

## REAL PROPERTY LAW SECTION

### Comments on Proposed Rulemaking - Title Insurance Agents, Affiliated Relationships, and Title Insurance Business

I.D. No. DFS18-17-00022-P

RPLS #2

June 7, 2017

TO: New York State Department of Financial Services  
FROM: Real Property Law Section of the New York State Bar Association  
RE: Proposed Rule-Making Amending Insurance Regulation 206 -  
**Title Insurance Agents, Affiliated Relationships, and Title Insurance Business— I.D. No. DFS18-17-00022-P**

#### Background

The Real Property Law Section (Section) of the New York State Bar Association has long-supported the licensing of title insurance agents. For years leading up to enactment of Chapter 57 of the Laws of 2014, which provides the statutory authority for the licensing of title insurance agents, the Section was engaged in numerous discussions to effectuate such a statutory codification. Likewise, we were meaningfully engaged in the negotiations that led to the ultimate enactment of Chapter 57. Those negotiations resulted, in part, in statutory language to ensure that attorney-title agents would be able to serve their clients as they have for centuries.

Attorneys-at-law in New York have been issuing written certifications of title for over 200 years before the advent of title insurance in the early twentieth century. Indeed, what is now Section 495 Subdivision 5 of the Judiciary Law (formerly Section 280 of the Penal Law) had to be enacted in 1909 to exempt title insurance corporations from the unlawful practice of law provisions of the Penal Law. Attorney title agents have always been, and will continue to be regulated under the Judiciary Law.

Many attorney title agents provide title insurance to their clients as an adjunct to their practice of law. However, many attorney title agents provide title insurance only for their own clients. This practice is authorized by ethics rules and opinions applicable to New York attorneys when the attorney performs the requisite services, provides full disclosure and obtains informed consent. In many cases, attorney-title agents do not have, nor do they actively seek, title insurance business from other parties or the general public. Attorney title agents often provide title insurance only to their own clients because much of the work done in insuring title is legal in nature and the attorney considers the title insurance work as an appropriate and efficient method of representing the client.

## Discussion

New York Insurance Law §2113(e) provides for the status quo in allowing attorneys to continue to provide title insurance to their clients where 1) the attorney or firm acted as counsel in a transaction; and 2) actually performed title services. The Real Property Law Section of the New York State Bar Association continues to take the position that payment simply for the referral of title insurance business violates Insurance Law §6409(d).

The Section appreciates that these proposed regulations clearly recognize the statutory provision which preserves the status quo for attorney-title agents. Throughout the proposed regulations there is both explicit and implicit recognition that an attorney may provide title insurance to clients as an adjunct to his or her law practice provided the attorney adheres to the terms and conditions of §6409(d). For example, the language of Insurance Regulation 206 §34.2 explicitly contemplates that an attorney or law firm may transact title insurance business from their law office.

We recognize that the Department clarified the definition of affiliated business to exclude situations where attorneys provide title insurance to their clients. However, we urge further adjustment to the definition of “affiliated person” to avoid possible confusion:

1. Therefore, we propose that the definition of affiliated person found in proposed Insurance Regulation 206 §35.1(b) be amended to read as follows:

“35.1(b) *affiliated person* means an applicant for insurance or a person who acts as an agent, representative, attorney (other than an attorney who is a licensed title agent or a member of or employed by a law firm title agent), or employee of the owner . . .”

This would make clear, for example, where a trust and estates attorney brings a client to the firm and a real estate partner handles the closing and provides title insurance, a referral has not been made. The attorney, firm and title agent are one and the same. They are not affiliated parties.

2. As compared to the previous version of Insurance Regulation 206, we interpret the changes in this proposal to have clarified the foregoing issue somewhat. However, if the Department takes the position that the foregoing is a referral from an affiliated party, then further amendment is necessary to implement the statutory mandate. Specifically, in such case we would be most concerned with §35.4(f), (1) and (3). We agree that an attorney must provide core title services to earn compensation as a title agent as provided in §34.5(f)(2). However, §35.4(f)(1) and §35.4(f)(3) would require attorneys to begin competing with other title agents. While it is highly unlikely an attorney would deny a request from another firm or person to write title insurance, the position of the Real Property Law Section is that the statutory language sustains neither the requirement of an independent functioning agency (as provided in §35.4(f)(1)), nor mandated competition with other title companies (as provided in §35.4(f)(3)).

We respectfully suggest that the language be modified to adhere more closely to the statutory requirements by adding a new subdivision (i) as follows:

“(i) Subdivisions (f)(1) and (3) shall not apply to a title insurance agent who is a licensed attorney or that is a law firm who or that transacts title insurance business from the title insurance agent’s law office.”

As discussed, this language is consistent with the recognition in the proposed regulations that an attorney may provide title insurance to clients as an adjunct to their law practice, specifically §34.2, and the statutory provisions of Insurance Law §2113. The language proposed above tracks that of §34.2. We believe that such a change would implement the legislative intent.

Although less concerning to the Real Property Law Section, we make the following comments and/or recommendations with respect to some of the other provisions of the proposed regulations:

A. §35.6(b)(2) should provide that posting charges on a website or place of business should not be required if there is no markup of ancillary or discretionary fees (defined in 228.5) above actual out-of-pocket costs. First, we believe the posting of charges in a law office or any office would seem unprofessional. Second, it is not customary for attorney agents to mark up any charges.

B. §35.1(e) defines Core title services. We believe that subsection 5 of that section should be amended to read as follows:

“Clearing or negotiating the clearance of.

C. §20.6(a) should be amended to state:

“compensation means any fee, commission or thing of value, but shall not include any reimbursement for actual out-of-pocket costs set forth in §228.5 . . .”

D. §20.4(c)(5) refers to applications. Title insurance is conducted differently than other types of insurance. There is typically no formal application process and reference to an application seems to conflict with ordinary procedure.

## **Conclusion**

The Real Property Law Section of the New York State Bar Association has long recognized the importance of licensing title insurance agents. Accordingly, although attorneys are already regulated by the Judiciary, the Section did not object to licensing of attorneys as long as the status quo of allowing attorneys to provide title insurance to their clients was preserved. We were meaningfully engaged in the negotiations that led to ultimate enactment of Chapter 57 of the Laws of 2014, which codified statutory language

to ensure that attorney-title agents would be able to continue to serve their clients as they have for centuries.

We appreciate the Department's willingness to consider the unique consumer protections related to attorneys providing title insurance to their clients. We have urged, through this memorandum, additional amendments to these recently proposed regulations to ensure that they conform to the legislative intent of Chapter 57.

We hope these comments will provide a helpful analysis of these issues and stand ready to discuss our concerns more fully.