27 May 2022

Utah Department of Insurance
Title and Escrow Commission
4315 S 2700 West
Taylorsville, UT 84129

Re: Request for hearing regarding proposed R592-18
Comments opposing proposed 592-18

Dear Title and Escrow Commission:

I request a public hearing regarding proposed R592-18 pursuant to Utah Code § 63G-3-302(2) and Utah Adm. Code R15-1.

First, a little about myself. I am a lawyer and I have practiced in the title and escrow area since 1998. I have a master's degree from the London School of Economics. I am currently legal counsel for Metro National Title.

The Utah Rate Regulation Act seeks to ensure that a free market exists in the insurance industry generally and the title and escrow industry in particular. Licensed entities are entitled to fair competition and an opportunity to make a profit. These are important policy goals. Proposed R592-18 undermines these goals.

The Administrative Rule Analysis for proposed R592-18 states that its purpose is to establish a standard for determining compliance with Utah Code § 31A-19a-209(3)(a)(ii), which states:

> (3) A title insurer, individual title insurance producer, or agency title insurance producer may not file or use any rate or other charge relating to the business of title insurance, including rates or charges filed for escrow that would cause the title insurance company, individual title insurance producer, or agency title insurance producer to:
>
> (a) operate at less than the cost of doing:
>
> …
>
> (ii) the escrow business; or

For ease, this letter refers to title insurers, individual title insurance producers, and agency title insurance producers as "licensed entities." Thus, under subsection (3)(a)(ii) licensed entities may not file or use a charge that would cause the entity to lose money on its escrow business. *See id.* To determine whether a licensed entity

complies with this section, the Commission needs to know (1) the cost of doing the escrow business and (2) the licensed entity's charges.

"The cost of doing…the escrow business" cannot be determined by finding the state-wide average escrow charge and dividing it by two. Nor is this a coherent way to estimate it. Escrow charges do not equal escrow costs, even when they are averaged across the state. Dividing the average by two presupposes that, on average, licensed entities have a 100% profit margin on their escrow operations, but nothing supports such a wild guess. A licensed entity could be losing money on its escrow operations—the very situation that subsection (3)(a)(ii) prohibits—and still be above the floor established by proposed R592-18. The calculation in proposed R592-18 is effectively a refusal to "protect policyholders and the public from the adverse effects of…inadequate...rates." *See* Utah Code § 31A-19a-101(3)(a). Proposed R592-18 does not do what the Commission is supposed to do under subjection (3)(a)(ii).

A state-wide average is also an inappropriate measure of the "cost of doing…the escrow business" because costs vary widely across the state. Office space, employees, and property values differ a great deal, particularly between rural and urban areas. Based on our experience, an urban office's escrow costs can easily be four times those of a rural office. Escrow costs are also affected by the size of the licensed entity, with larger licensed entities having higher escrow costs than smaller entities. Escrow costs can also differ based on a licensed entity's specialty and client base because some types of transactions are more involved. Just as "when you have a hammer, every problem looks like a nail," when we look in the statistics toolbox, it is tempting to use an average even when it is the wrong tool. An old statistics adage warns against using an average when it isn't appropriate to do so: On average, humans have one testicle each. Sometimes, the average misses the point entirely. Proposed R592-18 is one of those times.

Even if average charges were related to average costs, proposed R592-18 enshrines another misuse of the average by giving as much weight to the average escrow fees charged by low cost, rural licensed entities that do a handful of transactions per year as it does to entities that handle thousands of transactions. Thus, calculating the escrow charge floor by calculating the state-wide average of the average charge of each entity does not yield the average escrow charge for transactions across the state. Even if this mathematical error were corrected, calculating average ***charges*** would still not establish average ***costs***.

Thus, proposed R592-18 does not allow the Commission to determine whether subsection (3)(a)(ii) has been complied with. What proposed R592-18 tries to do is very normal and common—replace a difficult question with an easier, related question. *See* Daniel Kahneman, *Thinking, Fast and Slow* (2011) at 12. In this case, it is not a

345 East Broadway, SLC Utah 84111 o. 801-236-3806 / m. 801-556-6605 llitchfield@metrotitle.com

reasonable substitution because it does not meet the policy considerations underlying subsection (3)(a)(ii).

Indeed, in the 2022 legislative session, the legislature expressly rejected the calculations in proposed R592-18. HB31 proposed changes to the statute that mirrored proposed R592-18, but that language was rejected by the legislature and was removed before a substitute bill was passed. The Commission should not adopt a rule that the legislature rejected.

Further, we believe proposed R592-18 will increase escrow fees in smaller counties, encourage unfair inducements, force title companies into money-losing transactions, put title companies out of business, and harm the real estate industry in the state of Utah.

As the Commission is aware, title and escrow agencies make money from (1) title insurance premiums and (2) escrow fees (sometimes called settlement fees or closing fees). Licensed entities must charge the title insurance premiums that have been filed by underwriters with the Department of Insurance. Consequently, licensed entities cannot compete on price by lowering title insurance premiums. They can compete only by lowering escrow fees. Although subsection (3)(a)(ii) requires agencies to charge an escrow fee that covers their costs, the Commission has not enforced this rule, and so many companies have lost money year after year on the escrow side of by subsidizing it with by title insurance income. This violates subsection (3)(a)(ii) and creates risks in the industry that the Utah Rate Regulation Act seeks to overcome.

Meanwhile, licensed entities' costs are increasing. Inflation is already at historic levels, but Utah licensed agencies are experience even greater increases in salaries and office space, even as the real estate industry cools. It is becoming harder and harder for title and escrow agencies to break even. Recent decisions by the Commission are making things even worse. Title insurance rates have not increased for many years, but a few months ago, the Commission made some title insurance underwriters LOWER their rates, despite serious inflation. Imposing a mechanism that lowers escrow fees, too, will put many licensed entities in danger of failing.

Proposed R592-18's method for calculating the minimum escrow fee will unfairly result in increased charges to consumers in Utah's small counties. In smaller communities the escrow charges actually charged are lower than higher population areas because of lower wages, office space, and costs generally. For example, the prevailing charge in Logan is $75.00 per side (buyer and seller), but in Salt Lake it is $400.00 or more per side. (In fact, in the major counties, the actual cost to produce and conduct the settlement is probably over $600.00 per side.) Summit county costs are even higher due to cost of employees, office space, and the size of the transactions.

345 East Broadway, SLC Utah 84111 o. 801-236-3806 / m. 801-556-6605 llitchfield@metrotitle.com

Under proposed R592-18 the minimum fee will be 50% of the average fee across the state, which will probably result in a big increase in settlement fees in smaller communities. Given the other issues with proposed R592-18, there is no justification for increasing fees in smaller communities.

On the other hand, in the larger counties, proposed R592-18 will create a race-to-the-bottom for escrow fees. Let's say the average escrow fee in Year 1 is $400.00. That means a licensed entity can charge as little as $200.00 for settlement services, regardless of how much it costs to provide those services. As the real estate industry cools, there will be fewer transactions. Utah has more title and escrow agencies per capita than anywhere else in the nation (165+ agencies). As discussed above, licensed entities can only compete for price by lowering escrow fees. This increasing competition coupled with proposed R592-18's unjustified presumption that the cost of doing escrow business is half the average charge will result in pressure to lower escrow fees toward minimum allowed by proposed R592-18. Thus, in year 2, the average fee will be $200, or perhaps slightly more. In year 3, the average fee will be $100, and so on. To stay in business, licensed entities will have to violate subsection (3)(a)(ii) by using money from other parts of the business (title insurance premiums) to cover their escrow costs.

Escrow charges there are too low are an inducement to consumers of settlement services. For many years, the insurance policy of Utah has been that inducements are inherently unfair and distort competition. Proposed R592-18 will pressure licensed entities to engage in offering this inducement. This further violates the policies we are trying to achieve. To repeat: proposed R592-18 will not result in compliance with subsection (3)(a)(ii), but in violation of that subsection. Many agencies will be forced out of business, decreasing competition while simultaneously providing worse services to Utah citizens.

Unfortunately, we have observed over the years that some title companies, when faced with failure, will take money from their trust account to cover bills, believing they will pay it back as soon as the market improves. However, they do not; defalcation occurs, and the escrow money is gone. Over the years, underwriters have asked us to take over 5 agencies that have done this. In these situations, it takes many months for the underwriters to make everyone whole. The burden on the homeowner is very straining and emotional. This loss of funds and trust is absolutely devastating to a community.

Proposed R592-18 should not be adopted. Instead, the Commission should audit the industry to set an evidence-based minimum escrow fee, as required by Utah Code § 31A-19a-209(3)(a)(ii).

345 East Broadway, SLC Utah 84111 o. 801-236-3806 / m. 801-556-6605 llitchfield@metrotitle.com

Sincerely yours,

LONN LITCHFIELD
Legal counsel

345 East Broadway, SLC Utah 84111 o. 801-236-3806 / m. 801-556-6605 llitchfield@metrotitle.com