GUIDANCE ON NMAC 13.14.4 SECTION 11 COMPLIANCE

From: New Mexico Office of Superintendent of Insurance
Title Insurance Bureau
PO Box 1689
Santa Fe, NM 87504-1689

Date of Issue: February 23, 2023

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 the transactions who deposit funds with title insurers or agents. NMAC 13.14.4 was 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 is to provide examples and clarification related to NMAC 13.14.4, Section 11 “Annual Escrow Compliance Procedures”. The purpose of the guidance is also to support title insurers and title insurance agencies and agents in engaging an independent certified public accountant (CPA) to perform the required annual escrow compliance procedures, and to support CPAs in carrying out the compliance procedures in a consistent and effective manner.

GUIDANCE

NMAC 13.14.4.11 states the following:

A. “Title insurers and agencies shall, at their own expense, engage an independent certified public accountant to certify the procedures required by OSI. Title insurers and agencies shall require the certified public accountant to follow and comply with all requirements of any order of OSI relating to the performances of escrow duties as set out in these rules.”

B. “The certified public accountant shall be licensed and in good standing.”

The New Mexico Office of Superintendent of Insurance (OSI) believes that additional guidance should be provided, on an annual basis. The “Guidance/Examples of Application” below should be utilized and applied by all agencies and agents in order, where applicable, to ensure that compliance procedures are performed consistently for all agencies/agents in the industry, and to standardize the reporting prepared by the CPA. The OSI requires, as described under the “Engagement of CPA and Reporting Format” section below, that the procedures performed, including sample sizes tested, be

included in the report issued by the CPA. This information helps to ensure that reporting between agencies and agents is standardized, and that the results of the compliance procedures (i.e., findings or statement of no findings) can be compared to the basis of procedures performed.

Users of this guidance should tailor their compliance procedures, as deemed appropriate, 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.

GUIDANCE SUMMARY	GUIDANCE DETAILS/EXAMPLES
Engagement of CPA and Reporting Format	
All agencies/agents should engage a licensed CPA to perform **agreed-upon procedures**.	The agreed-upon procedures engagement must be performed in compliance with attestation standards established by the American Institute of Certified Public Accountants (AICPA). CPAs should reference the current attestation standards for specific requirements and for the reporting template/instructions.
The New Mexico OSI will issue an Order, on an annual basis, which will define the timeline/due date for submitting the agreed-upon procedures report.	The Order issued should be referenced for the specific timeline requirements for submitting the agreed-upon procedures report. Agencies/agents should contract with a CPA prior to, or shortly after, the issuance of the Order to ensure the required due date for submitting the related report can be met.
The report submitted by each agency/agent must be in the format of agreed upon procedures report.	While NMAC 13.14.4.11 simply requires that compliance procedures be performed, the New Mexico OSI will require the submission of an agreed-upon procedures report to satisfy this requirement. The agreed-upon procedures report must include language in compliance with the current attestation standards established by the AICPA and include, at a minimum, the following: • The detailed procedures performed by the CPA, including sample sizes tested, as required by reporting standards • Schedule B: Description of Credit Balances Open Three Years or Longer, which must present each file number, date of origin, amount in the escrow account, and the reason/justification for the amount held • Schedule C: Summary Analysis of Escrow Receivables and Shortages for the year ended, which must present all receivables and shortages as of year-end including the bank name and account number the receivable/shortage is related to (as applicable), the file number, the aging amount by month (first month, second month, etc.), the date of clearance (if applicable) and an explanation • Schedule D: Analysis of Bank Overdrafts and Other Irregularities for the year ended, which must present the bank name and account number, amount, date of origin, date of clearance and an explanation of each overdraft and irregularity (as applicable) • Findings that resulted from the procedures performed (refer to the attestation standards for format required) For each of the required schedules above, if there are no files, balances, or instances that qualify for reporting, the fact that there were none should be reported.

GUIDANCE SUMMARY	GUIDANCE DETAILS/EXAMPLES
Agencies/agents should prepare for the agreed-upon procedures engagement to ensure that all documentation is readily available for review.	Agencies/agents should ensure that all escrow-related files are compliant with the requirements of NMAC 13.14.4. In preparation for the annual compliance review, consider ensuring the following is ready and available (preferably in electronic format): • System reports to support all escrow-related file activity (see Population for Compliance Testing) • All bank statements, bank reconciliations, and supporting documentation for the full calendar year • Any internal policies and procedures supporting compliance processes and controls related to escrow activity
Population for Compliance Testing	
CPAs engaged to perform the agreed-upon procedures should determine the appropriate population for ensuring coverage of the entire year under review.	All agency/agent files that were opened and/or closed during the year under review should be considered for compliance testing. The CPA should determine the appropriate population of files to sample from and should perform procedures to ensure the population is complete. However, the following can be considered: • A report produced directly from the agency/agent system is typically the most appropriate source; however, the report should be assessed for any alterations. • The report utilized should include all escrow file activity during the year. • The beginning file number (i.e., first new/opened file or closed file) should be compared to the prior year ending file number. • The last/ending file number (i.e., the last new file issued or closed) should be verified through an appropriate means such as reviewing the next sequential file number for activity after year-end. • The completeness reviews should be adequately documented.
The agreed-upon procedures performed are applicable only to escrow-related files.	The population of files subject to compliance procedures would only be those that have escrow-related activity. Opened/closed files that are for non-escrow related services performed by the agency/agent would not be appropriate for sample selection. Examples of files that would be for non-escrow services would be for files with only title searches or title-related services only. The CPA should perform appropriate assessments to ensure that all non-escrow related files are removed from the population. If this is not possible and non-escrow related (i.e. titled only) files are included in the population and end up being selected in the sample the CPA will need to replace those non-escrow files with actual escrow related files. If sampled files are “replaced”, the method for additional selection should be documented (i.e. selecting the next file in the numerical sequence or other basis for selection).
Escrow File Sampling	
CPAs are responsible for ensuring that the means of sampling escrow files is appropriate and that the sampling methods applied are adequately documented.	Once the population of files that should be subject to sampling is identified, the CPA may use sampling procedures to perform the compliance procedures. The following general sample sizes are recommended: • If the agency/agent has 300 or fewer files in the population, test a minimum of 10 files.

GUIDANCE SUMMARY	GUIDANCE DETAILS/EXAMPLES
	• If the agency/agent has 301 or more files in the population, test a minimum of 20 files. The sample should ensure coverage of accounts that were both opened/new during the year and accounts closed during the year. Ensuring coverage of both types of files will allow for testing of applicable compliance requirements.
If additional risks are identified during the planning for the agreed-upon procedures, larger samples should be tested.	The minimum sample sizes above are recommendations only, and CPAs are responsible for assessing the population, and other risk factors, and determining the appropriate sample size. Examples of risk factors that may warrant larger sample sizes include, but are not limited to, the following: • Prior compliance findings related to the area being tested. • Significant changes identified in the systems, processes or controls over escrow-related files. For example, turnover of key personnel, new system implementation, etc. • Known or reported fraud, instances of non-compliance, or other situations. All considerations and conclusions related to sample size should be adequately documented, and the total population and sample size tested should be included in the agreed-upon procedures report.
Compliance Procedures	
Confirmation of individual escrow funds, accounts where fund have not been fully disbursed, and escrow bank accounts should be performed and documented, to the extent determined to be appropriate.	The CPA should assess to what degree individual escrow fund account balances should be confirmed. While a 100% confirmation of undisbursed balances may not be reasonable, a sampling methodology should be used, and the judgement applied for the size of the sample and method of the sample should be documented.

Compliance review/testing procedures performed should be adequate to cover all aspects of NMAC 13.14.4, specifically sections 8 through 10.	The following are minimum recommended procedures that should be assessed by the CPA for applicability and appropriateness, considering the specific agency/agent being reviewed under the agreed-upon procedures engagement. The recommended sample sizes, methodologies and specific procedures may need to be tailored based on the circumstances, and the CPA and agency/agent are responsible for ensuring that all procedures performed are adequate and appropriate.
	
	• *Escrow Files:* For all escrow files sampled:
	  • Assess whether the file is identified with a unique number.
	  • Assess whether a complete, current disbursements sheet is maintained in the file, and includes all required information.
	  • Determine if available funds for all transactions processed during the period were received and deposited before any disbursements were made.
	  • All transfers processed during the period appear to be reasonable/appropriate and are properly supported.
	  • On all closing statements, determine if charges for things such as overnight mail service, messenger service, copies of documents, recording fees, tax certifications

GUIDANCE SUMMARY	GUIDANCE DETAILS/EXAMPLES

	• *Disbursements*: For all disbursements within the sample of escrow files selected:
	  • Determine if disbursements were made to logical payees and for amounts supported by supporting documentation (invoices or other).
	  • Assess whether disbursements were made from escrow accounts deposited for that transaction and in accordance with documented escrow instructions.
	  • Determine if escrow funds were only disbursed in accordance with escrow instructions.
	  • Review all cancelled checks to determine if they were properly approved, in compliance with requirements, payees appear reasonable and the endorsements appear appropriate.
	• *Bank Reconciliations*: Obtain all supporting documentation for the bank reconciliations performed by the agency/agent for the full year under assessment. For each month, perform procedures to assess compliance with applicable portions of NMAC 13.14.4. Specifically, the assessment should include:
	  • Determining if the reconciliation was performed within ten business days of the closing date of the bank statement and documentation is on file to support that it was reviewed/approved by someone independent of the preparer of the reconciliation.
	  • Assess whether the reconciliation each month includes:
	  • The bank statement:
	  • A reconciliation sheet/summary page of book balances;
	  • Outstanding deposits list and list of deposits in transit;
	  • Open escrow file listing or trial balance; and,
	  • Outstanding disbursements list as of the reconciliation date.
	  • Assess any instances in which the year-end reconciliation includes long-outstanding items, including outstanding checks (outstanding 180+ days) or deposits in transit (over 3 business days) and determine if they are reasonable and require additional procedures.

When possible, the CPA should test 100% of the related activity (i.e. transfers, disbursements, cancelled checks, etc.) within their full sample of escrow files. For example, testing all related disbursements made, during the year under assessment, within the 10-20 escrow files sampled.	When the volume of transactions prevents the testing of 100% of a specific type of transaction, the CPA should apply judgment to selecting samples to teach each are of compliance. The following general guidelines can be applied:
	• In most circumstances, if the number of transactions is 30 or less, the CPA should test 100%.
	• In most circumstances, if the number of transactions is over 30, sample selection may be necessary. In those cases, you should ensure that at least 50% or more of the overall population is tested (for example, if there are 50 disbursements within the sample of escrow files selected, test a minimum of 25 disbursements for compliance). Judgment should be applied if sampling is required, and must include the testing of all items deemed “significant” such as:
	  • Transfers over $1,000
	  • Disbursements and/or checks over $10,000