



STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

David A. Paterson
Governor

James J. Wrynn
Superintendent

Circular Letter No. 14 (2010)
September 14, 2010

TO: All Title Insurance Companies Licensed to Write Title Insurance in New York and the Title Insurance Rate Service Association

RE: Title Insurance Companies' Issuance of Comfort Letters in Lieu of Endorsements

STATUTORY REFERENCES: N.Y. Ins. Law §§ 2305, 6409

It has come to the attention of the New York State Insurance Department ("Department") that insured lenders regularly request that title insurance companies issue to such lenders "comfort letters," sometimes referred to as "non-impairment letters," which state that the coverage under an existing loan insurance policy continues in full force notwithstanding modifications to the insured loan. This circular letter addresses comfort letters that purport to modify the obligations of an existing loan insurance policy or that are otherwise issued in lieu of issuing an endorsement to a policy. The purpose of this circular letter is to provide guidance to title insurance companies regarding their obligations in such instances.

Often, a lender will change the terms of its mortgages and record modifications to its loan documents. Such modifications include the addition of severance agreements, assignment of the mortgage loan, and mortgage assumption. When such modifications are not covered by the terms of the existing loan policy, the lender will then request a comfort letter from the title insurance company that notes these modifications and purports to modify the insurer's obligations. When a title insurance company issues a comfort letter, the lender does not pay the additional premium typically associated with the issuance of an endorsement to an existing policy. In essence, title insurance companies are issuing these comfort letters to lenders instead of issuing endorsements to policies and charging the appropriate premium.

I. Forms

N.Y. Ins. Law § 6409(a) (McKinney 2009) provides: "No title insurance policy shall be issued or delivered in this state, unless and until a copy of the form thereof shall have been filed with the

superintendent for his information.” Thus, a title insurance company may use only those policy forms and endorsements that it files with the Superintendent of Insurance (“Superintendent”).

Modifications to a mortgage loan, such as an assignment or assumption as described above, typically require a title insurance company to make changes to the policy insuring the loan and to acknowledge that changes have been made. A sample comfort letter provided to the Department notes certain changes made to an existing loan policy in the same manner as an endorsement and creating the same obligations for the insurer. Indeed, when a mortgage loan is modified, the underlying risk that a title insurance policy insures is modified as well. A comfort letter seeks to extend coverage of the existing title insurance policy to the modified loan, but purports not to amend the title insurance policy itself. However, when an insured loan is modified, only an endorsement to the policy can extend coverage of the existing title insurance policy to the modified loan. Thus, a comfort letter would constitute a policy form or endorsement not filed with the Superintendent, in violation of Insurance Law § 6409(a).

II. Rates and Rules

Furthermore, an insurer’s premium rates must be filed with the Superintendent pursuant to Insurance Law § 6409(b), and approved in accordance with the requirements set forth in Insurance Law § 2305(b)(7). Insurance Law § 6409(b) requires that “[e]very title insurance corporation shall file with the superintendent its rate manual, if any, its basic schedule of rates and classification of risks, its rating plan and rules in connection with the writing or issuance of policies of title insurance and shall thereafter likewise file any changes therein.” Members and subscribers of the Title Insurance Rate Service Association (“TIRSA”) use the rates and rules set forth in the TIRSA rate manual, unless a specific deviation from the manual is filed by the member or subscriber and approved by the Superintendent. The appropriate premium for endorsements to existing loan policies is prescribed in Section 16 of the manual, which provides:

- (A) For endorsements to existing loan policies, or new policies insuring previously insured mortgages modified or assigned within ten years from the date of closing, where there has been no change of ownership of the mortgaged interest and the property is identical and no increase in the outstanding principal balance, the charge shall be fifty percent (50%) of the applicable loan rate based on the outstanding principal balance of the mortgage.

Manual for Title Insurance Rate Service Associations § 16(A) (4th ed. 2010).

When a title insurance company issues a comfort letter in lieu of an endorsement and avoids collecting the premium associated with such an endorsement, the company violates Insurance Law §§ 6409 and 2305 by deviating from the filed and approved rates. Companies that are not members of TIRSA also are subject to Insurance Law §§ 6409 and 2305, and must abide by the rates and rules that they have filed with the Superintendent.

III. Rebate of Premium

The failure of an insurer to charge a lender/insured the appropriate premium for an endorsement to an existing loan policy also may constitute a rebate that violates Insurance Law § 6409(d). That section provides in pertinent part that:

No title insurance corporation or any other person acting for or on behalf of it, shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business. Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof.

Ins. Law § 6409(d).

By not charging the lender/insured the premium for the endorsement when issuing a comfort letter, the title insurance company is, in essence, giving “free” insurance to the insured lender, which constitutes a rebate of the full premium for the endorsement. See OGC Opinion 06-08-15 (August 22, 2006).

For the foregoing reasons, a title insurance company may not issue a comfort letter to a lender in lieu of issuing an endorsement in a form, and subject to the rates, approved by the Superintendent.

Written acknowledgment of this Circular Letter should be sent no later than December 15, 2010 to the attention of Alwyn Codrington, Property Bureau, at the above address, or via e-mail to ACodrington@ins.state.ny.us, specifically indicating the number of comfort letters issued within the last three years that modify the obligations of an existing loan insurance policy and any comfort letter-related losses thus far incurred or paid.

If you have any questions regarding this Circular Letter, please contact Supervising Attorney D. Monica Marsh at dmarsh@ins.state.ny.us or (212) 480-5298.

Martha A. Lees
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