



August 20, 2009

Ms. Susan Donnellan
Deputy Superintendent
State of New York Insurance Department
25 Beaver Street
New York, New York 10004

Dear Ms. Donnellan:

On behalf of the American Land Title Association (ALTA), thank you for the opportunity to provide feedback on the May 26, 2009 Draft Title Insurance Regulation (Draft) currently being considered by the Insurance Department of the State of New York (Department). ALTA's comments are arranged to correspond with the respective provisions of the Draft.

We applaud the Department for reaching out to industry to produce regulations which all stakeholders can support, and we encourage the department to work with the New York State Land Title Association and others to craft an agents licensing bill which all stakeholders can support. An agents licensing bill would more properly address issues addressed by this proposed regulation. Even so, we hope that the following comments prove useful to the Department and would entertain any questions that the Department may have concerning them.

§ x.0 Preamble and Purpose

(b) As a result of numerous complaints and inquiries, the New York Attorney General and the Superintendent of Insurance conducted a joint investigation of the title insurance industry in New York. The investigation confirmed that there are industry-wide abuses and illegal practices involving rebates, inducements, gifts and the charging of fees, by various title insurance corporations and title insurance agents. These illegal practices and abuses have disadvantaged New York real estate consumers by, among other things, driving up insurance costs and perpetuating conflicts of interest.

Comment: Sweeping generalizations of the land title industry, such as the statement that a joint investigation confirmed "industry-wide abuses and illegal practices," are misleading and imply that everyone in the industry was involved in illegal behavior. This language should be tightened to ensure accuracy.

§ x.1 Definitions

i. “Significant and multiple sources of business” means title insurance business that flows into a title insurance agency from two or more non-affiliate, non-controlled or non-owner business sources that constitute [at] least 70% of the total amount of title insurance business transacted in the preceding, calendar year of the title insurance agency.

Comment: This definition is used only one time in the Draft at subparagraph (c)(4) under section 5 Affiliated/Controlled Business Arrangements at page 9. As used, a control person (or affiliated business) making a referral is required to disclose that the person is not the sole source of business for the title insurance corporation or agent but that the title insurance corporation or agent has “significant and multiple sources of business.” This requirement is to present obstacles to the sham affiliated business. But, this disclosure requirement could preclude certain legitimate affiliated business relationships. For example, there are a number of large national builders who have title insurance affiliates handling sales of their homes. These title insurance affiliates would likely not satisfy the definition of “significant and multiple sources of business,” with the likely unintended consequence of preventing their builder affiliates from referring their clients to their affiliated title insurance companies.

Accordingly, to avoid this unintended situation, the Department should consider revising either the definition or the disclosure obligation – unless the Department intends to prohibit legitimate affiliate businesses. The definition could be amended to “multiple sources of business.” To encourage greater diversity of representation by the affiliated business, the Department could simultaneously require affiliated businesses to demonstrate to the Department their efforts to diversify their business base. Such diversity can be based on diversity within the more local political jurisdictions or on a statewide basis.

l. “Title insurance agent” or “title insurance agency” means any ... (4) Such term shall not include any regular salaried officer or employee of an authorized title insurance corporation or a title insurance agent, who does not receive a commission or other compensation for services, which commission or other compensation is directly dependent upon the amount of title insurance business done.”

Comment: The intent of the exclusion from the definition is to remove *bona fide* employees of the insurer and agent. However, the exclusion is problematic due to the compensation structures used by various companies. It is often the case that an employee will have a regular salary consisting of a base salary amount with a bonus component. The bonus component is generally based on the amount of title insurance business done. In such a situation, under the language of the definition, these employees may not be excluded from the definition due to the bonus component of their salary.

To remedy the situation, the Department can amend the definition specifically to exclude these employees to read “whose salary does not consist solely from a commission or other compensation for services, which commission or other compensation is directly ...” Alternatively, if there is desire to ensure that the commission is not

disproportionately larger than the base salary, the definition could be changed to read: “who does not receive the majority of his or her salary through a commission ...”

§ x.2 Duties of Title Insurance Corporations Utilizing the Services of Title Insurance Agents

(c)(i) The title insurance corporation shall, at least annually, conduct an on-site review of the underwriting and escrow practices of the title insurance agent which shall include a review of the agent’s policy blank inventory and processing operations, audits of the operating, checking, payroll and escrow accounts of its title insurance agent in order to compare the list of persons ordering title insurance to the list of persons who received payments or gifts from the title insurance agent, and to ensure that all payments made are in accordance with the provisions of the Insurance Law and this Part.

Comment: The requirement that the insurer review the accounts and procedures of each agent at least once annually will likely impose significant additional expense on the insurer which has a significant number of agents within the State. This additional expense will arise from the specified review requirements but also from the necessary methods and procedures required to obtain the required information from the agent and the management reporting associated with the reviews.

Consideration should also be given to the availability of the information to the insurer resulting from the review. In instances where the agent acts as an agent for more than one insurer, then the obligation for the review appears to fall equally on all insurers, resulting in duplicative actions and the potential use of proprietary information by one insurer to the disadvantage of the other.

Further, consideration should be given to the nature of the agent. Attorney agents frequently restrict certain types of information that is available to the insurers due to issues of attorney client privilege. In addition, it may be difficult for an insurer to review “payments or gifts” in situations where attorneys act as agents only as part of their legal business.

A final comment is the likelihood that different agents will organize and maintain their records and accounts in different manners. Hopefully, this problem will be minimized under the requirements of section 3, but it won’t be eliminated.

c(2) Every title insurance corporation shall notify the superintendent of any suspected fraudulent activity in accordance with Article 4 of the Insurance Law, and any improper or illegal payments, material discrepancies or any other violations of law found during or as a result of such on-site review, and shall take steps to investigate such fraudulent activities, improper or illegal payments, material discrepancies or other violations of law and, where appropriate, take immediate steps to terminate the title insurance agent’s contract.

Comment: The use of the terms “improper or illegal payments, material discrepancies or any other violations of law” creates uncertainty. For example, what is an “improper payment.” An incorrect payment made to a party to an escrow or closing falls within this definition. While an insurer will clearly be in a position to report any significant

violations of law which its review uncovers as it relates to title or escrow, the catch-all phrase creates a difficult, if not impossible standard, for the insurer.

In addition, there is no guidance as to the nature or scope of the investigation required if the insurer suspects the possibility of fraudulent activities, etc. We recommend that the term “reasonable” be inserted in this sentence so that the sentence will read: “... and shall take reasonable steps to investigate such fraudulent activities....”

A broader question is whether the suggested obligation is appropriate for an insurer since it is a regulatory function.

(d) A title insurance corporation that appoints a title insurance agent to act for or on behalf of it in this State, either directly, or through sub-agents of the title insurance agent shall, within 30 days of the appointment of a title insurance agent, complete and file written notification of such appointment with the superintendent on a form prescribed by the superintendent. An amended form shall be filed within 30 days after any change, including termination of appointment.

Comment: Depending upon the form adopted by the Department, a concern exists as to the obligation to amend the form within 30 days after any change. If, for example, the form requires the listing of the employees of the agent, and the agent fails to advise the insurer of a change in its personnel, the insurer will not be aware of such change and will fail to file the amended form timely.

(g) The title insurance corporation shall establish, and incorporate into the contract with its title insurance agents, its underwriting guidelines and its prohibition on a title insurance agent’s authority to settle claims.

Comment: It is standard industry practice for agents to settle minor claims as well as those claims covered under their Errors & Omissions insurance coverage. Blanket prohibitions should be limited.

§ x.3 Required Provisions for Contract between Title Insurance Corporation and Title Insurance Agent

(b) if the title insurance corporation does not receive remittance of all funds due under the contract, except for amounts in dispute, within the time frame specified in subsection (a) of this section, the title insurance corporation must promptly advise the title insurance agent of such failure to remit, and if the title insurance agent fails to take immediate steps to remit the funds, the title insurance corporation shall promptly notify the superintendent of such failure to remit, and the title insurance agent must be immediately terminated.

Comment: We suggest that the Department reconsider the termination requirement. As presently drafted, the first time that an agent fails to take steps to remit the funds, the agent is required to be terminated. In order to protect the relationship between insurers and agents, we suggest that termination not be required in the first instance but only if the problem is repetitive. For example, if the agent has more than 3 violations within a defined period of time.

We also suggest that the insurer advise the agent when it notifies the Department of the failure to remit timely. The agent's awareness that the Department has been notified should act as a deterrent against a repeat problem.

(d)(2) the title insurance corporation shall have access to and a right to copy all accounts and records related to its business in a form usable to the title insurance corporation;

Comment: The broad term "related to its business" may create difficulties when the agent is acting as an agent for more than one insurer. There is clearly a need for the insurer to access and copy all accounts and records related to the business which the agent does for that insurer. But, there are competitive concerns if an insurer interprets that term to allow the insurer to demand access to accounts and records related to business the agent does on behalf of a competitor.

(3) the superintendent shall have access to all books, bank accounts and records of the title insurance corporation and the title insurance agent in a form usable to the superintendent; and

Comment: We suggest coordination with the industry so that the form usable to the superintendent is the same form which is usable to the insurer to avoid duplicative and conflicting demands for information retention and storage.

(g)(5) settle title insurance claims on behalf of the title insurance corporation.

Comment: In many instances title claims involving small amounts, such as the failure to pay off a tax lien, may be handled by the agent pursuant to an agreement between the insurer and the agent since the amount to resolve the claim would be chargeable to the agent under the underwriting agreement. Permitting this practice is often more efficient and timely for the consumer. Rather than disrupt this procedure but to ensure appropriate reporting and record keeping, we suggest that the agent, in such case, be required to report each such claim to the insurer and that the agent be required to maintain and retain appropriate records of the claim and its resolution.

(i) (2) the insured has not paid any additional charges of any kind to the title insurance agent, including but not limited to the payment of cash tips at the closing;

Comment: The required certification that the insured has not paid any other charges should except additional charges as set forth in the HUD-1 Settlement Statement.

(i) (3) where the title insurance agent performs additional services required by the lender or other party, which are not necessary services performed in connection with the issuance of the title insurance policy, in advance of the closing date the title insurance agent has provided clear written notice to the insured, that such additional services are not performed in connection with the issuance of the title insurance policy; and

Comment: The term "additional services" which are not necessary in connection with the issuance of the title insurance policy is unclear. Under a broad definition of the term,

it could be argued that virtually all services provided are necessary to enable the deal to close and title insurance to be issued. Since there is a requirement to provide notice of these services, there should be clarity as to the meaning of the term. We suggest that illustrations of these types of services be provided.

(k) the title insurance agent shall maintain at all times an insurance policy designed to make the title insurance corporation whole in the event of professional negligence or omission on the part of such title insurance agent or, in the case of intentional fraud by the title insurance agent, a surety bond or other acceptable evidence of financial responsibility. The insurance policy shall provide for a deductible of no less than \$10,000.00, applicable per occurrence for claims resulting from the title insurance agent's negligent acts or omissions. ...

Comment: Consider revising the first sentence to read: “the title insurance agent shall maintain at all times an insurance policy *in amount and form satisfactory to the insurer* designed to make ...”

(m) once the title insurance corporation serves a notice of termination upon the title insurance agent, the title insurance corporation will immediately notify the superintendent of such termination and the reasons therefore.

Comment: The notice to the Department should be in writing.

§ x.4 Disclosures to Policyholders

Comment: A title insurance corporation can require an agent to provide a disclosure, but it cannot ensure that a disclosure is made. This is a regulatory function.

§ x.5 Affiliated/Controlled Business Arrangements

Comment: See comment above re the definition of “significant and multiple sources of business.”

§ x.6 Rebates, Inducements and Fees

Comment: See comment above re requiring versus ensuring.

(b) Every title insurance corporation shall ensure that all fees, including discretionary fees, when charged in connection with the issuance of a title insurance policy, shall be reasonably based on the actual cost for the services provided or cost incurred. All title insurance fees charged shall be listed on the closing statement along with any other separately identifiable service charge, in accordance with the title insurance corporation's fee schedule. The title insurance corporation shall ensure that fees charged by its appointed title insurance agent shall not be greater than the fees charged for the same services by the title insurance corporation.

Comment: It is unclear whether “discretionary fees,” are included within the term “any other separately identifiable service charge.” It is also unclear whether “discretionary

fees” are required to be identified on the insurer’s fee schedule. Regardless, it appears that the intent is to have all discretionary fees listed on the closing statement. As such, it would provide clarity to specifically state: “All title insurance fees *and discretionary fees* charged shall be ...”

If an agent acts as the agent for more than one insurer, the situation may arise when the fees charged by each insurer may differ. In that situation, how would the regulation apply? We believe that the rates charged by the agent for the transactions for an insurer would need to correspond to that insurer’s rates. We suggest that be clarified in the Draft.

(e) The title insurance corporation shall ensure that all entertainment-related events, including but not limited to parties, trips, gifts and charitable contributions that are hosted or disbursed by title insurance corporations or its appointed title insurance agents, and the expenses therefrom

...

Comment: We question the wisdom of seeking to hold one company responsible for the actions of another company in this regard. While the insurer can, and does, exercise control over its agent, the insurer should not be held responsible for the wrongful conduct of the agent unless it has knowledge of the wrongful conduct and approves it, which would appropriately place liability on the insurer for the insurer’s improper conduct. The inappropriateness of this provision is further illustrated by the difficulty which exists sometimes in determining compliance with the referenced statutes.

This proposed section also may create unnecessary confusion, and an unintended consequence, in the law of alter ego and whether the agent, which is intended to be a separate legal entity, constitutes the alter ego of the insurer.

It is clearly appropriate to hold both the insurer and the agent responsible for their own conduct, but it does not seem appropriate to expand the obligations of the title insurer beyond those of reviewing the operations of the agent and terminating the agent if the insurer discovers illegal conduct and notifying the Department of the termination.

§ x.7 Conditions for Providing Escrow, Closing, or Settlement Services, and Maintaining Escrow and Security Deposit Accounts

Comment: We understand from the July 28, 2009 meeting between the Department and industry that Section 7 would be removed.

§ x.8 Premium Rates

... In connection with rate filings and commissions, every title insurance corporation shall ensure that the provision for losses included in such rate formula shall not be less than 50% of the premium.

Comment: While we are not generally involved with rate issues, and are not familiar with how the rating bureau addresses rates and the loss component, we suggest that, if not already done, the Department solicit input from the rating bureau, and any other knowledgeable sources, relative to the appropriateness of the proposed 50% loss requirement. Such high loss ratios are seen in property and casualty lines, but not with title, which spends the majority of most of its premium dollars in risk elimination.

Thanks, again, for the opportunity to comment on the draft regulation. We look forward to working with the Department to advance thoughtful oversight of the land title industry.

Sincerely,

A handwritten signature in blue ink that reads "Kurt Pfothauer" followed by a horizontal line.

Kurt Pfothauer
Chief Executive Officer