Assessment of Public Comments on proposed new 11 NYCRR 228 (Insurance Regulation 208).

The New York State Department of Financial Services (the "Department" or "DFS") initially proposed rule 11 NYCRR 227 (since renumbered as Part 228) in May 2015 and received over three thousand comments to that proposed rulemaking. The Department reviewed and considered the comments and in 2017 issued a new, revised proposed rule 11 NYCRR 228, which incorporated a number of changes made in response to those comments. In response to that revised proposed rulemaking, the Department has received close to three hundred written comments from: title insurance corporations, title insurance agents and agencies, title insurance closers, attorneys, trade associations, a rate service organization, and public officials. Many commenters addressed more than one provision of the proposed regulation, and many requested specific changes. The Department has considered the comments and has made several clarifications to the regulation. This summary is intended to provide an overview of the categories of comments received by the Department, the clarifications the Department has added to the final rule in response to those comments, and, where applicable, the reasons for not making additional changes or clarifications.

Section 228.1 Definitions.

Comments: The Department received technical and clarifying suggestions regarding definitions. Suggestions were made to add definitions for purposes of clarity including definitions of "escrow" and "fair market value."

Response: The Department made technical and clarifying changes to definitions as appropriate and does not believe that all of the changes or new definitions requested are required. In response to a comment suggesting that the limits on ancillary charges should only apply to residential closings, the term "residential real property" was added to the definitions section.

<u>Section 228.2 Prohibition on Inducements for Future Title Insurance Business.</u>

<u>Comments</u>: Comments stated that the Department lacked the authority to regulate what they consider to be marketing activities and some claimed that the proposed regulation improperly expanded the scope of Insurance Law section 6409(d). Commenters expressed a misunderstanding that the proposed regulation would prohibit all forms of marketing and acceptable customary business activity by title insurers and agents. Many commenters stated that the industry has always operated by providing the types of consideration that the Department considers to be violative of Insurance Law section 6409(d). One commenter questioned why other industries can continue business as usual and work as sales people and *induce their clients* with business lunches to talk about business but those in the title insurance industry cannot (emphasis added). Several commenters objected to the language in the proposed regulation that refers to the statute as prohibiting the payment of compensation or anything of value to any person or entity and not those specified in Insurance Law section 6409(d).

Commenters objected that the Department deleted the examples of prohibited expenses that were set forth in the first proposed regulation, stating that without it the regulation is unclear and does not clearly convey what specific conduct is prohibited. Commenters suggested that the regulation provide lists of expenses to make clear what expenses are prohibited and what expenses are proper.

Several comments suggested that meals, beverages, entertainment, parties and sports activities should be allowed at least under certain circumstances and the Department received various suggestions regarding the types of activities and circumstances that should be allowed where one or more representatives of the title insurance corporation or agent is present, where title insurance business is discussed, where the expenditure is not a "regular occurrence", and where the expense is customary, reasonable and not excessive. Another commenter suggested that meals and entertainment should be allowed where substantial title insurance business is discussed directly before, during, or after the business meal or "business activity", and the total cost is reasonable. One insurer stated that the prohibition should not apply to commercial transactions.

Several comments objected to the language that provides that the giving of a thing of value to the specified group of people is considered an inducement regardless of whether there is an explicit quid pro quo, claiming that the clear language of Insurance Law section 6409(d) only prohibits rebates and inducements in connection with a quid pro quo and that relationship building over a meal or social event is a form of marketing that has long proven to be more efficient at getting business than direct market advertising.

One commenter requested reasonable parameters for charitable or political donations, CLE classes, and gifts for life milestones. Many commenters continued to object to what they interpreted as a prohibition on providing free CLE classes.

Response: The Department has clear authority to support this regulation, including authority under the Insurance Law and Financial Services Law. Insurance Law section 6409(d) prohibits the payment of any consideration or valuable thing to any applicant for title insurance, or to any person, firm, or corporation acting as an agent, representative, attorney or employee of the actual or prospective owner, lessee, or mortgagee as an inducement for or as compensation for title insurance business. The statutory bar is broad and has no dollar threshold exception. It is intended to bar certain persons—including attorneys, lenders, and real estate agents, in addition to the purchaser of the property—involved in the real estate transaction from receiving any benefit by using a particular title insurance corporation or title insurance agent. Based on current practices and discussions, it is apparent that the broad scope of the statute was not being followed by the industry. Indeed, many in the industry acknowledge that the expenditures on meals and entertainment are made "to get the business". Thus, far from exceeding its authority, the Department is clarifying by regulation that while Insurance Law section 6409(d) prohibits those types of expenditures that are made to induce referrals of title insurance business, certain expenditures, for marketing purposes, do not run afoul of Insurance Law section 6409(d) and, accordingly, are permitted.

In addition to the Department's authority under Insurance Law section 6409, this regulation is supported by broad authorities under the Financial Services Law and Insurance Law to promote the public welfare by proscribing practices that result in excessive rates, and protect consumers from being overcharged for improper or excessive fees, and to generally prohibit unfair, deceptive or discriminatory practices in the industry.

The Department is issuing this final regulation clarifying that the prohibitions in Insurance Law section 6409(d) are not limited to those circumstances in which there is an explicit quid pro quo for a particular piece of business and setting forth guidance regarding permissible and prohibited expenses. The final regulation sets forth a list containing examples of activities and expenditures that are barred pursuant to the statute, and a list of marketing expenditures that are permitted. Accordingly, while, for example, meals and entertainment are generally prohibited, meals and beverages may be provided at continuing legal education events and limited marketing and advertising events as long as certain requirements are followed, including that the event may not be restricted to a select number of clients. In addition, advertising and marketing promotional items of de minimus value may be distributed. The examples set forth in the final regulation are illustrative and are not exclusive and are not intended to bar legitimate transactions that do not violate Insurance Law § 6409(d) or unlawful transactions that do violate the statute. The lists included in the final regulation include provisions from the first proposed regulation, comments received, longstanding Departmental guidance as well as comparable provisions in other laws and regulations.

With respect to charitable contributions or political contributions, the Department does not intend to discourage title insurance corporations or agents from giving to charity or to restrict them from providing political contributions but clarifies that any such contributions must be made directly to the organization and not on behalf of anyone who refers title insurance business to them, or in exchange for title insurance business.

Finally, in response to comments regarding persons who are prohibited from receiving compensation or anything of value in violation of Insurance Law section 6409(d), language mirroring the statute was added to clarify that payment of compensation or providing things of value is only prohibited as to those persons specified in the statute.

<u>Section 228.3 Expense reporting and rate filings.</u>

<u>Comments</u>: Some commenters objected to the expense reporting requirements, characterized as retroactive or punitive. Commenters suggested that the Department institute a prospective reporting requirement. Commenters claimed that having to restate expenses is burdensome, or would require insurers to admit that they had violated the law by having made certain expenditures. Some title insurance corporations objected to the time frame of 120 days for restating expense schedules. One commenter claimed that it was improper for the Department to require underwriters to certify that all of their agents are in compliance and that the agents' expense schedules contain only proper expenditures.

Comments stated that the statute does not specify what expenditures are prohibited and that until prohibited expenditures are further defined relevant parties cannot create appropriate recordkeeping systems.

Several comments expressed practical considerations that title insurance corporations do not have the detailed information regarding their expenses for the already reduced six-year period that will be required for data calls to support future rate applications, expressing concerns regarding the ability to create six years of a company's expenses and statistical reporting system for the specific requirements of each state regulator.

However, the Department was also told that so long as it publishes clear guidance with respect to which categories of expenditures are permitted or prohibited under section 6409(d), the Department's proposal to exclude certain categories of expenses from the calculation of title insurance rates in New York on a prospective basis could be implemented.

Comments questioned the Department's authority to include as an alternative that new rate filings with 5% reductions for each category of policy be filed, stating that this alternative is punitive, arbitrary or violates Insurance Law Article 23. Several commenters stated that a 5% reduction in premiums would put a strain on agents to make a profit and stay in business or would result in businesses making other cuts to expenses to enable the rate reduction. However, comments received also supported the Department's conclusions that title insurance rates can be reduced including a comment confirming that the Department would be able to reduce title insurance rates by between 1-3% on top of more substantial savings resulting from caps on ancillary and discretionary fees.

Response: The Department does not agree that this regulation applies retroactively or is punitive or arbitrary. Insurance rates are set prospectively based on data relating to past experience. This regulation merely requires title insurance corporations to support applications for future rates that do not include expenditures for improper rebates or inducements that were made in violation of the law at the time they were made. The Department has given clear notice through numerous regulatory proposals, circular letters, and other mechanisms as to the types of expenses that it has intended to limit and the regulatory requirement that these expenses be excluded from all future rate submissions is a regulatory mandate that has been included in the final regulation.

In the judgment of the Department, the best way to ensure that improper expenditures are not included in the rates is to have the insurers restate and refile their expense schedules. However, in response to comments received, the Department has adjusted the regulation to provide for greater flexibility in assessing the appropriate data that can be submitted to support a rate application. In response to commenters' concerns that the requirement to refile expense schedules would require admission of any particular marketing expenditures being illegal, the Department states that it does not consider the re-filings to be an admission or concession.

In response to the practical considerations raised in comments, the Department had previously considered the concerns raised and reduced period of review from ten to six years and created an alternative 5% reduction. Thus, any title insurance corporation, in lieu of restating and resubmitting expense schedules, can opt to file a rate filing requesting a reduction from its current rate that would uniformly decrease the base rate five percent. The Department believes the 5% reduction is reasonable based upon the information obtained during its investigation, and based on other information the Department has developed within its actuarial expertise. This option is also voluntary, and the establishment of this voluntary option to reduce the practical concerns expressed is within the Department's authority. While it was not the intent that insurers verify their agents' expense schedules, in response to a comment voicing such concern, the Department has clarified that each entity verifies its own expense schedules.

Section 228.5 (a), (b), and (c) Ancillary charges.

Comments: Several commenters challenged the Department's authority to regulate ancillary charges although several commenters agreed that ancillary charges should be regulated and one insurer stated that the proposed regulation sets forth reasonable limits on ancillary fees. Others claimed that the price caps do not reflect the actual cost of providing the service, were arbitrary, or that reductions in fees in conjunction with additional costs imposed would drive companies out of business. Comments expressed that certain commercial closings were particularly complicated causing more significant work to be required in connection with services related to certain fees and proposed to limit any regulatory caps on ancillary charges to residential closings.

Response: The Department has the authority to regulate services provided in connection with the issuance of an insurance policy and ancillary charges related to services the title insurance corporation, title insurance agent, or any other person acting for or on behalf of such title insurance corporation or title insurance agent to ensure clean title for purposes of issuing a title insurance policy. In addition, Article 24 of the Insurance Law prohibits unfair or deceptive practices and Insurance Law §2110 provides that insurance producers' licenses may be revoked or suspended if they engage in untrustworthy behavior. The Department believes that this regulation is necessary particularly in light of Circular Letter No. 9 (2006), which specifically reminded licensees that "service fees should be reasonable and different insureds should not be charged different amounts for the same services."

With regard to comments that the fees proposed may be inappropriate where there is a particularly complicated commercial closing that requires significantly more work, the Department accepted a proposed change that the restrictions on ancillary charges only apply to residential closings and has revised the regulation to limit that section, relating to ancillary charges, to residential real estate closings as set forth in the added definition of "residential real property" to the definition section. The Department has also made technical corrections and clarifications in response to comments received.

Section 228.5(d) Ancillary charges-title closers.

Comments: Comments received objected to the prohibitions in the proposed regulation against paying closers gratuities and pick-up fees, claiming that the Department would eliminate title insurance closers or require that they work for free.

Objections were based on the claim that the regulation of compensation to title closers is not within the scope of the Department's authority and that gratuities should be allowed just as they are for other occupations. In addition, several commenters claimed that it would disrupt the way of doing business in New York where the concept of paying closers gratuities for a job well done is a longstanding tradition.

A number of commenters objected to the additional cost, stating that small companies would be unable to incur the additional expense on top of what they typically pay closers, approximately $30 to $50.

Several commenters agreed with the Department's goal of eliminating tips or gratuities for closers, although one insurer stated that insurers and agents cannot absorb the additional cost of a closer, and suggested that the Department approve specific amounts for an attendance fee or payoff fees.

Many commented that if the charge to the closer for remitting the loan payoff is banned, then attorneys or a bank representative would have to perform that task and the cost would be higher to the consumer. Others suggested that the Department set a maximum on the amount of the pick-up fee and gratuity.

Other comments received generally objected to the requirement that a title insurance corporation or title insurance agent remain responsible for closers or other persons acting on behalf of such title insurance corporation or title insurance agent at the closing and the fees charged at the closing.

Response: The Department has repeatedly stated that this regulation does not eliminate title insurance closers or require that they work for free. Rather, the Department's intention is that closers be paid by the entity that hires them to represent them at a closing. Closers representation of the title insurance corporation or title insurance agent at the closing is for the purpose of arranging for clean title to be achieved before a title insurance policy is issued. The Department has clarified that the entity hiring a closer remains responsible for the fees that the closers charge to ensure that they are not unreasonable or excessive, and that the closer is not charging the applicant for work relating to the insurance policy in excess of the premium charged . Because having someone represent the title insurance corporation at the closing is an essential component of issuing the policy, an "attendance fee" for the closer is included in the rate manual as a fee that is encompassed by the premium. The applicant for insurance thus is already paying for such services as part of the premium and should not be charged twice. While all fees charged by closers remain subject to these principles, in response to comments received, the Department has removed express prohibitions on closers charging fees other than to the applicant for insurance.

With regard to comments received relating to the "pick up fee" charged by closers, the Department has considered comments claiming that the elimination of such fee could result in additional fees being charged by requiring additional parties to attend the closing to ensure the payoff. In response to these comments, the Department has removed the prohibition on an independent closer charging a reasonable fee for the remittal of a loan payoff, which amount must be disclosed prior to the closing and remains subject to the title insurance corporation or title insurance agent that hired the closer remaining responsible to ensure that the amounts charged by the closer are reasonable and not excessive.

With respect to the comments that the Department should license title insurance closers, the Department has previously proposed such legislation and will consider renewing this proposal.