



Federal Deposit Insurance Corporation

Washington, D.C. 20429

Legal Division

August 29, 2008

Kurt Pfotenhauer
Chief Executive Officer
American Land Title Association
1828 L Street, N.W., Suite 705
Washington, D.C. 20036

Dear Mr. Pfotenhauer:

In a letter dated August 1, 2008, addressed to Chairman Sheila Bair, you asked about the insurance coverage of deposit accounts relating to real estate transactions. Your letter was forwarded to me. I am an attorney in the FDIC's Legal Division who is familiar with the operation of the deposit insurance regulations at 12 C.F.R. Part 330. In your letter, you described the following situation:

Our members are involved in all aspects of the title and real estate transaction, including table and escrow closings. As part of the closing, they may have the total real estate loan deposited, as good funds, in an escrow account in the title agency's name for the benefit of the buyer or refinancer of real estate. With the possibility of bank failures on the increase, several of our members are posing the question, what happens if during the time between the deposit of the lender's funds in the escrow account and the disbursement of those funds at closing, typically 24-48 hours, the insured financial institution where the escrow account is held closes its doors? Obviously there is the \$100,000 insurance guarantee provided by the FDIC, which we understand is extended through to separate account holders; however, the amount of a typical home purchase can well exceed even these protections. One can easily imagine a tragic situation where borrowed funds intended for a home purchase disappear leaving a buyer, seller, lender and closing agent all at a loss.

You have described a situation in which the accountholder (the title company) serves as an agent or custodian for other parties (the buyer, seller, or lender) pending the closing of a

real estate transaction. Under the FDIC's insurance regulations, "[f]unds owned by a principal or principals and deposited into one or more deposit accounts in the name of an agent, custodian or nominee, shall be insured to the same extent as if deposited in the name of the principal(s)." 12 C.F.R. § 330.7(a). In other words, the insurance coverage "passes through" the agent or custodian to the actual owners. "Pass-through" coverage means that the funds belonging to each owner would be aggregated with any other funds held by the same owner at the same insured depository institution and insured up to the \$100,000 limit.

"Pass-through" coverage as described above is not available unless certain requirements are satisfied. First, the custodial nature of the account must be disclosed in the deposit account records of the insured depository institution. See 12 C.F.R. § 330.5(b)(1). Second, the interests of the actual owners must be ascertainable either from the account records of the insured depository institution or records maintained in good faith by the agent or other party. See 12 C.F.R. § 330.5(b)(2). Third, the agency or custodial relationship must be genuine. Through this relationship, the deposit actually must be owned by the named owners and not by the agent or custodian. See 12 C.F.R. § 330.3(h); 12 C.F.R. § 330.5(a)(1).

The title company can satisfy the first requirement by opening the account under a title such as "Title Company as Custodian" or "Title Company Escrow Account." The title company can satisfy the second requirement by maintaining its own records as to interests of the parties (buyer, seller, lender). Even if the first and second requirements are satisfied, however, the coverage will be limited to \$100,000 for the interest of each of the actual owners (in aggregation with the owner's other deposit accounts, if any, at the same insured depository institution).

In Advisory Opinion No. 05-04 (July 6, 2005), the FDIC staff discussed the actual ownership of real estate escrow accounts:

In the typical escrow arrangement to facilitate transfer of title to real property, the seller and buyer "employ a third party to accept their respective tenders of performance under the contract." *Ferguson v. Casper*, 359 A.2d 17, 20-21 (D.C. 1976). Thus, the seller's deed and the buyer's purchase money (and other pertinent instruments) are deposited with the escrow agent pending each party's performance of his or her respective duties required for settlement. Until each party has satisfied the respective conditions precedent, legal title to the

property does not pass to the buyer and legal title to the purchase money does not pass to the seller. *Stuart v. Clarke*, 619 A.2d 1199, 1200 (D.C. 1993). See also 30A C.J.S. *Escrows* § 6(b).

Under these general principles, the purchase funds held by an escrow agent in a traditional real estate transaction belong to the buyer and not the seller prior to closing. Assuming such funds are held in a deposit account at an insured depository institution, and the depository institution fails before the real estate closing, the funds would be insured to the buyer and not the seller (up to the \$100,000 limit).

You are concerned that a buyer's funds in an escrow account (or perhaps another party's funds in some transactions) might exceed \$100,000. You are correct that this possibility presents a risk. In light of this risk, the American Land Title Association may or may not wish to explore the possibility of placing escrow funds in several insured depository institutions (with no more than \$100,000 of an owner's funds at any institution). In any event, the FDIC cannot waive the \$100,000 insurance limit for certain types of accounts. This limit was prescribed by Congress. See 12 U.S.C. § 1821(a)(1) (providing that the FDIC shall insure deposits up to \$100,000 for each depositor in each ownership capacity).

In your letter, you mentioned the following incident:

One of our members experienced exactly this situation [i.e., escrow funds in excess of \$100,000] during the S&L crisis. At the time, he was able to demonstrate to FDIC/RTC personnel that his was in fact a trust account, and they released the freeze on the account. However, we do not know if this was a common practice or if there exists any policy guidance in this area.

Please be advised that "trust accounts" are not entitled to unlimited insurance coverage. In the case of a deposit account in the name of an irrevocable trust, coverage is limited to \$100,000 for the "non-contingent trust interest" of each beneficiary. See 12 C.F.R. § 330.13. In the case of an account opened by an agent or custodian, as discussed above, coverage is limited to \$100,000 for the funds of each principal or actual owner.

Funds entrusted to the trust department of an insured depository institution are handled separately. If such funds are invested outside the bank (e.g., in the stock market and not in a deposit account at the bank), the investment would be unaffected by the bank's failure. Of course, such investments

carry their own risks. See FDIC Advisory Opinion No. 03-01 (January 3, 2003).

I hope that this information is useful.

The opinions expressed herein represent the views of the Legal Division staff and should be considered advisory in nature. Staff opinions are not binding upon the FDIC or its Board of Directors. This opinion is based upon the facts presented. Any changes in the facts or circumstances could result in different conclusions.

Sincerely,

A handwritten signature in cursive script, reading "Christopher L. Hencke".

Christopher L. Hencke
Counsel