure rescue that requires a person to:

431 (i) transfer title to real estate to the licensee or to a third-party with whom the licensee
432 has a business relationship or financial interest;

433 (ii) make a mortgage payment to a person other than the person's loan servicer; or

434 (iii) refrain from contacting the person's:

435 (A) lender;

436 (B) loan servicer;

437 (C) attorney;

438 (D) credit counselor; or

439 (E) housing counselor;

440 (24) as a principal broker, placing a lien on real property, unless authorized by law; [or]

441 (25) as a sales agent or associate broker, placing a lien on real property for an unpaid
442 commission or other compensation related to real estate brokerage services[.]; or

443 (26) failing to timely disclose to a buyer or seller an affiliated business arrangement, as
444 defined in Section 31A-23a-1101, in accordance with the federal Real Estate Settlement
445 Procedures Act, 12 U.S.C. Sec. 2601 et seq. and any rules made thereunder.

446 Section 10. **Repealer.**

447 This bill repeals:

448 Section **31A-23a-503, Controlled business in title insurance.**