Consolidated assessment of public comments on the proposed Fifth Amendment to 11 NYCRR 20 (Insurance Regulations 9, 18 and 29); Fifth Amendment to 11 NYCRR 29 (Insurance Regulation 87); First Amendment to 11 NYCRR 30 (Insurance Regulation 194); Third Amendment to 11 NYCRR 34 (Insurance Regulation 125); and new 11 NYCRR 35 (Insurance Regulation 206).

The consolidated amendments implement Part V of Chapter 57 of the Laws of 2014, which required title insurance agents to become licensed in New York. The Department of Financial Services ("Department") originally published a proposal to amend the rules and add a new rule on July 23, 2014. The Department promulgated a revised version of the proposal on an emergency basis on September 27, 2014 and without any substantive change from the September 27, 2014 version, readopted the revised version on an emergency basis on December 23, 2014, February 20, 2015, April 20, 2015, June 11, 2015, August 13, 2015, November 10, 2015, February 5, 2016, May 4, 2016, August 1, 2016, October 28, 2016, January 25, 2017, April 24, 2017, June 22, 2017 and August 18, 2017. The emergency addressed some of the comments that the Department had received on the initial proposed rulemaking that needed to be immediately made while the Department considered other changes. The July 23, 2014 proposal expired and a revised version was proposed this year. The comments herein address the current rule.

The Department received written comments from many interested parties in response to its publication of the rule in the New York State Register, including from several New York State legislators; an association representing the title insurance industry; an association representing New York banks; the real property law section of a state bar association; an association of real estate providers from all segments of the residential home buying and financing industry; an association of realtors; title insurance corporations; and numerous title insurance agents and other interested parties. The Department met with several stakeholders, industry representatives and interested parties to listen to their concerns.

Comments on Specific Sections of the Regulation

Section 20.3 of Insurance Regulation 29 – Premium Accounts

Comments:

Comments were received regarding the requirements in section 20.3(b) of Insurance Regulation 29 governing the types of funds that may be maintained in a title insurance agent's "premium account". One comment noted that most of the escrowed funds received at a closing is for the payment of mortgage, transfer and real estate taxes and other escrowed monies. They argued that the premium is often a relatively small amount of the funds collected, and the amount of the premium remitted to the insurer is even a smaller amount. They suggested that it would be better to deposit the mixed checks first into a clearing/exchange account and then have the premiums transferred to the premium accounts, which would then be segregated accounts from which remittance withdrawals are made to the underwriter. The rule, which has been in place for many decades for insurance agents and brokers and which has been extended to title insurance agents now, addresses premium received from the insured and return premiums, but not other monies that may be received by the licensee in a fiduciary capacity.

Response:

While it may appear that those other monies could not be deposited into the premium account, Insurance Law section 2120, implemented by section 20.3, speaks broadly about funds received or collected by a licensee in a fiduciary capacity. The Department modified this section to clarify what other funds may be deposited in a premium account and under what conditions they may be deposited there. The revisions are not limited to title insurance agents but apply also to insurance agents and insurance brokers as well. A title insurance agent, for example, may deposit the funds into the fiduciary account and treat it as a clearinghouse, and then segregate the escrow funds and other funds as the association suggested provided that each such account satisfied the requirements of the regulation.

Section 20.4 of Insurance Regulation 29 – Fiduciary responsibility of insurance agents, title insurance agents, and insurance brokers; minimum recordkeeping requirements

Comments:

One commenter stated that, because with title insurance there is typically no formal application process, the reference in section 20.4(c)(5) to an application seems to conflict with ordinary procedure.

Response:

The rule clarifies and modifies an existing regulation to extend the requirements to title insurance agents. The revisions are not limited to title insurance agents but apply also to other licensees subject to Insurance Law section 2119 ("Section 2119"), including insurance agents, insurance brokers, insurance consultants, and life settlement brokers, as well. While the Department recognizes that there is not always a formal application, which is the case for both title and non-title insurance, in circumstances where a written application exists, the regulation requires that a copy be provided to the insured. Where no written application exists, the receipt should otherwise make clear the purpose for which the receipt is provided.

Section 20.6 of Insurance Regulations 9, 18, and 29 – Fees; Insurance Law section 2119

Comments:

One commenter suggested that section 20.6(a) be amended to allow for the definition of "compensation" to mean any fee, commission or thing of value, but not include any reimbursement for actual out-of-pocket costs set forth in section 228.5 (regulation 208). Another commenter argued that including "commission" in the definition of compensation in section 20.6(a)(1) extends all of Insurance Law section 2119 to title agents, when only Insurance Law section 2119 (f) applies to title agents and (f) contains no requirement to disclose commission. It was argued that Insurance Law section 2113 already requires disclosure of commission on good faith estimate forms, so requiring that the same information be disclosed in two separate disclosures serves no purpose.

Response:

As noted, the rule clarifies and modifies an existing regulation to extend the requirements to title insurance agents. The revisions are not limited to title insurance agents but apply also to other licensees subject to Insurance Law section 2119, including insurance agents, insurance brokers, insurance consultants, and life settlement brokers, as well.

The definition of "compensation" as used in section 20.6 is drawn directly from Insurance Law section 2119 and is interpreted in the same manner as it has been interpreted with respect to other licensees that have long been subject to that section. Reimbursement for certain actual out-of-pocket costs, such as where the agent engages a third-party entity to do a search must be included within the section 2119 agreement because they relate to the services provided by the agent. Collection of mandatory fees, including a municipality or county recording fee, do not need to be specified in the section 2119 agreement though the agent should nonetheless provide the insured with a clear statement of all such amounts.

With respect to whether commission paid by the insurer must be specified in the section 2119 agreement, the definition of "compensation" has been amended to exclude commissions deductible from premiums payable on insurance policies or contracts, which is the same as the case with respect to section 2119 insurance broker agreements. The commission, however, must be disclosed in accordance with Insurance Law section 2113 and section 30.3 of Insurance Regulation 194.

Section 35.1 of Insurance Regulation 206 – Definitions

Comments:

One commenter argued that section 35.1(b)(2)'s requirement that there be at least a five percent share to create an affiliate is more lenient than the federal Real Estate Settlement Procedures Act's ("RESPA") one percent share requirement. Another commenter states that the new definition of affiliated person in section 35.1(b) as one who must "own or control" a title insurance agency is narrower than the previous definition and now “completely exempts many, if not most, affiliated business agencies from all the requirements and disclosures in section 35.4” because many affiliated business arrangements (“AfBAs”) are only partially owned by referring entities who do not necessarily control them. It was argued that section 35.1(d) provides less consumer protection by requiring operational control not just a financial interest in, or influence over, as in the current regulation, and hides the fact that the party doing the referral will receive additional compensation in the form of a return on investment. It was suggested, therefore, that the Department retain the previous definition. Another commenter would like the definition of affiliated person to be amended to make clear, for example, that where a trust and estates attorney brings a client to a law firm and a real estate partner in said law firm handles the closing and provides title insurance to the client, that a referral has not been made. The commenter argued that the attorney, the law firm and the title agent would not be affiliated parties because they are one and the same. One commenter suggested a fix to the definition of core title services in section 35.1(e)(5), by adding the words “clearing or” before the word “negotiating”.

Response:

The five percent ownership threshold in determining whether an entity or person is an affiliated person only applies to a title insurance corporation; the threshold with respect to a title agent is “any” ownership interest in the agent. The higher threshold for a title insurance corporation is because a title insurance corporation is generally larger in size than a title insurance agent. The five percent threshold for a title insurance corporation is significantly smaller than the threshold for deeming entities to be part of a holding company system under Insurance Law Article 15. As such, it is felt that the threshold was sufficient for title insurance corporations. Parties must still comply with RESPA where RESPA applies, notwithstanding the lower threshold for the purposes of the regulation. With respect to the attorney scenario, the attorney, law firm and the real estate partner would, in fact, be affiliated parties under the rule. The exception that was created in section 35.5(c) involved a scenario where the same person acted in both capacities. However, revisions were made to section 35.4(f) as discussed below.

The suggested clarification to the definition of core title services was made as indicated above.

Section 35.4 of Insurance Regulation 206 - Affiliated Business Relationships; other prohibitions

Comments:

Many of the commenters support the new language in the rule that requires that affiliate businesses make a good faith effort to obtain, and be open for, title insurance business from all sources and not business only from affiliated persons. They believe the good faith standard is consistent with best practices under RESPA and will ensure similar compliance at the state level, without the unintended consequence of dissolving lawfully affiliated agency operations in New York. They state that the new language in section 35.4(f)(3) is more in line with the original legislative intent and is consistent with RESPA. They argue, further, that the significant and multiple sources of business standard "was nebulous as to what would be required for compliance." Some commenters also argue that section 35.4(a) has expanded the definition of the term "inducement", thus, making it apply to any title insurance policy that may be issued at some future time and to virtually any marketing activities by an insurance company.

On the other hand, many commenters oppose the rule arguing that it will have unintended consequences for the title insurance industry and will lead to disruptions that will destabilize the marketplace. They argue that the rule does not serve the public interest and that smaller title agencies will find it difficult to keep their doors open. One commenter wants a change to the language in section 35.4(f)(1) and (3) in so far as it would require attorneys to begin competing with other title agents. Many commenters argue that the rule is inconsistent with RESPA because it has relaxed the standard for AfBAs, creating a more lenient standard resulting in preemption by RESPA. They further contend that the rule will create ambiguity about the types of business arrangements that are permissible in New York. One commenter also asserts that the requirement in section 35.1(b)(2) that there be at least a five percent share to create an affiliate is more lenient than RESPA's one percent share requirement and that section 35.4(f)(3)'s requirement that an entity make a good faith effort to obtain business from other sources is impermissibly more lenient than RESPA, which requires in a policy statement issued by the Department of Housing and Urban Development (HUD) that an entity is "actively competing in the market place for business." They argue that the rule backtracks from, and stands in contrast to, the Department's own advisory opinions, which require "significant and multiple sources of business" for an affiliated business to be allowed to operate and that those are clear standards that have been implemented by the industry and on which title insurers have built their businesses for over a decade. They argue that if the Department backtracks now, it will only serve to create confusion about the appropriate standard and that such change may lead to title insurers being required to unwind acquisitions and other partnerships that have been good for the industry.

Other comments express objection to removal of the "significant and multiple sources of business" requirement. They refer to earlier industry comments which asked the Department to provide further definition of significant and multiple sources, i.e., an economic measurement or number of orders measurement. They argue that the requirements that AfBAs have their own employees and perform core title services are commendable but the rule falls short on preventing sham arrangements because it does not require a defined level of non-affiliated business. Other commenters contend that removal of the "significant and multiple sources of business" standard will dilute consumer protection to allow sham title agents and businesses and will allow large real estate projects to self-insure, which will threaten the stability of the title insurance industry. They ask that the Department revise the rule to provide a revised definition of "significant and multiple sources of business" and to restore RESPA-level consumer protection. Other commenters argue that the changes to the rule will give joint ventures and controlled businesses a competitive advantage when competing for title business and place small businesses and independent title agents at an unfair disadvantage. They argue that the rule is contrary to RESPA, will result in job loss and little benefit, if any, to consumers.

Response:

The affiliated business relationship issue remains the most commented on provision in this rule. The original rule provided that: 1. A title insurance corporation may not accept title insurance business referred directly or indirectly from an affiliated person unless the title insurance corporation had “significant and multiple sources of business”; and 2. A title insurance agent may not accept title insurance business referred directly or indirectly from an affiliated person unless the title insurance agent has significant and multiple sources of business.

The Department remains concerned with arrangements that are sham agreements created to evade the requirements in Insurance Law section 6409(d) or that otherwise restrict consumer choice. The Department, in developing the current rule, recognized that the “significant and multiple sources standard” was a useful guidepost to evaluate whether certain transactions violated Insurance Law section 6409(d) or were shams. However, the Department also recognized that the standard does not establish sufficient specificity as to what volume of outside sources is *significant* or sufficiently *multiple*. While many commenters urged more specificity and definition, the Legislature had removed provisions from the title licensing bill that had imposed specific limitations in this regard, thus the Department could not implement by regulation what the Legislature was not willing to do by statute. The Legislature also specifically provided an exemption for attorneys who are also title agents, allowing such a person to wear two hats, *i.e.*, act as a title insurance agent and an attorney in the same transaction. In addition, serious consideration was given to assertions by lenders that the “significant and multiple sources standard” could run afoul of the Gramm-Leach-Bliley Act because it would “significantly interfere” with their activities. The Department took all these factors into consideration in developing the final rule.

Moreover, as discussed in the regulatory impact statement for this rule, the Department does not believe that the significant and multiple test necessarily should be the sole or even the key factor in determining whether Insurance Law section 6409(d) is being violated. Exclusive reliance on the significant and multiple sources test may instead give the impression that simply meeting the test would preclude further inquiry as to whether a sham relationship exists or, on the other hand, that failing to meet the test would automatically mean that Insurance Law section 6409(d) was being violated. Rather, the Department refined its rules on AfBAs and incorporated certain criteria that federal regulators have relied upon in implementing RESPA, which we believe will not only protect consumers, but will further the public policy of New York against sham business arrangements.

In response to the comments, the Department has made clear that a good faith effort should include active marketing of one's title insurance business. The criteria specified in section 35.4(f) are intended to help provide guidance to the industry to ensure that the affiliates and others in the title industry do not violate Insurance Law section 6409. The criteria in section 35.4(f) serves to ensure that affiliates engage in core title services with respect to affiliated business. Section 35.4(f) also requires that title insurance services are provided to all applicants in a fair and non-discriminatory manner and that affiliations are not entered into as a way to circumvent Insurance Law section 6409(d).

In addition, the Department recognized that, while affiliated businesses should usually be provided by separate entities, to the extent permissible under RESPA, the employees of a law firm that is licensed as a title agent may also provide the title agent services.

Section 35.5 of Insurance Regulation 206 – Referrals by affiliated persons and required disclosures

<u>Comments</u>:

Many commenters argue that the required disclosures in the rule are duplicative and burdensome. Some argue that section 35.5 does not track the required disclosures in Insurance Law section 2113(d), but instead alters them. They argue that the rule does not provide a format for such disclosures or refines or clarifies the statutory language, and that RESPA already requires usage of a standard form for such disclosures. They believe that the new Department standard will require a second set of disclosures to customers, which will create more work for title insurers and more confusion for customers. Another commenter argued that the AfBA disclosures are redundant in light of those already required under RESPA and because states may enforce RESPA, including compliance with the disclosure provisions, AfBAs now have two sets of disclosure requirements, while all others do not. They suggest that the Department provide clarification as to whether a separate disclosure would be required or whether an entity could comply by adding required New York information to the federal disclosure statement.

One commenter argues that the requirement in section 35.5(a)(5) would make it impossible to calculate a return on investment for affiliates as the amount of return for any single transaction would be inaccurate. Another commenter argues that it is impractical to calculate how much an affiliate might receive from a transaction when such affiliate can only receive income based on his/her ownership interest, which is not calculated at the transaction level but more likely on a monthly or quarterly basis based on profits. Another commenter also states that requiring that an affiliate disclose to an applicant an estimate of the amount it expects to receive based on referral is an impossible task when affiliates only receive returns on their ownership interests. One commenter requests exemption from this requirement in the event compensation to an affiliate is limited to its ownership interest.

<u>Response</u>:

The Department does not intend that duplicative notices be provided. The notices under the regulation supplement the required notices under Insurance Law section 2113(d) and do not alter them. Wherever possible, they may be combined with other notices so long as they satisfy all of the requirements of the rule, including being prominent and clear.

With respect to the return on investment concern, similar issues were raised when the Superintendent promulgated Insurance Regulation 194, regarding disclosure of producer compensation. The regulation makes clear that only a reasonable estimate is required if the exact amount is not known at the time of the transaction. Examples of how title insurance agents can handle these kinds of disclosures can be found in Circular Letter 18 (2010), which addressed Insurance Regulation 194. *See* http://www.dfs.ny.gov/insurance/circltr/2010.htm

With respect to the requested exemption from the disclosure requirement in the event compensation to an affiliate is limited to its ownership interest, because compensation to the affiliate may only be based upon either fair market value for actual bona fide services performed or based upon ownership interest, any such exemption would defeat the purpose of this rule.

Section 35.6 of Insurance Regulation 206 – Disclosure of fees and other charges

Comments:

One commenter argues that section 35.6(b)(2) should provide that posting charges on a website or place of business should not be required if there is no mark up of ancillary or discretionary fees above actual out-of-pocket costs. It was argued that requiring the posting of charges in a law office or any office would seem unprofessional and that it is not customary for attorney/agents to mark up charges.

Response:

Even if the title insurance agent or title insurance corporation does not mark up ancillary or discretionary fees, the point of the disclosure is to enable the insured to know what expenses may be incurred.

Section 35.8 of Insurance Regulation 206 – Use of title insurance closer by title insurance agent and title insurance corporation

Comments:

One commenter opposed the language in section 35.8 stating that it imposes a strict liability on title insurers and agents for the act of title closers. They argue that the terms “any acts relating to the issuance of a title policy” and “while the closer is acting for or on behalf of...the title insurance corporation” are vague and have the potential to expand the liability of an underwriter beyond coverage under the terms of the policy. They argue that the language is problematic because: (1) reserve statutes are tied to the face amount of the policy and have no provision for loss reserves due to the acts of closers resulting in losses outside of the issuance of the policy; (2) coverage for acts outside of the policy more closely resembles fidelity or surety insurance – title insurers are limited to NY's monoline statute; (3) previously issued guidance from the Department held that closing protection letters are prohibited because their protection falls beyond the scope of the monoline title insurer's license and writing authority" and are in the "nature of fidelity or surety coverage, or resemble professional liability insurance." They suggested, for our consideration, new language to address their concerns.

Response:

The Department believes that the closer is acting as the agent of the title insurance corporation or title insurance agent that has retained the closer for the closing. The Department believes that the proposed suggestions were too broad. However, the Department did modify the language of the rule to make it clearer that the responsibility applies with respect to actions taken by the title closer in connection with the issuance of the title insurance policy.