

COMMONWEALTH OF VIRGINIA

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TO: All Settlement Agents who are Title Licensed and Registered with the Bureau of Insurance

RE: Prohibition Against Rebating and Legislative Amendments to Statutory Remedies

The Bureau of Insurance ("Bureau") has received inquiries regarding whether a fee charged for performing settlement services in connection with the sale of real property may be reduced or eliminated in order to obtain or retain a consumer's settlement business. Though § 38.2-4608 of the Code of Virginia ("Code") expressly allows title insurance rates to be negotiated (in compliance with the requirements and limitations provided therein), there is no such direct provision regarding settlement fees. As such, the inquiries have sought clarification regarding the ability to negotiate or adjust settlement fees. The Bureau offers the following guidance and reiterates its prior and long-standing position on these matters.

The relevant laws and regulations allow title settlement agencies and agents to charge consumers for the direct cost of providing escrow, closing or settlement services, as well as the agency's fee for providing settlement services.¹ These settlement fees and charges are separate and distinct from the premium amount consumers pay to purchase the applicable title insurance policy.²

However, Virginia law, namely § 38.2-509 of the Code, also prohibits the practice of rebating, which occurs when an insurer or agent offers as an inducement to purchase an insurance policy, any "thing of value" that is not specified in the policy or included in its rating plan.³ Persons engaged in the selling of real property or performing settlement services related to the sale of real property are also prohibited from paying or receiving any kickback, rebate, commission or other "thing of value" in exchange for the *referral* of title insurance business, as identified in §§ 38.2-4614 and 55.1-1009.1 of the Code. A rebating or anti-kickback violation can result from both *direct* or *indirect* inducements or referrals of business.⁴

It is the Bureau's opinion that a reduced (*i.e.* discounted) or eliminated settlement fee is a "thing of value" as contemplated by the applicable rebating or anti-kickback provisions.⁵ Therefore, offering a reduced or modified settlement fee may give rise to an impermissible rebate in violation of § 38.2-509 A of the Code when those fees are offered *as an inducement to purchase an insurance policy*.⁶ Such a fee modification

¹ See *e.g.* § 55.1-1004 of the Code and 14 VAC 5-395-20.

² See § 38.2-4608 of the Code.

³ See § 38.2-509A of the Code and January 4, 2017 Letter to All Licensed Title Insurance Agents, Agencies, and Companies who are Registered Settlement Agents ("Informational Letter")
<https://scc.virginia.gov/getattachment/91ab23ce-a1ed-441d-956e-ec05b3736ddd/il-prohRebElect.pdf>

⁴ See §§ 38.2-509 A, 38.2-4614 and 55.1-1009.1 of the Code and the Informational Letter.

⁵ See §§ 38.2-509 A, 38.2-4614 and 55.1-1009.1 of the Code.

⁶ See § 38.2-509 A of the Code.

may not be *expressly or directly* conditioned on the purchase of a title insurance policy by the consumer. Additionally, such an offer often may serve as an *indirect* inducement, because in nearly all transactions, title insurance is purchased. This is especially so because it is rare for a consumer to purchase settlement services from one title settlement agent and to purchase title insurance from another title settlement agent.⁷

Thus, should the Bureau discover during an investigation that a title settlement agency or agent has reduced or eliminated its fee for a particular transaction or transactions, it will review the agency records to assess whether the activities constitute impermissible rebating in violation of § 38.2-509 A of the Code. The Bureau will also investigate to determine if any discovered settlement fee reduction or elimination related to the referral of title insurance business constitutes impermissible activity in violation of §§ 38.2-4614 and 55.1-1009.1 of the Code.

The Bureau understands that specific factual situations involving a fee reduction or elimination will not result in a rebating violation. As such, the Bureau will analyze agency responses to its inquiries on a case-by-case basis and evaluate all potentially mitigating facts and circumstances. The Bureau encourages title settlement agencies and agents to maintain appropriate records necessary to respond or address concerns the Bureau may have regarding potential impermissible rebating if a fee reduction or elimination is offered to consumer(s). Such records may include, but are not limited to, promotional advertisements, communications concerning a fee reduction, and/ or documentation of fee reduction(s).

Questions concerning this informational letter should be directed to:

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⁷ See also the Informational Letter.