



# Insurance Department

State of Utah

GARY R. HERBERT  
Governor  
SPENCER J. COX  
Lieutenant Governor  
TODD E. KISER  
Commissioner

## State of Utah Title & Escrow Commission Meeting Meeting Information

**Date:** July 11, 2016 **Time:** 9AM **Place:** East Building, Copper Room

### MEMBERS

#### COMMISSION MEMBERS

xChair, Bob Rice (*Insurer, Ada County, ID*)                      Matthew Jagerson (*Agency, Utah County*)  
Co-Chair, Jeff Wiener (*Insurer, Salt Lake County*)              xDavid Moore (*Agency, Salt Lake County*)  
xSylvia Andersen (*Public Member, Salt Lake County*)

#### DEPARTMENT STAFF

Todd Kiser, *Ins. Commissioner*                      xPerri Babalis, *AG Counsel*                      xBrett Barratt, *Deputy Comm.*  
xSuzette Green-Wright, *MC Dir.*                      xReed Stringham, *AG Counsel*                      xRandy Overstreet, *Licensing Dir.*  
xTammy Greening, *Examiner*                      Greg Soderberg, *ALJ*                      Adam Martin, *Examiner*  
xSteve Gooch, *PIO Recorder*

#### PUBLIC

Carol Yamamoto                      Tim A. Krueger                      James Swan  
Blake Heiner                      Timothy Grubb                      Steve Forrey  
D. Adam Back                      Frank Medina                      Sandy Day  
Tyrone Johnson [PHONE]                      Amy Perry [PHONE]                      Cal Robinson [PHONE]  
Joseph McPhie [PHONE]                      Matt Sager [PHONE]                      Wade Taylor [PHONE]  
Matt Ryden [PHONE]                      Pete Sevens [PHONE]

### MINUTES — *Not Approved*

#### General Session: (Open to the Public)

- **Welcome** / Bob Rice, Chair (9:05 AM)
- **Adopt Minutes of Previous Meeting**
  - **Motion by David to adopt minutes. Seconded by Sylvia. Motion passes 3-0.**
- **Reports**
  - Concur with Licensee Report / Suzette
    - There were no new agencies and no lapsed agencies. As a result of the discussion last month, Suzette added "Agencies taken off limited license" to the report. Two agencies were taken off a limited license and were placed on a full license. This will be discussed later in the meeting.
    - **Motion by David to concur. Seconded by Sylvia. Motion passes 3-0.**
  - Concur with Complaint & Enforcement Report / Suzette
    - There are only 6 open cases. Most of the old cases have been cleaned up, but older ones are very convoluted. The oldest one involves many agencies, and Market Conduct is working through it as they can. The last one is a relationship with a real estate brokerage that came up after the last T&E Commission meeting.
    - E-cases show 2 outstanding: one is a very meticulous review because it's similar to other cases and they want to make sure they fine appropriately; the bottom one is an informal that hasn't come back yet. Tammy thinks it's a CE issue.
    - **Motion by Sylvia to concur. Seconded by David. Motion passes 3-0.**
  - Request for Dual Licensee Expedited Request: None

- Request for Attorney Exemption: None
- **Administrative Proceedings Action** / Greg Soderberg, ALJ
  - Stipulation and Order: None
  - Order to Show Cause: None
  - Informal Adjudicative Proceeding and Order: None
  - Notice of Formal Adjudicative Proceeding: None
- **Board Duties & Responsibilities** / Perri
- **New Business**
  - Elect officers
    - **Bob nominates David Moore as chair. Sylvia seconds. Motion passes 3-0.**
    - **David nominates Bob Rice as vice chair. Sylvia seconds. Motion passes 3-0.**
    - **Perri will do the annual presentation on the Open Meetings Act next month.**
- **Old Business**
  - Exam Review / Tammy
    - An email blast was sent out to all agencies asking for questions, comments, etc. regarding the exam review. It was sent to roughly 159 agencies; there were zero responses.
    - Sylvia asks why Tammy thinks that is. Tammy says she thinks people just didn't check their spam filters. Sylvia suggests they might feel like the exam is fine as it is, or they just didn't want to think about it. Tammy says it could be all of the above, but she does get questions often about whether the test is on the old stuff or the new stuff. It's the old stuff, and doesn't include TRID or marketing-specific questions.
    - Sylvia asks who takes the test. Tammy says it's anyone who wants to have a title examination, title escrow, or title marketing license. It's taken once to become licensed, then there are 12 hours of CE every two years. Sylvia asks how many people take it every year. Randy says it's not many, and could be around 20 a year.
    - Sylvia asks who oversees the test. Randy says the department has gone out to observe the test site to see security and how tests are run, etc. Industry has also come out, and someone from the T&E Commission has been involved with the annual review. The review is mostly weeding through the easiest and hardest questions on the test. David notes that the licensee report shows, under "New licensees", who has taken the test every month. This month it's 2, while usually it's 4 or 5.
    - Sylvia asks if the purpose is to make sure agents are prepared do the job they're trying to do. Tammy and Randy note that it's the minimum competency requirements. Sylvia says industry leaders should want the test to be really good because they should want qualified workers working for them. Their lack of response is concerning to her. They should have taken the time and effort to offer their thoughts to Tammy about this test. She's dumbfounded and gravely concerned as a member of the public that nobody would respond to Tammy's request for input. Just like anyone who takes an industry test for licensing, she wants them to be good at what they do.
    - Randy suggests sending the test question request again, and maybe also a snail mail notice.
    - Bob asks if Tammy is going to the ULTA meeting. Tammy says yes. Bob suggests bringing it up in front of that trade industry group as well.
    - Pete fully supports what Sylvia said, and thanks her for her recommendation. He says underwriters know the problems and weaknesses with escrow, and it would be good for them to submit questions so we can test around those areas. There needs to be feedback from the underwriters and agencies about where they see problems and claims. One simple thing would be to identify the principles of an escrow.
    - Randy says tests are updated annually on January 1. He notes that the test review usually happens in late summer, but it was late spring this year. We should have until fall to develop questions.
    - Cal Robinson says it's been a long time since he took the test, and he doesn't know what's on the test now — how would he find out? David says a test outline can be found through PSI or the

UID website. Randy notes that they're all multiple choice questions. David says there aren't many questions that line up with Utah's rules, especially unfair marketing. It would be good to get some of those on the test.

- R592-11 five-year rule review
  - David looked at R592-11 and sees nothing that needs to change in it.
- Controlled business
  - Public notice and audit / Suzette
    - The request last month was that if we're going to have limited licenses going forward, will they be noticed publicly. Suzette says we are no longer going to have limited licenses going forward. Bob clarifies that it's either an approved license or nothing. Suzette says that's correct.
    - Brett says it might be helpful for the T&E Commission to understand if we've had limited licenses and what we've done about it. Suzette says we had 2 limited licenses, and the reason we didn't note them last month is because there are two with similar names. They are Vantage Title and North American Title. One was issued in 2011 and one in 2013. They have been audited and no issues were found with either. They now have a full license, but are required to report any controlled business and cannot use those specific people who were involved as ownership on the transactions.
    - Brett notes that the limited license statute lays out a myriad of specific items for which a limited license can be issued. None of them fit neatly into the controlled business situation; the closest are that the Commissioner can issue a limited license after a public hearing or when an order has been issued. Those situations were not present in this instance, so the Department sent a letter to the licensees that the limitation is being removed, but with a reminder that controlled business is a violation of the law.
    - Amy Perry asks if the Department is still planning to still prohibit all controlled business. Brett says we've spent a lot of time over the last month, and it's a difficult statute to understand. The department has concluded that the controlled business statute essentially says there's no prohibition of a realtor owning a title insurance agency; however, that real estate professional cannot profit from ownership in a title insurance agency. If it appears that part of the business plan or profits come from referrals from the real estate agency, then they couldn't have a title license. The prohibition is that you can own it, but you can't profit from it. You can't self-refer except up to 1%.
    - Bob asks if someone owns a title company and a real estate company, if the title company received no business from the real estate company, could the real estate company make a profit from the title company? The answer is no.
    - Sylvia asks what the point would be. The Department has determined that you could own it, but you can't profit from it. Brett gives a hypothetical situation where it could be of value — if someone is in the real estate business and tells his realtor friends that he'd like it if they used his title company, there could be a benefit there — but most often it wouldn't be beneficial.
    - Bob asks if the Department has analyzed the section of statute that says if more than 30% of business comes from controlled business, it's presumed to be done for the purposes of the prohibition. How do we read that with respect to the 1% because they don't seem to go together. Brett agrees and says the 30% is an easy line of demarcation for the enforcement professionals. Reed thinks the 1% refers to whether someone has a financial interest in the company. If you have 1% ownership, then you qualify as having a financial interest; then if you're referring business to the agency then you have controlled business. The 1% is an identifier, while the 30% refers to whether the substantial standard factor is met. He agrees that the 30% statute doesn't fit in his mind. That statute was first enacted in 1981 before the code was amended and we haven't been able to determine the reason it was made.

- Sylvia asks if this includes deferred income, such as letting the company keep it until they're not a realtor anymore. Reed says yes because it's being entitled to 1% of the net profit, not receiving it.
- Amy Perry asks about places like eTitle, which gives itself 100% of the business. She asks if we would benefit from an independent AG's opinion about that. Brett says the AG's duty is to advise executive agencies, not the public. But we've talked about what the Department and AG's can do to help the T&E Commission and the industry. There are a number of options, including issuing a bulletin.
- Blake Heiner asks if a real estate professional owns more than 1% of a title agency but there is no controlled business, that's not a violation? Brett says that's correct. Brett says if they are entitled to a profit of 1% or more, they can't self-refer or derive a benefit.
- Carol Yamamoto asks about builder-developers who own interest in a title company. Brett says it would be the same, as would a lender in the same situation. It's not a licensing issue — it has to do with the industry you're in. Blake says the defined term is "a producer of title insurance business" and it includes attorneys, agents, agencies, etc.
- Brett says when we were reanalyzing the topic, he thought it would be nice to say we allow it or don't allow it, but then there are issues about telling they can't own a business and restraint of trade. In this case, you can own and do business in both, but you can't profit from self-referral.
- Amy asks if there could be a bulletin produced about this. Brett asks for direction from the T&E Commission and notes that one of its duties is to inform the Department of matters most critical to the industry. Sylvia asks if this is rampant in the industry. David says it is nationally. In many states, title companies are owned in part or in full by a bank or developer. Utah is one of the few states with a prohibition. Sylvia asks if there's a lot of it here. Brett says there shouldn't be any of it.
- Matt Ryden says that his reading of the statute is that you can profit from controlled business, and until you get to 30% you won't be presumed to be in violation. Brett says the Department disagrees with that: any amount would be a violation, but once you hit 30% it's presumed that you're violating the statute. Pete notes that would be a rebuttable presumption. How can we restrict people in the future and yet permit people to continue a practice that's gone on for years?
- Brett asks if a bulletin should be worked on and issued regarding the Department's interpretation of the controlled business statute. Bob says that would be great. Listening to the conversation, it would be good to have the department's interpretation, especially since the statute is confusing.
- **Brett says the Department will present a draft not later than the September T&E Commission meeting.**
- Bob suggests that the topic be brought up at the ULTA meeting to gauge the tone of the industry. Brett says the Department would be interested to hear legal opinions from those in the title industry to make sure we get it right.
- Joseph McPhie asks if there will be any public notification about title companies that have any controlled business. Bob says his understanding is that there will be no more limited licenses, so public notice won't be required. Brett says two limited licenses were issued that shouldn't have been issued, and that has been corrected.
- David asks if it's part of the controlled business statute to provide a report to the T&E Commission regarding all controlled business in. Tammy says the reports are part of the annual report and are subject to review by the T&E Commission. Bob notes that people always fill out the controlled business report incorrectly. He asks when Tammy gets those reports, does she have them fix it. Tammy says yes, she usually calls or emails them to confirm. They are supposed to note who the owners are on a separate form. The hope was

that this separate form would alleviate the confusion. David notes that it's 31A-23a-503(8) that requires a summary of controlled business to inform the T&E Commission and the Commissioner about the money derived from controlled business. He notes that the T&E Commission has never seen that report. Tammy says she hasn't created one, but will look through the statute to see the requirements.

- Sandy Day asks if the specific ownership will be disclosed for the two companies taken off the limited license. Randy says when an agency license is issued, it doesn't ever say who the owner is. It might be available through the Division of Corporation. Randy notes that 31A-23a-111 describes reasons why a license may be revoked or issued with a license limitation. None of the reasons in the limitations section include controlled business, which is why we took that limitation off the licenses in question. We could put a limitation on a license in the future as long as we give them the opportunity to have a hearing, but not for the reason of controlled business. Since it shouldn't have been put on there in the first place, we won't disclose the ownership of the agency, just like we don't on any other agency.
- Requirements for reporting a change in agency ownership / Randy
  - David asks if there's a change in ownership of an agency that would lead to controlled business, does that need to be reported. Randy says yes. He points to R590-244-13(3), which discusses miscellaneous license amendments such as a change in agency ownership.
  - Bob asks if the department's position is that a change in position means a change of ownership position. Randy says the language isn't really clear, but that the intent will be clarified next time we make a change to the rule.
- **Other Business**
  - Title commission website / David
    - There are two places on the website where you can access a list of underwriters/title insurers. One is full of outdated information, while the other is updated often. **Steve will fix the outdated link to point to the updated link.**
    - There are a number of market share reports for various lines of authority. In 2010, there was a Title market share report, but there hasn't been one for the next 4 years. Steve says those market share reports come from a tool that is provided by the NAIC. **Steve will look to see if a Title report is available.**
    - The Title Agency Report and Information page includes a document named "Department Procedures to Determine Title Agency Profitability" at the bottom. He wants to know who compiled the document. Steve doesn't know, but Tammy has. **We will review it.**
- **Hot Topics**
  - Title & escrow standards / David
    - David wonders if there is interest in creating standards for creating or clearing title, such as recording old trust deeds, recording reconveyances, etc. He says we haven't seen powers of attorney being recorded anymore. Should there be some standardization? He thinks it might be good to create some standards for the industry. Carol asks how he would implement them. David thinks maybe a rule or bulletin.
    - David says a lot of time is spent redoing work that was previously done by another title agency. This could cut down on some of that time.
    - Tammy notes that regarding reconveyances, there's a portion of the statute that says if you're going to charge someone for a service, then not provide that service, the Department would take issue with that.
    - Carol says the industry has become sloppy because she spends a lot of time researching and clearing things off titles. She finds it offensive when it seems like the same title companies hold files hostage. Tammy notes that refusing to record adequate documentation is a violation.
    - Tammy says older trust deeds may fall through the cracks, but now there's a statutory reconveyance, so there should be no reason to have outstanding trust deeds. David says with his

- company, if they haven't cleared older trust deeds they're going to get a call, and he doesn't want to get a call.
- Sylvia asks if the T&E Commission's responsibility is to the consumer or to the industry. She asks because if the responsibility is to the consumer, then shouldn't we have an annual workshop or seminar that's open to the public to tell them what to look for in a title transaction? She wants to know what's the priority of responsibility. Perri says the statute doesn't say. Bob says realistically the Commission doesn't have much authority, so really it's almost just a sounding board for the Department. Sylvia asks if the rules are to protect the consumer or the industry. She would like to see an annual workshop for consumers that will talk about changes and things to be aware of when investing in real estate. Bob says the T&E Commission is a liaison between the industry and the Department, but is also aligned with the Department and has an obligation to the public. However, the focus has often been on the industry. Perri says she would hope that they serve both sides.
  - Sylvia thinks there's value in an annual workshop, because she's gained a lot of information and become a more informed consumer by serving on the T&E Commission. It would be a great service to the public to inform them of what the Commission has done. We need to find a greater purpose for these meetings rather than just holding a meeting.
  - Acceptance of earnest money by a title agency or producer / Tammy
    - Tammy got an email from an agency owner who had a conversation with a real estate broker about why the title industry always accepts the earnest money. Brokerages used to take the earnest money, but then they got tired of having someone do the accounting, so then it fell to the title agency. That makes the title agency the neutral third party. If the contract fails, both sides then have to agree that the money should go to one party. If there's no agreement, the agency hangs onto the money until there's a lawsuit.
    - Bob asks if there's a real estate contract and earnest money is deposited with a title agency, then the contract falls apart, is there an escrow. Tammy says yes. Bob asks if that then violates 31A-23a-406 because no title insurance policy was issued in the transaction. Tammy says the work done assumes that a title policy will be issued. She thinks it is discussed in a bulleting about lot deposits.
    - Tammy reads the email, which says title agencies should be able to charge brokers the exact costs of the title employee that will be managing the earnest money in the real estate broker's account. This is consistent with RESPA which should make any subsidy by a service provider illegal.
    - Sylvia says it sounds like the title company is neutral, where the brokerage may not be. As a consumer, she would prefer the neutral party holding the money. Bob says if a transaction is consummated and a policy is created, then there's no violation anyway.
    - Sylvia asks how much money we're talking about with respect to escrow fees and administration. David says it's usually around \$195. Tammy says almost all brokerages charge an administrative fee, but the escrow fee is solely to sit down and close. David notes that this administrative fee is charged regardless of whether the title company holds the earnest money.
    - Bob says there's a chicken-and-egg problem all through this because if you charge a fee to hold the earnest money, you're taking on escrow liability outside the transaction which you cannot do; but if you hold money with the anticipation of earning the escrow fee when the transaction closes, you don't need to charge it. If you start saying it's a RESPA violation to charge to hold the earnest money, then it's a separate escrow transaction that wouldn't be allowed under statute.
    - Sylvia asks if there's an ability to charge the fee if the transaction doesn't consummate. David says in the real world, when the money is deposited, there's a note made in the trust account software. The only time there are extraneous expenses is when a sale fails. They'll have to then get approvals from the buyer, seller, and both brokerages to release the money. That's when you're doing work for nothing.
    - Bob asks Blake Heiner if most agencies take earnest money. Blake says yes, he's certain they all do and none of them like it because it's a no-win situation. If the deal fails, there's a dispute about

who's entitled to the money and everyone is unhappy with the title agency. Bob asks if the majority of real estate agents send the earnest money to the title agent. Blake says yes. Some hold it themselves, but the majority send it to the title agent. Sandy Day says she's seen it both ways, and it's probably closer to half-and-half.

- Tammy thinks the consumer would prefer the title agency hold the money, but the broker decides whether to pass the money to the title agency or whether to keep it themselves. As the email says, is the title agency subsidizing the real estate brokerage by holding their earnest money and doing the work for it. Bob asks if that constitutes a thing of value being given to a real estate company, and whether that actually comes into play and whether it's even an illegal inducement issue.
- Carol notes that she deals with brokerages who give specific instructions about how to specifically disburse the checks. It feels like the agency is doing it all, and aren't charging for it.
- Bob says what if a consumer says they're having a contractual dispute with their broker, and tells the title agency not to pay the broker. Bob thinks the broker is just there as part of the deal at the behest of the consumer, but they're not the agency's customer — the buyer and seller are the actual customer.
- David says if the deal goes through it requires minimal time and effort, but when the deal fails, that's where the real expense is.
- Hot Topic additions
  - Differences & legal authority for an informal order versus a stipulation and order / Bob

**Executive Session** (None)

- **Adjourn** (10:57 AM)
  - Motion by Sylvia to adjourn. Seconded by David. Motion passes 3-0.
- **Next Meeting: August 8**, 2016 — Copper Room

**2016 Meeting Schedule in Copper Room**

<del>Jan 11</del>	<del>Feb 8 (Centennial)</del>	<del>Mar 14</del>	<del>Apr 11</del>	<del>May 9</del>	<del>Jun 13</del>
Jul 11	Aug 8	Sept 12	Oct 17	Nov 14	Dec 12 (Aspen)