



State of Utah

SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

Insurance Department

JONATHAN T. PIKE
Insurance Commissioner

Title & Escrow Commission Meeting

(<https://insurance.utah.gov/licensee/title/tec>)

Date: **October 18, 2021**

Place: **In Person**
None

Virtual
Google Meet

Time: **9:00 AM**

ATTENDEES

TITLE & ESCROW COMMISSION

xChair, Kim Holbrook (<i>Insurer, Davis County</i>)	Darla Milovich (<i>Agency, Salt Lake County</i>)
xVice Chair, Chase Phillips (<i>Agency, Weber County</i>)	xCal Robinson (<i>Agency, Iron County</i>)
Randy Smart (<i>Public Member, Salt Lake County</i>)	xPerri Babalis, <i>AG Counsel - TEC</i>

DEPARTMENT STAFF

xJon Pike, <i>Insurance Commissioner</i>	xReed Stringham, <i>Deputy Comm.</i>	xTracy Klausmeier, <i>P&C Dir.</i>
xRandy Overstreet, <i>Licensing Dir.</i>	Patrick Lee, <i>Finance Dir.</i>	xAdam Martin, <i>MC Examiner</i>
Michael Covington, <i>CE Specialist</i>	xSteve Gooch, <i>PIO Recorder</i>	xEddie Vasquez, <i>AG Counsel</i>

PUBLIC

Blake Heiner	Joseph McPhie	Wade Taylor
Jonathan Ivins	Bob Rice	Matt Ryden
Wes Jensen	Cort Ashton	Matt Sager
Kristen Jorgensen	Nancy Frandsen	Nathan Sprague
James Seaman	Justin Sutherland	Carol Yamamoto
Rachael Ortiz		

MINUTES — Not Approved

General Session: (Open to the Public)

- **Welcome** / Kim Holbrook, Chair (9:00 AM)
- **Reading of Anchor Location Determination**
- **Telephone Roll Call**
- **Adopt Minutes of Previous Meeting**
 - **Motion by Chase to adopt minutes. Seconded by Cal. Motion passes 3-0.**
- **Concurrence Reports**
 - Licenses
 - **Motion by Cal to concur. Seconded by Chase. Motion passes 3-0.**
 - Attorney exemptions
 - Daniel S. Sam
 - Chase notes that, in the past, the TEC has required that an attorney seeking an exemption be licensed as well. He notes that Mr. Sam is licensed in title and escrow as of September 2021.

He has plenty of experience in the industry. He thinks this should be OK to approve unless someone has a concern.

- **Motion by Chase to approve the exemption. Seconded by Cal. Motion passes 3-0.**

- **Board Duties & Responsibilities / Perri**

- **Update on 2021 Goals**

- ULTA report / Chase
 - Chase thanks the TEC for helping the ULTA in creating the amendment to 31A-19a-209. They put a lot of time into it, as did a lot of independent people in the industry.
 - He was unable to attend last month's ULTA meeting because the TEC subcommittee meeting ran long, but he understands that the amendment has been the ULTA's primary concern.
 - Jon Ivins notes that the ULTA meets today at 4pm.

- **New Business**

- Amending TEC meeting requirements / Reed
 - At the last meeting, Reed suggested changing the statute so the TEC would not require any in-person meeting. Randy suggested doing one in-person meeting a year. The UID has no preference between the two options.
 - Kim likes the idea of having one in-person meeting a year. Chase agrees. He says it's important for commission members to see and know each other in person, but knows that online meetings have been successful and are helpful for people with scheduling issues or who need to travel. Cal agrees.
 - Commissioner Pike suggests that the TEC can hold an in-person meeting at any time, but asks if they want it to be a requirement. They could schedule meetings in a particular month, but once it's a requirement, they HAVE to hold it. It's nice to give yourself options.
 - Kim likes the idea of it being a requirement. Chase agrees with both sides, but it's important to meet in person. He thinks they need the flexibility to have it at some point in the year, not a specific month every year. Cal agrees.
 - Reed suggests adding "calendar year" in the third line, to make it clear what year it means.
 - **Motion by Chase to approve option 2 with the amended wording. Seconded by Cal. Motion passes 3-0.**
- Review proposed rule changes under Executive Order 2021-12 / Perri
 - R592-14: Unfair or Deceptive Acts or Practices Affecting Title to Real Property
 - These changes are all being done to clean the rules up and make them compliant with the Office of Administrative Rules' rulewriting manual.
 - The title has been changed because the prior title was confusing. The rule is enacted under 31A-23a-406, which deals with unfair or deceptive acts, so it made sense to have the title align with the statute.
 - The purpose and scope are cleaned up.
 - The bulk of the rule is in Section (4), and the main thing is just cleaning up the language.
 - Cort Ashton, speaking on behalf of the ULTA's legislative committee, says this version doesn't contain the idea of knowing or willful conduct of intentionally not recording documents. That's an important thing that needs to continue. If someone fails to obtain a document that results in unmarketable or uninsurable title, even if it's by mistake or error, or if someone insures something in that case, the person could be in violation. He says that's not what the rule was intended to do. The original intent was for documents to be put in the public record. He liked the old Subsections (A) and (B) because they include the knowing and willful conduct.
 - Chase agrees with Cort. He remembers hearing that there were agencies years ago that would hold onto reconveyances in their office saying that they needed to continually insure property because they had the releases, and would not file them of record. It's important that that not happen in the future. The idea of knowing and willful conduct is important.

- Cort sent Steve a version of the rule with Subsections (A) and (B) added back in. Kim requests that Perri review it and return with changes next month. Steve will forward Cort's draft to Perri.
- Reed recalls that the UID looked at the "knowing and willful" requirement and they're just the duties that an escrow company is supposed to do. A knowing requirement could let them get away with sloppy work because they could say an error wasn't "knowing" and therefore isn't a violation. He thinks taking it out is the direction the UID was heading.
- Perri says the problem is proving whether something is "knowing" or "willful". Reed says it's a requirement that's impossible to prove unless there's a smoking gun like a memo or something.
- Matt Sager says he thinks the "knowing" requirement is important because it's classified as a "misleading or deceptive" act. When a mistake is made it shouldn't rise to the level of a misleading or deceptive act. A misleading or deceptive act requires intent.
- **Perri will rework the rule and present it in November.**
- R592-15: Schedule of Minimum Charges for Escrow Services
 - None of the changes were made in relation with the ongoing discussions about 31A-19a-209. It's all cleanup and removing extra language.
 - Some definitions are removed because they aren't used in the rule.
 - A lot of it is moving language to better places or breaking up sections to align with OAR's requirements.
 - Kim suggests reviewing this rule in November after the discussion of 31A-19a-209 happens. Chase thinks it's important to review the rule and statute side by side. Perri notes that any changes to 31A-19a-209 will not affect this rule.
 - Reed says even if the statute and rule don't mesh, the statute won't take effect until May. Since this is just a cleanup of the status quo, the TEC can approve it and then fix it up later if necessary. Perri says she was careful with this one because of the statute discussion.
 - Joseph McPhie says this rule is not in compliance with the existing statute. The statute says agencies have to use the rates they file, while the rule allows a minimum. The statute doesn't allow for a minimum. Reed says if there's a problem between a rule and a statute, the statute is always controlling over a rule.
 - Rachael Ortiz agrees with Reed. She says there are issues with the rule and statute, but they don't have anything to do with Perri's suggestions. None of the currently proposed changes are why the rule isn't in compliance with the statute. She's in favor of continuing with the changes.
 - **Motion by Chase to approve changes. Seconded by Cal. Motion passes 3-0.**
- R592-16: Escrow Settlement Closing Transactions
 - The changes clean up formatting and excess language.
 - The definition of "land flip" is being clarified; the meaning isn't being changed, just the wordiness.
 - Cal asks about Subsection (3)(1)(c) — what does "near the same time" mean? A week? The same transaction? Perri says that language was in the old rule. Chase says the time frame doesn't really matter. Someone could close a land flip two years later, and if they closed A with C's funds, it's still illegal. The intent of the rule is that you're not supposed to use buyer C's funds to pay buyer A, regardless of timing.
 - Rachael says what's looked at is whether a transaction can stand on its own with separate and distinct funds.
 - **Motion by Chase to approve changes with removal of "at or near the same time". Seconded by Cal. Motion passes 3-0.**
- R592-17: Requirements for an Interest Bearing Account Used for Trust Fund Deposits

- Fixes the definition of "depository institution" which is defined by the Department of Financial Institutions, cleans up formatting, and removes excess language.
 - **Motion by Cal to approve changes. Seconded by Chase. Motion passes 3-0.**
- **Old Business**
 - Subcommittee amendments to 31A-19a-209 / Cal
 - Cal says the subcommittee has worked diligently to answer Commissioner Pike's letter and has worked with the ULTA on proposed language.
 - Justin Sutherland with the ULTA notes that there was a lot of back and forth about several options for how to improve the regulation. The language they're proposing is the best proposal for the situation. The language was created by the ULTA's legislative committee, then reviewed by the executive board and the full membership. There was no opposition to it.
 - The proposal is that each title agency will annually submit a self-certified statement with the agency's average escrow fee charged on residential transactions, excluding passthrough costs, for the previous 12 months. The UID would use that data to establish an industry average escrow fee. Title agencies would be prohibited from charging an escrow fee less than 50% of the industry average, and from charging an escrow fee different from the initially quoted fee.
 - Justin says title and escrow are intertwined and have never operated as separate businesses. This gives the UID a framework for enforcement, and gives Adam a way to easily audit a file. It avoids a race to the bottom in escrow fees and the advance of predatory practices in the title industry. It avoids any unnecessary increase in fees to the consumer.
 - After talking with Adam, Justin suggests removing Subsections (3)(b) and (4) because the consumer is already protected through RESPA. The existing proposed language could give someone an avenue to say there was a change in circumstance and they could use it to malicious ends.
 - Reed says the Commissioner's letter did three things, the first of which was to evaluate the need to regulate below-cost escrow services. The Utah Code's stated purpose is to encourage self-regulation when possible. The Governor's Office has asked all departments to review their rules and eliminate unnecessary regulation. The Division of Occupational and Professional Licensing is getting rid of regulatory requirements across the board in all occupations and professions.
 - During the first subcommittee meeting, Reed reminded everyone that the first need was to identify if there was really a problem. The answer was yes, there was a need to prevent large agencies from undercutting the escrow market and putting smaller agencies out of business, which would hurt consumers. However, there wasn't much discussion and no evidence given, such as stories, reports or anecdotes about a race to the bottom. There was no mention of other states doing anything similar. His takeaway was that there may be a logical reason to regulate, but the risk seems more theoretical than real.
 - There is evidence to the contrary: 1) up to this point in the market, the UID has trusted each agency's annual certifications and hasn't been auditing; 2) agencies are sometimes federally required to charge below cost for escrow services, and there's no way around it; and 3) Metro National was convinced that some agencies were charging below cost for escrow and requested audits. Reed says the UID has to assume that was a good faith request, and at the September 13 subcommittee meeting, he heard an agency representative say that their agency and others had doctored their annual filings. We've heard similar comments today: Nobody is complying with the law. With this record of passive enforcement, you'd see signs of consumer harm or a race to the bottom. He says he hasn't seen anything like that or heard the industry talking about it.
 - Reed says some agencies have suggested getting rid of the regulation entirely. If there's a problem with a race to the bottom, why would agencies suggest that? There's a disagreement on whether the theory for regulation has a basis in reality.
 - Reed says this presents the industry with the opportunity to do away with the prohibition on below-cost escrow, whether permanently or temporarily. He says it doesn't seem like it will be a problem, and could present some advantages. First, title and escrow really cannot be separated.

Deregulation would strongly support that principle. It is odd to say they can't be separated, but they have to be regulated separately. Second, title companies would step up and monitor their associated agencies, which is consistent with the Code's purpose to encourage self-regulation of the industry.

- Commissioner Pike has had discussions with several people in the title industry and believes that escrow does not stand alone. The lack of enforcement of the current statute has shown that viability of self-regulation and that there may be no negative consequences. He appreciates the effort that has gone into this, but the subcommittee didn't identify a harm and there is no reason to prevent a harm that isn't occurring. He suggests eliminating the regulation, even temporarily, to see what happens. He suggests that it's been tried in practice because the UID hasn't enforced it.
- Justin disagrees with the idea that the idea has been tested, the lack of enforcement isn't a test. He thinks there would be a race to the bottom. There have been a number of statutes arise recently that may cause issues in the industry, but this regulation would create status quo. He says removing the regulation will create a race to the bottom and the ULTA would strongly oppose it.
- Rachael was on the ULTA's research team that gathered information. It's true that the regulation was unenforced, but the majority of companies were complying with some form of it. No companies charged \$0 for escrow. She would disagree that this has been tested; it's unregulated. There was a conflict between the rule and the statute, which makes compliance difficult, but companies were complying. The complaint that came to the UID was that some companies were charging their minimum rate, which isn't a good faith effort to comply with the rule or statute. She says her research of surrounding states showed that almost every state has some structure for escrow fees, even in states where title and escrow are run together. She disagrees that not regulating is the same as testing. She feels like there is a need to regulate to maintain the status quo.
- Chase says he thought the need for regulation was a foregone conclusion. Title and escrow is one business, and the separate regulation of escrow is necessary, but he's not opposed to removing the regulation. He thinks the only thing that has stopped people from charging \$0 is that this statute is in place. He was initially hesitant about the idea of being told what he has to charge; however, he loves the ULTA's proposal because it gives freedom of variation in what they can charge. His fear without regulation is that small agencies would go away and only larger agencies would be left doing the work. When pricing is just about volume, that's what harms the consumer. This proposal brings options and keeps the free market alive.
- Blake Heiner says he was in the minority on the subcommittee because he thought the need for escrow regulation went back to the time the industry was concerned about a race to the bottom. He remembers when the statute was enacted. He was originally in favor of Reed's proposal to have agencies receive CPA certification. He was shot down and heard people say they know there's a cost involved, but they didn't know how to calculate it. He says there's certainly a cost, and it certainly be calculated. What he's heard at the meeting was that they should let the market set the rate; that's what Reed and the Commissioner are saying with removing the regulation. Either you can calculate the rates or you can't, and if you can't, just let the market set the rates. He supports the UID's suggestion.
- Justin says title and escrow in Utah are two separate businesses. If you take away the regulation, you will see unintended consequences in small-town Utah. There will be a race to the bottom and it will kill small-town Utah. You can't compare the experiences in large cities and small towns, so you have to regulate it.
- Cal agrees that dropping the regulation will result in companies doing \$0 escrow for the top producing real estate agents. The rest of the industry can't compete with that. They make their money on the title side, but they can't drop their rates to \$0 to get the business. There are realtors out there who will be offering no-cost escrow and it will take out agencies.

- Rachael notes that if there was no regulation, agencies would have the additional expense of needing to track their time per transaction, similar to a law firm, either individually or by hiring a new employee to handle it for the agency.
- Jon Ivins notes that the risk of no regulation is that rates could significantly vary not just between agencies, but between transactions as well. How would you regulate unfair inducement if consumers are being charged wildly different rates? Consistency of rates between and within agencies is important. Removing the regulation could create an increase in RESPA violations that Utah would have to deal with. He says every state has some sort of minimum or required escrow charge. Some states set them by regulation or a rating bureau, but it's a better call to allow the market to establish an industry minimum versus one set by a rating bureau. It would be a good idea to allow the free market to set the rates, but not allow the rates to go too low.
- Kim appreciates all the work and discussion that has gone into the proposed amendment. She thought that there had been enough discussion in the subcommittee and that the regulation was a necessity. She asks if there's time for more discussion on the subcommittee, or if the TEC needs to move forward. Chase says he thinks the industry is operating under the assumption that what is submitted would be accepted as-is, but that may not be the case. He and Kim were going to submit the amendment with a response letter to the UID. He thinks the majority of the industry agrees with the proposal as written, and that it solves a lot of problems and stops others from occurring. Commissioner Pike says it would be helpful if the response includes some of the insight from this meeting. The need for this regulation wasn't communicated as clearly in the past as it has been today. He would also like some information about how the ULTA membership works. There are more differences of thought about this issue than what the ULTA has presented. He would like to see this done right, whichever route is taken.
- Justin says the majority of the industry has spoken and said there is the need for some sort of regulation. The industry is speaking to the UID and saying what they need.
- Commissioner Pike notes that there are key people in the industry who feel differently from what the ULTA is proposing. One comment he heard is that if we're going to enforce what is proposed, will there not be additional effort and therefore costs to industry to make sure they're in compliance? If so, and they're willing to accept that, then great. The UID won't be able to increase staffing to handle the enforcement, so the industry will need to do it.
- Rachael says if the key players Commissioner Pike referred to want to be heard, they need to present themselves to the subcommittee. It's hard to take their opinion into account if they aren't participating. Also, the cost of compliance was a discussion and it was felt that there would be very little additional cost. It's simple math and won't require additional people. It's a simple process for the UID too. Adam will add the submissions and divide it by the number of submissions, and that's the cost for enforcement purposes.
- Chase agrees. He proposed the subcommittee and his intent was for concerned parties to participate. He doesn't want people to think that the ULTA was the only one with suggestions. They were just the one that made this proposal. He asks if notice of the next subcommittee meeting can be sent to all agencies in the state. Steve says yes.
- Reed says that all he's heard so far is opinion based on what people think will happen. It's logical, but it's speculative. When the UID goes before the legislature, it has to answer questions about why it's proposing regulations. Saying "the people we regulate think it's a good idea" isn't enough. If the industry could provide information about tangible harms that have been seen in other states, or actual evidence, that would be helpful in showing that we're protecting the industry and consumers.
- Commissioner Pike expects that legislators will ask if the state government, via the Insurance Department, is being asked to set the price of escrow. Is that what the industry is asking? And if so, why? It will be up to the legislature to decide if that's what's happening and if it's appropriate. They will want to know how this will benefit the people of Utah.
- Justin says it would be great if these key players could show up to be heard.

- Kim suggests holding a subcommittee meeting and then a special TEC meeting prior to the next one.
 - Subcommittee meeting: **October 28 at 9am** at the Taylorsville State Office Building.
 - Special TEC meeting: **Immediately following the subcommittee meeting.**
- **Other Business**
- **Hot Topics**

Executive Session (None)

- **Adjourn** (11:16 AM)
 - **Motion by Cal to adjourn. Seconded by Chase. Motion passes 3-0.**
- **Next Meeting: November 8, 2021** — Bonneville Room, Taylorsville State Office Building

2021 Meeting Schedule

Jan 11	Feb 8	Mar 8	Apr 19	May 10	Jun 14
Jul 12	Aug 9	Sept 13	Oct 18	Nov 8	Dec 20

* bold dates denote quarterly required in-person meetings