

**\*\*\*DRAFT - NOT FOR FILING\*\*\***

**3901-7-04 Title insurance controlled business arrangements.**

- (A) Purpose. ~~The purpose of this rule is to establish ownership and licensing standards for title insurance agents and agencies in accordance with division (B) of section 3953.21 of the Revised Code, which prohibits certain persons from acting as agents for a title insurance company.~~

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- (B) Authority. ~~This rule promulgated pursuant to the authority vested in the superintendent under section 3901.041 of the Revised Code.~~

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- (C) Definitions. ~~As used in this rule:~~

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- (1) "Beneficial ownership" means the effective ownership of any interest in a title insurance agency or the right to control an ownership interest even though legal ownership may be held in another person's name.
- (2) "Control," including "controlling", "controlled by", and "under common control with" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management services, or otherwise. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing fifty ~~percent~~ per cent or more of the voting securities or interests of any other person. Control shall also be presumed to exist between a natural person and an immediate family member. These presumptions may be rebutted by showing that control does not exist in fact. The superintendent of insurance may determine that control exists if the facts support such a determination notwithstanding the absence of a presumption to that effect.
- (3) "Immediate family member" includes a person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the person's spouse.

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- (4) "Person" means any natural person or any business entity as defined in division (A) of section 3905.01 of the Revised Code.
  - (5) "Prohibited person" means a person prohibited from acting as an agent for a title insurance company pursuant to division (B) of section 3953.21 of the Revised Code, and includes builders and developers.
  - (6) "RESPA" means the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq., as amended, and all rules, regulations and interpretations issued under RESPA, as amended, including but not limited to 24 C.F.R. Part 3500 and the Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements found at 61 Fed. Reg. 29258 et seq.
- (D) No business entity may be licensed as a title insurance agency where one or more prohibited persons control the business entity.
- (E) A business entity may not become licensed or remain licensed where the entity is merely a sham arrangement used as a conduit for inducements or compensation for business payments in violation of section 3953.26 and/or section 3933.01 of the Revised Code. In determining whether an entity is a sham arrangement, the superintendent may consider factors similar to those used to determine whether a controlled business arrangement is a sham arrangement under RESPA, including, but not limited to:
- (1) Does the new entity have sufficient initial capital and net worth, typical of the industry, to conduct the title insurance business for which it was created or is it undercapitalized to do the work it purports to provide?
  - (2) Is the new entity staffed with its own employees to perform the services it provides or does the new entity have "loaned" employees of one of the parents?
  - (3) Does the new entity manage its own business affairs or is the new entity being run by one of the parents?
  - (4) Does the new entity have ~~a~~an office for business which is separate from any of the parents? If the new entity is located at the same business address as one of the parents, does the new entity pay fair market value rent for the facilities actually furnished?
  - (5) Is the new entity providing substantial services, i.e., the essential functions of the real estate settlement service, for which it receives a fee?
  - (6) Does the new entity perform all of the substantial services itself or does it contract out part of the work? If so, how much work is contracted out?
  - (7) If the new entity contracts out some of its essential functions does it contract services from an independent third party or from a parent or affiliate of a parent? If the new entity contracts out work to a parent or to an affiliate of a parent, does the new entity provide any functions that are of value to the settlement process?

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- (8) If the new entity contracts out work to another party, is the party performing any contracted services receiving a payment for the services or facilities that bears a reasonable relationship to the value of the goods or services received?
- (9) Is the new entity actively competing in the marketplace for business or does it provide services solely for one or more of the parents?
- (F) Where a person has a direct or beneficial ownership interest in a business entity title insurance agent, the only thing of value that can flow from such an arrangement, other than permissible payments for services rendered, is a return on ownership interest.
- (1) Under this rule, a return on ownership interest may not include any of the following:
- (a) Any payment which has, as a basis of calculation, no apparent business motive other than distinguishing among recipients of payments on the basis of the amount of their actual, estimated or anticipated referrals;
  - (b) Any payment which varies according to the relative amount of referrals by different recipients of similar payments; or
  - (c) A payment based on an ownership, partnership or joint venture share which has been adjusted on the basis of previous relative referrals by recipients of similar payments.
- (2) In determining whether a payment is a return on an ownership interest or an impermissible payment for the referral of title insurance business, the superintendent may consider factors similar to those used to determine whether a payment is an impermissible payment for a referral under RESPA.
- (G) A prohibited person may not serve as a partner, officer, director, or managing member of a title insurance agency, nor may a prohibited person be involved in the day-to-day operations of the title agency.

~~(H) Paragraph (D) of this rule applies to all persons applying for a business entity title insurance agent license on or after the effective date of this rule and to all business entity title insurance agents having a change in ownership on or after the effective date of this rule.~~

~~(I) (H) Severability. If any section, term or provision of this rule be adjudged to be invalid for any reason, such judgment shall not affect, impair, or invalidate any other section, term, or provision of this rule, but the remaining sections, terms and provisions shall be and continue in full force and effect.~~

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