

MAINE STATE LEGISLATURE

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124th MAINE LEGISLATURE

FIRST REGULAR SESSION-2009

Legislative Document

No. 165

H.P. 144

House of Representatives, January 20, 2009

An Act To Supervise and Regulate Escrow Agents in Order To Protect Consumers

Reference to the Committee on Insurance and Financial Services suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative PILON of Saco.
Cosponsored by Senator BOWMAN of York and
Representatives: CONNOR of Kennebunk, TREAT of Hallowell, Senators: ALFOND of
Cumberland, BARTLETT of Cumberland, DIAMOND of Cumberland.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 10 MRSA c. 212-C** is enacted to read:

3 **CHAPTER 212-C**

4 **REGULATION OF ESCROW AGENTS**

5 **§1395. Definitions**

6 As used in this chapter, unless the context otherwise indicates, the following terms
7 have the following meanings.

8 **1. Administrator.** "Administrator" means the Superintendent of Consumer Credit
9 Protection within the Department of Professional and Financial Regulation.

10 **2. Escrow.** "Escrow" means a transaction in which a person, for the purpose of
11 effecting the sale, transfer, encumbrance or lease of real or personal property to another
12 person, delivers a written instrument, money, evidence of title to real or personal property
13 or other thing of value to a 3rd person to be held by that 3rd person until the happening of
14 a specified event or the performance of a prescribed condition, when the instrument,
15 money, evidence of title or thing of value is then to be delivered by the 3rd person to a
16 grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor or an agent or
17 employee of any of the latter, pursuant to written instructions.

18 **3. Escrow agency.** "Escrow agency" means a person engaged in the business of
19 accepting or receiving escrows for deposit or delivery by any means, including over the
20 Internet or other electronic means.

21 **4. Escrow agent.** "Escrow agent" means a person engaged in the business of
22 accepting or receiving escrows for deposit or delivery on behalf of an escrow agency.

23 **§1396. License; requirements**

24 **1. License.** A person may not directly or indirectly engage in or carry on, or purport
25 to engage in or carry on, the business of, or act in the capacity of, an escrow agency in
26 this State without first obtaining a license under this chapter. The requirements of this
27 chapter apply to an escrow transaction effecting the sale, transfer, encumbrance or lease
28 to another person of real or personal property located in this State.

29 **2. Place of business; name.** An escrow agency licensed under this chapter shall
30 maintain a home office as its principal location for the transaction of escrow business.
31 The administrator may, on application, issue additional branch licenses to the same
32 escrow agency licensee upon compliance with all the provisions of this chapter governing
33 the issuance of a single escrow agency license. An escrow agency may not engage in the
34 escrow business at any place of business for which it does not hold a license or engage in
35 business under any other name than that on the license.

36 **3. Exemptions.** The persons described in this subsection are exempt from the
37 requirements of this chapter:

1 A. A person licensed to practice law in this State while engaged in the performance
2 of the person's professional duties, except an attorney or law firm actively engaging
3 in a separate business as an escrow agency;

4 B. A person licensed or chartered under the laws of any state or of the United States
5 as a bank, savings and loan association, credit union or industrial loan company as
6 well as a wholly owned subsidiary or affiliate of such an organization;

7 C. A title insurance company having a valid certificate of authority, or a title
8 insurance agent having a valid license as a title insurance agent, issued by the
9 Superintendent of Insurance;

10 D. A real estate company, broker or salesperson licensed by and subject to the
11 jurisdiction of this State while performing acts in the course of or incidental to sales
12 or purchases of real or personal property handled or negotiated by the real estate
13 company, broker or salesperson;

14 E. A receiver, trustee in bankruptcy, executor, administrator, guardian or other
15 person acting under the supervision or order of a court of this State or of a federal
16 court;

17 F. A person licensed in this State as a certified public accountant while engaged in
18 the performance of the person's professional duties who is not actively engaged in a
19 separate business as an escrow agency;

20 G. A state or federally chartered nondepository financial institution;

21 H. A regulated lender subject to the requirements of Title 9-A or Title 9-B to the
22 extent the lender is not engaged in a separate business as an escrow agency;

23 I. Agencies of the United States and agencies of this State and their political
24 subdivisions; and

25 J. A mortgage broker or mortgage lender subject to the requirements of Title 9-A to
26 the extent the broker or lender is not engaged in a separate business as an escrow
27 agency.

28 In any proceeding or action under this chapter, the burden of proving an exemption from
29 the requirements of this chapter is upon the person claiming the exemption.

30 **4. Issuance of license.** The administrator shall receive and act upon all applications
31 for licenses to engage in business as an escrow agency under this chapter. If the
32 administrator finds that all requirements of this chapter have been met and all applicable
33 fees paid, and the applicant is not otherwise unqualified for licensure, the administrator
34 shall issue a license to the applicant. An application for a license as an escrow agency
35 must be in writing and filed with the administrator in the manner and form prescribed by
36 the administrator and verified on oath by the applicant. The administrator shall set a fee
37 for the license not to exceed \$350. When an application for licensure is denied or
38 withdrawn, the administrator shall retain all fees paid by the applicant.

39 **5. Denial.** The administrator may deny an application for an escrow agency license
40 under this chapter if the administrator finds that:

1 A. The escrow agency's business is or will be formed for any business other than
2 legitimate escrow services or proposes to use a name that is misleading or in conflict
3 with the name of an existing licensee;

4 B. An incorporator, officer, administrator, member, general partner, employee or
5 agent of the escrow agency applicant has:

6 (1) Been convicted of, or received a withheld judgment for, any Class A, Class B
7 or Class C crime;

8 (2) Been convicted of, or received a withheld judgment for, a Class D or Class E
9 crime involving dishonesty or moral turpitude; or

10 (3) Committed any crime or act involving dishonesty, fraud or deceit if the crime
11 or act is substantially related to the qualifications, functions or duties of a person
12 engaged as an escrow agent;

13 C. There is no natural person possessing a minimum of 3 years of supervisory
14 experience in relation to an escrow business supervising each escrow agency office;

15 D. The applicant or an officer, administrator, member, general partner, employee or
16 agent of the applicant has demonstrated lack of fitness to transact escrow business;

17 E. The applicant has made any false statement of a material fact in the application for
18 a license; or

19 F. The applicant or an officer, administrator, member or general partner of the
20 applicant or a person owning or controlling, directly or indirectly, 10% or more of the
21 outstanding equity securities of the applicant has violated any provision of this
22 chapter or any similar regulatory scheme in this State or in any foreign jurisdiction.

23 **6. Renewal.** On or before April 30th of each year, a licensee under this chapter shall
24 pay an annual license renewal fee of \$150 and shall file with the administrator a renewal
25 form containing such information as the administrator may require. As a condition of
26 renewal, a licensee shall file with the administrator a statement of its financial condition
27 and status of its escrow transactions as of the preceding December 31st. The financial
28 statement must be in a form and contain the information prescribed by the administrator.
29 A license under this chapter remains in effect unless the licensee fails to timely satisfy the
30 renewal requirements of this subsection or the license is relinquished, suspended or
31 revoked, except that a branch license is terminated upon the relinquishment or revocation
32 of a home office license. A licensee may relinquish its license by notifying the
33 administrator of its relinquishment, but this relinquishment does not affect the licensee's
34 liability for acts previously committed and may not occur after the filing of a complaint
35 for revocation or suspension of the license. Following the failure of a licensee to satisfy
36 the renewal requirements of this subsection, a person previously licensed as an escrow
37 agency may, for an additional nonrefundable fee of \$200, apply for the reinstatement of
38 the person's previous license as long as the person satisfies the renewal requirements of
39 this section no later than the last business day of May immediately following expiration
40 of the license.

41 **7. Demonstration of financial responsibility.** At the time of filing an application
42 for an escrow agency license under this chapter, and at the time of any renewal or

1 reinstatement of such a license, the applicant or licensee shall provide satisfactory
2 evidence to the administrator of having obtained financial responsibility in accordance
3 with this subsection.

4 A. An applicant or licensee shall provide satisfactory evidence of financial
5 responsibility as required by this subsection through:

6 (1) A fidelity bond providing coverage in the aggregate amount of \$200,000 with
7 a deductible no greater than \$10,000 covering the applicant or licensee as well as
8 each corporate officer, partner, managing member, escrow agent and employee of
9 the applicant or licensee;

10 (2) An errors and omissions policy issued to the escrow agency providing
11 coverage in the minimum aggregate amount of \$50,000 or \$50,000 in cash or
12 securities deposited in a depository approved by the administrator on condition
13 that the cash or securities be available for payment of any claim payable under an
14 equivalent errors and omissions policy in such an amount; and

15 (3) A surety bond in an amount as set forth in this subparagraph. The surety
16 bond must be in a form provided by the administrator, and the applicant or
17 licensee must be named as principal. The surety bond must be executed by the
18 applicant or licensee as obligor and by a company authorized to conduct surety
19 business in this State. The surety bond must be conditioned that the obligor as
20 licensee will faithfully conform to and abide by this chapter and is liable for
21 reimbursement to all persons who suffer loss by reason of a violation of this
22 chapter. The surety bond must be in an amount based upon the average month-
23 end balance of the escrow trust accounts of the applicant or licensee for the
24 preceding calendar year, in increments as described in this subparagraph:

25 (a) For average month-end escrow trust account balances of \$50,000 or less,
26 a surety bond in the amount of \$20,000 is required;

27 (b) For average month-end escrow trust account balances of more than
28 \$50,000 but not more than \$250,000, a surety bond in the amount of \$50,000
29 is required;

30 (c) For average month-end escrow trust account balances of more than
31 \$250,000 but not more than \$500,000, a surety bond in the amount of
32 \$100,000 is required;

33 (d) For average month-end escrow trust account balances of more than
34 \$500,000 but not more than \$750,000, a surety bond in the amount of
35 \$150,000 is required;

36 (e) For average month-end escrow trust account balances of more than
37 \$750,000 but not more than \$1,000,000, a surety bond in the amount of
38 \$200,000 is required; and

39 (f) For average month-end escrow trust account balances of more than
40 \$1,000,000, a surety bond in the amount of \$250,000 is required.

41 B. The applicant or licensee under paragraph A shall place on file with the
42 administrator the surety bond and proof of its errors and omissions coverage and its

1 fidelity bond. The bonds and insurance coverage must be continuous during the
2 period of licensure of the licensee whether or not the bonds are renewed, continued,
3 reinstated, reissued or otherwise extended, replaced or modified, including increases
4 or decreases in the penal sum. The surety upon the bonds may not be liable in an
5 aggregate amount exceeding the penal sum set forth on the face of the bonds.

6 C. The surety bond under paragraph A must name as beneficiaries the State, for
7 payment of any costs incurred and charges made in connection with an escrow
8 agency's insolvency or default, including costs and charges relating to an examination
9 and receivership of an escrow agency, and a person who has a claim against the
10 surety on the bonds based on a default or violation of a duty or obligation of the
11 escrow agency.

12 D. In lieu of the bonds required by this subsection, a certificate of deposit issued by a
13 financial institution authorized to conduct business in this State and made payable to
14 the administrator may be provided to the administrator in the same principal amount
15 as required for the bonds. The interest on the certificate of deposit must be payable to
16 the applicant or licensee. The certificate of deposit must be maintained at all times
17 during which the applicant or licensee is authorized to engage in business as an
18 escrow agency under this chapter and must provide that it will remain in effect for at
19 least 3 years following discontinuance of operations unless released earlier by the
20 administrator.

21 E. Prior to cancellation of either the fidelity bond or the surety bond under paragraph
22 A, or both, the licensee shall file with the administrator satisfactory evidence of a
23 new bond in the appropriate amount with no lapse in coverage from the canceled
24 bond. Failure to do so is grounds for the suspension or revocation of the escrow
25 agency's license.

26 The administrator may, in the public interest and for good cause shown, waive or modify
27 any requirements of this subsection.

28 **8. Limitation of actions on bond.** An action may not be brought on an escrow bond
29 under subsection 7 by any person after the expiration of 3 years from the time when the
30 act or default complained of becomes known or should have become known.

31 **9. Transfer not permitted.** A license issued under this chapter is not transferable or
32 assignable. Control of a license may not be acquired through stock purchase or other
33 device without the prior written consent of the administrator.

34 **§1397. Records and accounts**

35 **1. Records.** An escrow agency licensed under this chapter shall maintain sufficient
36 books, accounts and records readily accessible to the administrator for the administrator
37 to determine at any time the escrow agency's financial condition, what duties and
38 responsibilities the escrow agency has undertaken to perform and whether it is properly
39 performing all such duties and any other information considered necessary by the
40 administrator to determine whether the escrow agency is operating in a safe, competent
41 and lawful manner. The books, records and accounts must be maintained in accordance
42 with generally accepted accounting principles and sound business practice.

1 2. Individual escrow accounts. For each individual escrow account, an escrow
2 agency licensed under this chapter shall maintain the escrow agreement and all
3 amendments, all instructions affecting the agreement, all related correspondence and an
4 individual ledger reflecting all activity pertinent to that account.

5 3. General accounts. An escrow agency licensed under this chapter shall
6 continuously maintain the general accounts described in this subsection:

7 A. A general ledger reflecting assets, liabilities, income, expenses and equity
8 accounts;

9 B. An escrow liability control ledger for all escrow accounts;

10 C. A cash receipts and disbursements journal; and

11 D. Copies of all receipts and disbursements used as a medium of posting to
12 individual escrow accounts.

13 4. Trust accounts. An escrow agency licensed under this chapter shall keep a
14 separate escrow trust fund account established at a financial institution approved by the
15 administrator, which must be kept separate, distinct and apart and segregated from the
16 escrow agency's own funds. The trust fund must hold all funds or money of clients being
17 held in trust by the escrow agency pending the closing of an escrow transaction or the full
18 performance of the escrow agreement. All trust funds must be deposited not later than
19 the first banking day following receipt of the trust funds. Such funds, when deposited,
20 must be designated as "escrow accounts" or given some other appropriate designation
21 indicating that the funds are not the funds of the escrow agency. Every escrow agency
22 shall maintain all other assets or property received pursuant to an escrow in accordance
23 with a written escrow agreement in a manner that reasonably preserves and protects the
24 property from loss, theft or damage and that otherwise complies with all duties and
25 responsibilities of a fiduciary.

26 5. Reconciliation. The records referenced in this section must be reconciled at least
27 monthly.

28 6. Retention. An escrow agency licensed under this chapter shall retain all records
29 referenced in this section for 7 years following the close of each account.

30 7. Interest. Interest received on funds deposited with an escrow agency in
31 connection with an escrow must be paid over to the depositing party to the escrow and
32 may not be transferred to an account of the escrow agency. This subsection does not
33 limit the right of the escrow agency to contract with the depositing party with respect to
34 the interest received on the deposits by independent agreement.

35 **§1398. Conflict of interest**

36 1. Conflict of interest; notice. An escrow agency licensed under this chapter shall
37 act without partiality to any of the parties to an escrow. An escrow agency may not close
38 a transaction where it has, directly or indirectly, a monetary interest in the subject
39 property either as buyer or seller. If an escrow agency has a business interest in the
40 escrow transaction other than as the escrow agency, the relationship or interest must be

1 disclosed in the written escrow instructions. After noting such interest, an additional
2 statement must appear as follows: "We call this interest to your attention for disclosure
3 purposes. This interest will not, in our opinion, prevent us from being a fair and impartial
4 escrow agency in this transaction, but you are, nevertheless, free to request the transaction
5 be handled by some other escrow agency."

6 **2. Closing statement.** On completion of an escrow transaction, an escrow agency
7 licensed under this chapter shall deliver to each principal a signed written closing
8 statement. The closing statement must show all receipts and disbursements relating to the
9 escrow transaction. Any charges by, or disbursements to, the escrow agency must be
10 clearly noted.

11 **§1399. Attachment**

12 Funds or other value received by an escrow agency licensed under this chapter
13 pursuant to an escrow or trust funds is not subject to execution or attachment in any claim
14 against the licensee.

15 **§1400. Powers and duties of the administrator**

16 **1. Rules.** In addition to any other powers and duties of the administrator authorized
17 by law, the administrator may issue orders and adopt rules that, in the opinion of the
18 administrator, are necessary to execute, enforce and effectuate the purposes of this
19 chapter. Rules adopted pursuant to this subsection are routine technical rules as defined
20 in Title 5, chapter 375, subchapter 2-A.

21 **2. Examinations.** The administrator shall examine the books, records and accounts
22 of each escrow agency, within or without the State, at intervals the administrator
23 considers necessary for the protection of the public. The escrow agency so examined
24 shall pay a fee for the examination at a rate fixed annually by the administrator, not to
25 exceed \$50 per examination hour. If it is necessary for the examination to be conducted
26 outside of this State, the actual cost of travel for the examiners must be reimbursed by the
27 escrow agency so examined. The administrator, upon prior written approval, may accept
28 an equivalent examination of an escrow agency by another state or federal agency as a
29 substitute for the examination pursuant to this subsection.

30 **3. Investigations.** The administrator may make necessary public or private
31 investigations within or outside of this State to determine whether any person has violated
32 or is about to violate this chapter.

33 **4. Administrative proceedings; authorized activities.** Except as otherwise
34 provided in this chapter, all proceedings under this chapter must be conducted in
35 accordance with Title 5, chapter 375.

36 **5. Enforcement.** The administrator may undertake any authorized actions pursuant
37 to Title 9-A, Article 6 to ensure compliance with this chapter.

1 **§1400-A. Prohibited practices**

2 **1. Misrepresentation.** An escrow agency may not issue, circulate, make use of,
3 publish or advertise, by any means of communication, the information that a person is
4 engaged in accepting or receiving escrows if that person is not licensed under this
5 chapter.

6 **2. Change or alteration of escrow.** An escrow agency may not solicit or accept an
7 escrow instruction or amended or supplemental escrow instruction containing any blank
8 to be filled in after signing or requiring any initialing after signing or permit any person to
9 make any addition to, deletion from or alteration of an escrow instruction or amended or
10 supplemental escrow instruction unless the addition, deletion or alteration is signed or
11 initialed by any affected party who signed or initialed the escrow instruction or amended
12 or supplemental escrow instruction prior to the addition, deletion or alteration.

13 **3. Failure to follow written instructions.** An escrow agency may not fail to carry
14 out an escrow transaction pursuant to the written escrow instructions unless the
15 instructions are amended by the written agreement of all parties to the escrow agreement
16 or their assigns.

17 **4. Acceptance of funds.** An escrow agency may not accept funds or papers in
18 escrow without a dated, written instruction signed by the parties or their authorized
19 representatives adequate to administer the escrow account and to provide for sufficient
20 funds and documents to carry out the terms of the escrow instructions. Funds and
21 documents deposited must be used only in accordance with such written instruction,
22 except that, if additional specific instructions are needed, the escrow agency shall obtain
23 the consent of both parties or their authorized representatives to the escrow or an order of
24 a court of competent jurisdiction at the expense of the escrow parties.

25 **5. Disbursement of funds.** An escrow agency may not fail to promptly distribute
26 funds, deeds or other personal property or instruments pursuant to escrow instructions or
27 fail to deliver, without reasonable cause, within a reasonable time after the close of an
28 escrow, to the respective parties of an escrow transaction, any money, documents or other
29 properties held in escrow in violation of the provisions of the escrow instructions.

30 **6. Submission of records.** An escrow agency may not fail to submit to an
31 examination by the administrator of its books, records and accounts or refuse to provide
32 to the administrator, within a reasonable time, all information requested by the
33 administrator pursuant to this chapter.

34 **7. Unfair or deceptive practices.** An escrow agency may not directly or indirectly
35 employ any scheme, device or artifice to defraud or mislead any person or engage in any
36 unfair or deceptive practice toward any person.

37 **8. Supervision.** An escrow agency may not fail to supervise diligently and control
38 the escrow-related activities of its agents, employees and independent contractors.

39 **9. Embezzlement.** An escrow agency may not engage in misappropriation or
40 embezzlement of funds or other property held in trust.

