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TITLE INSURANCE REGULATORY BULLETIN

BULLETIN 3 - 06

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Since the issuance of Bulletin 1-05 on July 9, 2005 as supplemented by Informational Handouts 1-06 and 2-06 issued on February 23, 2006, the Department of Financial and Professional Regulation, Division of Financial Institutions, Title Insurance Section, has received many inquiries by title insurance companies and title insurance agents regarding the various title agent programs in the title insurance industry, more specifically the attorney agent programs. Addressing these inquiries has led to a determination by the Department that to resolve the discrepancies that exist in these programs, it is appropriate to once again address the issue.

Previously, the Department set out examples which demonstrated HUD's requirements for being a title insurance agent. The Department is expanding those examples in this Bulletin to clarify the obligations of a title insurance agent in Illinois as mandated by HUD, with a review of the HUD Regulations dealing with this issue.

In the RESPA Manual, Appendix 2, Department of Housing and Urban Development Regulation X, HUD sets forth the following:

- "When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are

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actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, **the attorney must perform core title agent services (for which liability arises)** separate from attorney services, *including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.*” (Emphasis added)

Further, in the RESPA Manual, Appendix 2 to Part 3500, Illustrations of Requirements of RESPA, HUD sets forth the following illustration:

- *“Facts:* A is an attorney who, as a part of his legal representation of clients in residential real estate transactions, orders and reviews title insurance policies for his clients. A enters into a contract with B, a title company, to be an agent of B under a program set up by B. Under the agreement, A agrees to prepare and forward title insurance applications to B, to re-examine the preliminary title commitment for accuracy and if he chooses to attempt to clear exceptions to the title policy before closing. A agrees to assume liability for waiving certain exceptions to title, but never exercises this authority. B performs the necessary title search and examination work, determines insurability of title, prepares documents containing substantive information in title commitments, handles closings for A’s clients and issues title policies. A receives a fee from his client for legal services and an additional fee for his title agent “services” from the client’s title insurance premium to B.

Comments: A and B are violating Section 8 of RESPA. Here, A’s clients are being double billed because the work A performs as a “title agent” is that which he already performs for his client in his capacity as an attorney. For A to receive a separate payment as a title agent, A must perform necessary core title work and may not contract out the work. To receive additional compensation as a title agent for this transaction, A must provide his client with core title agent services for which he assumes liability, and which

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includes, at a minimum, the evaluation of the title search to determine insurability of the title, and the issuance of a title commitment where customary, the clearance of underwriting objections, and the actual issuance of the policy or policies on behalf of the title company. A may not be compensated for the mere re-examination of work performed by B. Here, A is not performing these services and may not be compensated as a title agent under Section 8(c)(1)(B). Referral fees or splits of fees may not be disguised as title agent commissions when the core title agent work is not performed. Further, because B created the program and gave A the opportunity to collect fees (a thing of value) in exchange for the referral of settlement service business, it has violated Section 8 of RESPA.”

The Department of Financial and Professional Regulation, Division of Financial Institutions, Title Insurance Section, has made the determination that in order to be in full compliance with the Title Insurance Act, Title Insurance Rules and RESPA, a Title Insurance Agent in the State of Illinois must be a “full service” Title Insurance Agent. In this regard, the Title Insurance Agent must determine the insurability of title, prepare and issue the title insurance commitment, handle the clearance of underwriting objections and the actual preparation and issuance of the final title insurance policy. The Title Insurance Agent cannot outsource any of these functions to other entities. The Title Insurance Agent can either search the record for the determination of insurability of title prior to issuing the title commitment or outsource the search function to a third party. However, if the title search function is outsourced to a title insurance company, title insurance agent or a related entity of either, the search received by the Title Insurance Agent must be raw data for the determination of insurability. Many companies have electronic search mechanisms which populate fields in searches given to customers. This will be an acceptable search mechanism so long as there is no human intervention in the population of the fields in the electronic platform at the time of the search. The entity performing the search function cannot do a preliminary title examination; any type of enhanced title search product or examination worksheet is prohibited. Additionally, if the Title Insurance Agent outsources the search function to another entity, including their title insurance company, the Title Insurance Agent must pay a reasonable fee for the search or it will be deemed a “thing of value” for the inducement of business.

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The Title Insurance Section issued "Informational Handout – 1-06" on February 23, 2006 at a meeting with representatives from the title insurance companies which dealt exclusively with the "title search, title examination" issue. The following language is from handout 1-06:

"The Department's review of certain search products indicates preprinted exceptions (pre-examination) are being created in conjunction with the search package. While the use of a prior title insurance policy (including a commitment that is substantiated by the issuing company's own prior file where the file did not go to final policy) may be utilized as a starting point (starter file) for the search and included with the search package as an aid for the purpose of the "determination of insurability of title", the creation of preprinted exceptions as a pre-examination may not be utilized. The use of a starter file is acceptable only if it is used as a starting point for a title examination. Some of the products that have been reviewed indicate that some in the title insurance industry have changed the meaning and design of the starter file to include events/information that have occurred since the last title insurance policy was issued (or commitment as stated above). Any starter file that includes information or changes that have occurred since the previous title insurance policy (commitment) date will be considered already "examined" and therefore in violation of Bulletin 1-05, the Title Insurance Act and RESPA.

In addition, in reviewing the title searches sent to title insurance agents by the title insurance underwriters and service companies, the Department has found that some title insurance agents are being sent a preliminary title commitment with the heading, "title search", basically requiring the title insurance agent to merely sign and return without doing the proper examination. The issuance of a commitment by a title insurance underwriter or service company in any shape or form prior to the "determination of insurability of title" by the title insurance agent is prohibited."

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Visits to title insurance companies and title insurance agents since February 23rd has shown that some companies are still producing a pre-examination or preliminary title commitment for their title insurance agents which is totally unacceptable.

1. A “starter file”, as discussed in Informational Handout 1-06, can only be used as a starting point for the examination of title; adding anything to the starter file which details current information is not permitted.
2. Any formatting of the title search information (raw data) into a “title search report” or onto an “examiner worksheet” is not permitted; the search package must contain only the raw data and may not contain preprinted exceptions or any other enhancements.

Effective immediately, **all title insurance agents** must perform the following core title services in order to be a registered title insurance agent in the State of Illinois:

1. Evaluation of the raw data title search to determine the insurability of title;
2. Prepare, issue and distribute the title insurance commitment;
3. Handle the clearance of underwriting objections;
4. The actual preparation, issuance and distribution of the final title insurance policy(ies).

The registered title insurance agent may outsource and purchase a raw data search package from a third party and under direction and approval of their title insurance company, may outsource closing services to their title insurance company or another registered title insurance agent of their title insurance company.

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Any Title Insurance Agent not complying with the mandates set forth in this Regulatory Bulletin will be found to be in violation of RESPA, the Illinois Title Insurance Act and Rules.

The Department requires that the licensed title insurance companies immediately advise their personnel and their registered title insurance agents of the requirements set forth in this Regulatory Bulletin, including the mailing of this Regulatory Bulletin to all registered agents.

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