

MEMORANDUM

TO: Maryland Insurance Administration

FROM: Maryland Building Industry Association

DATE: July 24, 2020

RE: Comments on Maryland Insurance Administration Proposed Bulletin—Use of Specific Title Company

The Maryland Building Industry Association is the Maryland trade association for home builders, residential developers and related businesses. The Association has over 1,100 members which employ over 100,000 workers, the vast majority of which live in Maryland.

The purpose of this memo is to provide comments on the Maryland Insurance Administration's ("MIA") interpretation of MD Code (Ins) Section 27-214 set forth in the Proposed Bulletin titled "Seller's closing assistance and required use of a specific title company" with a posting date of July 22, 2020 at MIA's website (the "Proposed Bulletin").

For the last 40 or more years, builders in Maryland (and in every other jurisdiction we are aware of) have been offering closing cost assistance to homebuyers who use a preferred title company (which is often an affiliated business) or other settlement service provider ("SSP") identified by the builder (a "Designated SSP") after providing the required disclosures to the buyer. These sales agreements do not *require* the use of any Designated SSP and provide the required disclosures. They explicitly state that the buyer has the free choice to use any title company/SSP they want. They also give the buyer the option to select a Designated SSP and in turn, get assistance with their closing costs if they choose the Designated SSP. The foregoing approach complies with the federal Real Estate Settlement Procedures Act ("RESPA").

The Maryland corollary to RESPA (MD Code Real Prop. (RP) Sec. 14-127) defers to RESPA. As such, the above-described approach does not violate the Real Property statute as long as RESPA is complied with, including that the proper disclosures are made (e.g., of affiliated business arrangement) and there is no "required use" of a particular title company/SSP. Under RESPA, "required use" is defined as follows:

Required use means a situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service. However, the offering of a package (or combination of settlement services) or *the offering of discounts or rebates to consumers for the purchase of multiple settlement services does not constitute a required use. Any package or discount must be optional to the purchaser.* The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process.

12 CFR Part 1024, §1024.2 (emphasis added). Consistent with RESPA's "required use" definition, builders offer assistance with settlement costs to consumers, and the assistance is entirely optional.

Section 27-214 says essentially the same thing as RP 14-127. A violation of each of Section 27-214, Section (RP) 14-127 and RESPA depends upon a "required" use of a particular title company/SSP. However, RP 14-127 defers to RESPA; and RESPA defines what is and what is not "required use." We believe that the provisions of RP 14-127 would control.

While there is no definition of required use under Section 27-214, Merriam-Webster defines the word "require" as to "compel." Buyers are not compelled to use any title company/SSP. If a buyer is not compelled to use a particular title company/SSP, there can be no violation. As a result, compliance with RP 14-127 and RESPA should necessarily mean compliance with Sec. 27-214.

We understand that MIA believes that builders are violating the Insurance statute by allegedly requiring use of a particular title company as a *condition* of making the *contract*. We respectfully dispute that claim. The insurance statute (§27-214) states: "(a)(1) A person may not *require* another person to buy insurance through a particular insurance producer or insurer as a *condition*, agreement, or understanding *with respect to* selling or providing a loan, credit, sale, goods, property, *contract*, lease, or service to the other person." **Builder sales agreements are not making the use of a particular title insurer a condition of entering the contract. Nor is it a condition of receiving any other item (e.g., loan, property, etc.) in the foregoing list. Rather, builder sales agreements make it a condition of getting closing cost assistance. If the consumer does not select the Designated SSP, the builder and consumer are still obligated to proceed with the contract and complete closing using whatever title company the consumer chooses; they just do not receive the closing cost assistance.**

Moreover, MIA's own "A Consumer Guide to Title Insurance" ("Guide") makes clear (on page 3) that it is acceptable to recommend a title insurance company, and that affiliated business arrangements are acceptable provided the builder follows RESPA (which builders are doing as further described below):

The buyer decides who will conduct the closing and issue the title insurance policy. While the real estate agent or broker *may suggest or recommend a title insurance producer*, the buyer does not have to hire that company. Additionally, some real estate firms or mortgage companies have "*affiliated business arrangements*" with certain title insurance producers or insurance companies. If one of these arrangements exists, it must be disclosed to the buyer in writing so that the buyer can make an informed decision. The federal Real Estate Settlement Procedures Act (RESPA) prohibits kickbacks and referral fees among persons involved in real estate settlements.

(emphasis added). At the same time, Maryland is a "Filed Rate" state for title insurance, and therefore, there is little if any difference in title premium cost to the consumer regardless of the title company selected. The consumer therefore gains nothing of value from choosing his/her own title company. On the other hand, the consumer does benefit (along with the builder) from use of the Designated SSP because it is the title company that has already researched title on the property, and therefore it saves everyone time (and the consumer, money) to use the Designated SSP.

Builders who are complying with Sec. 14-127/RESPA are providing savings for the consumer. In addition, if the long-standing (and nationwide) builder closing cost assistance approach were now prohibited, it would negatively impact the financial ability of scores of buyers to close on their homes. What will then happen is that builders will still offer the use of a Designated SSP, but remove any contribution to closing costs for choosing the Designated SSP. We do not understand how this will benefit the public/consumers in any way. As such, the interpretation suggested by the Proposed Bulletin will have the greatest adverse impact on the consumer.

Although not mentioned in the Proposed Bulletin, we also understand that MIA believes the current practice is contrary to Maryland Code requirements prohibiting certain rebates and inducements with respect to providing insurance set forth in Sec. 27-212 of the Insurance Article. That statute provides, in pertinent part:

. . . insurer or insurance producer may not pay, allow, give, or offer to pay, allow, or give directly or indirectly as an inducement to insurance or after insurance has become effective:

- (1) a rebate, discount, abatement, credit, or reduction of the premium stated in the policy;
- (2) a special favor or advantage in the dividends or other benefits to accrue on the policy; or
- (3) any valuable consideration or other inducement not specified in the policy.

Respectfully, we do not believe this provision has any relation to the contributions made to closing costs by builders/sellers if a buyer uses a Designated SSP. The contributions provided toward closing costs are not rebates or other credits to the cost of insurance but rather are for the settlement services provided by the title company. Insurance rates are consistent, and thus the contributions are for settlement services to the buyer for the convenience of using a Designated SSP. The closing cost assistance provided to buyers does not affect the insurance rates at all.

In addition, Section 27-212 has no relation to the builder recommendation of, and affiliated business relationship between, builder and any title companies. The relevant language from RESPA's AfBA regulation is:

Affiliate relationship means the relationship among business entities where one entity has effective control over the other by virtue of a partnership or other agreement or is under common control with the other by a third entity or where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock ownership.

And

- (3) The only thing of value that is received from the arrangement other than payments listed in § 1024.14(g) is a return on an ownership interest or franchise relationship.

There is no rebate or inducement between the builder and settlement service provider (title company, etc.). No money exchanges hands between the two. The relationship is one of

ownership as shown in the RESPA excerpts. This is what the builders are in fact doing, and it is 100% legal under RESPA and the Real Property Article, and fully complies with MIA's Guide.

In that regard, below is an excerpt from the RESPA AfBA Disclosure Form, which builders who participate in AfBA's provide to the consumer as part of their sales agreements. The builder form is the same as the RESPA form and makes clear in conspicuous language that the consumer/buyer is not required to use the settlement service provider and can shop around:

Set forth below is the estimated charge or range of charges for the settlement services listed. You are **NOT** required to use the listed provider(s) as a condition for purchase, sale, or refinance of the subject property. **THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.**

Given the above, the current practice is not prohibited or otherwise regulated by Section 27-212 of the Insurance Article because the closing cost assistance provided for using a Designated SSP is not a rebate or inducement with respect to the purchase of insurance.

In summary, the Proposed Bulletin errs in its interpretation of the law as it applies to transactions in which buyers receive closing cost assistance based on their voluntary choice of a Designated SSP. Section 27-214 does not apply because such transactions do not require that the buyer use any Designated SSP or buy insurance through any particular insurance producer, and buyers are clearly free to select their own SSP and title insurer. Further, Section 27-212 of the Insurance Article, while not specifically addressed in the Proposed Bulletin, is inapplicable to such transactions for the reasons stated. Therefore, we respectfully request that the Proposed Bulletin be withdrawn.