ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

PROPOSED REGULATORY GUIDANCE

TITLE INSURANCE:

TITLE AGENT COMPENSATION

CONTENTS

PURPOSE

The Department of Financial and Professional Regulation (Department) is aware of concerns in the title insurance industry regarding how title insurance companies (underwriters) compensate their title insurance agents (agents)—namely, paying a percentage of the premium or closing fees, known as "splitting premium" or "splitting fees."

There are three concerns: 1) whether these splits are improper inducements that violate the Illinois Title Insurance Act (Act) or the Federal Real Estate Settlement Procedures Act (RESPA); 2) what is the appropriate percentage of premium to be split with an agent; and 3) whether closing fees can be split with an agent. Ultimately, the greatest concern rests with the propriety of increased costs that are passed on to the consumers.

Through this guidance, the Department states its positions on these issues (which are neither formal legal opinions nor interpretations of law), welcomes comments from the public, and ultimately seeks to establish appropriate regulatory oversight.

CURRENT PRACTICES

Historically, when insurance companies receive a premium for selling an insurance policy, they split a percentage of the proceeds with the agent who was responsible for selling it. This holds true in the title insurance industry as well.[1]

Illinois has a unique process by which title underwriters and agents operate. While the Act provides regulatory authority to the Department, underwriters are responsible for their agents.[2] Underwriters establish a relationship with an agent (usually an attorney) and then apply to register that agent with the Department.[3] The attorney-agents refer their clients to the underwriter, and then determine insurability, assist in closing the transaction, and have the underwriter issue the policy.[4]

[1] State and federal regulation of title insurance is geared toward consumer protection, i.e. residential real estate transactions only.
[2] 215 ILCS 155/3(3), 3(8), 12(b), 16 and 16.1
[3] Approximately 85% of the 10,000+ registered title agents are attorneys who are located predominantly in the eight counties of northeast Illinois, which includes Chicago and its surrounding suburbs.
[4] Anytime an agent refers title business to an underwriter it must be disclosed in writing to the parties of the transaction, pursuant to 215 ILCS 155/18 and 12 USC §2607(c).

IMPROPER INDUCEMENTS OR COMPENSATION

The real estate market in Illinois has seen a rejuvenation since the crash in 2008 and market activity has increased greatly, with corresponding increases in prices and sales.[5] With this increased market activity comes greater competition among underwriters.

While underwriters have been competing to obtain greater revenue, the Department has learned anecdotally that some of the larger underwriters are willing to forego added revenue in order to gain greater market share. This has led to the increase in the split percentages paid to agents. It also raises the question of whether these splits are improper inducements that bring more title business to the underwriters, which would violate state and federal law.

SPLITTING OF PREMIUM

The percentage split with an agent has changed over time, likely due to conditions in the marketplace, cycles within the industry, changes in the law, etc. Currently, the typical percentage split in many surrounding states is 80-20, i.e. 80% to the agent and 20% to the underwriter. In cases where an agent has a larger number of closings and thus handles the issuance of a larger number of policies, the split is more generous, usually 85-15. These percentages are paid pursuant to the agreement between the underwriter and the agent.

However, there are instances where the split can be even higher. Anecdotal evidence indicates that splits of 90-10 or 95-5 may be occurring, and there is speculation that agents are receiving 100% of the premium in some cases.

In Illinois, agents receive a portion of the premium, typically splitting 80-20 or 85-15.[6] This is also the norm in Indiana, Michigan, and Wisconsin, though Illinois and Michigan seem to be experiencing premium splits of 90-10 and 95-5, in some cases.
Two states have promulgated statutory limits as to what agents can receive. Connecticut limits agents to 60% of the premium, while Florida limits agents to 70%.[7] No other state or jurisdiction has such statutory limitations.

SPLITTING FEES

While splitting of premiums is certainly allowable in all states, splitting of settlement or closing fees varies by state. Some states allow for fee splitting because their statutes or rules place no restrictions, while other states have specific prohibitions.

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[5] https://www.globalpropertyguide.com/North-America/United-States/Price-History
https://blog.lucidrealty.com/chicago_real_estate_statistics/

[6] Based on an informal survey conducted by the Department. For purposes of this guidance, nearby states include: Indiana, Kentucky, Michigan, Missouri and Wisconsin. While Iowa borders Illinois, residential title insurance is issued by the State of Iowa and is thus excluded from comparison.

[7] National Association of Insurance Commissioners, Survey of State Insurance Laws Regarding Title Data and Title Matters, November 2015, (p. 14).

Examples of how some states handle splitting of settlement or closing fees:

> Indiana - Pursuant to a Department of Insurance bulletin and interpretation of certain limitations in its insurance code, fee splitting is prohibited.
> Kentucky - there are no statutes or rules prohibiting splits, but regulators look to the agreement between the underwriter and agent to determine if and how fees can be split.
> Michigan - premium charges are all inclusive, meaning an agent cannot assess fees separately if they are splitting the premium with an underwriter. However, a settlement service provider that is not receiving a split of premium can assess fees for closing the transaction.
> Wisconsin - there is no specific statute that addresses splits in Wisconsin. However, statutory disclosure requirements and misrepresentation provisions make splitting a fee a violation of law.
> Illinois - the Act and rules do not specifically prohibit splitting of fees.

DEPARTMENT'S POSITIONS

Improper Inducements or Compensation

The Act specifically prohibits payment or acceptance, directly or indirectly, from any commission, discount, referral fee or other consideration as inducement or compensation for the referral of title business.[8]

Similarly, RESPA prohibits anyone from giving or receiving any fee, kickback or thing of value pursuant to any agreement that business incidental to or part of a settlement service be referred to any person when a federally related mortgage loan is involved.[9] It also prohibits splitting any charge for rendering a settlement service, other than for services actually performed.[10] RESPA provides safe harbor for certain activities of attorneys, underwriters, lenders, etc., but only if those services are actually performed,[11] i.e. if no service is provided, then it is an improper referral or kickback.

While it can be difficult to determine improper inducements generally, the Department's position is that evidence of inducement can be determined by whether the split complies with the underlying agreement between the underwriter and its agent. Thus, if any split of premium is greater than that found in the underlying agreement, it is an improper inducement and violates both the Act and RESPA (however, see the exception under Splitting Premium, below).

[8] 215 ILCS 155/24
[9] 12 USC §2607(a)
[10] 12 USC §2607(b)
[11] 12 USC §2607(c)

Splitting Premium

The Act and its rules are silent regarding splitting premium between an underwriter and its agents. The Department prefers the free market continue to affect the choices between underwriters and agents. As noted above, in Illinois the typical split is 80-20 or 85-15, which reflects the free market valuation. The splits in nearby states also appear to reflect fair market valuations. Therefore, an 80-20 split is acceptable in most cases, with 85-15 in circumstances involving agents that bring in a larger book of business to the underwriter.

In exceptional circumstances, a higher split than previously agreed may be allowed, but only if there is an acceptable justification for it, i.e. it must be fully explained in a separate written agreement between the underwriter and agent, setting forth the circumstances and rationale for that exception, including specific enumeration of the services to be provided and supporting evidence that those services were performed by the agent.

A "split" of 100% or a split that otherwise violates the statutory premium reserve requirement of the Act is improper.[12]

Splitting Fees

The Department's position is that a non-escrow agent (one who is not working as an "escrow agent," as defined by the Act) can receive a split of a fee if that fee relates directly to policy-issuance or is otherwise authorized by the Act, i.e. determining insurability, collecting premiums, soliciting title insurance and issuing commitments, policies and endorsements.[13] Such a fee may be split, but only if those services were performed by the agent. For example, a fee for later date examination relates to determining insurability, but if the underwriter performs it, the fee cannot be split with the agent.

A fee that relates to closing/settlement services cannot be split with a non-escrow agent because such a fee is not related to the agent's statutorily authorized activities.[14]

CONCLUSION

The Department's positions are not immutable. Comments are very much welcomed as the Department gains valuable insight from interested parties. Depending on what is provided, the Department may take other regulatory action, either on its own (as authorized by the Act) or through the rulemaking process.

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[12] 215 ILCS 155/11(c)(2)
[13] 215 ILCS 155/3(3)
[14] Ibid. The Department also has concern about the increase in closing/junk fees. These fees appear to be a way to recapture the monies paid to agents through increased splits. This almost certainly has an adversely impact on consumers, who pay for both the increase in premium splits and these fees. The Department will continue to scrutinize this issue and may either take regulatory action or issue guidance.