June 19, 2017

Maria T. Vullo, Superintendent of Financial Services
New York State Department of Financial Services
One State Street
New York, NY 10004-1511

Via email: paul.zuckerman@dfs.ny.gov

RE: New York’s Proposed Title Insurance Regulations
    Proposed new Part 35; regulation 11 NYCRR 35
    “Title Insurance: Title Insurance Agents, Affiliated Relationships, and Required Disclosures”

Dear Commissioner Vullo:

Please accept this as an official comment upon the newly proposed title insurance regulations published on May 3, 2017, in the State Register, known as proposed new Part 35; regulation 11 NYCRR 35 (“Proposed Regulation 206”).

The New York State Land Title Association (“NYSLTA”; “the Association”) fully supports enacting measures aimed at protecting consumers from unfair and harmful practices, but we believe that the proposed regulation is an example of government overreach and unnecessary intervention in the business community. This regulation will cause many of New York’s residents to experience a reduction in the quality and expertise of individuals involved in title transactions. If the proposed regulation goes into effect as is, it will work against the goals it is meant to achieve. The proposed regulation must be reformed in the following ways:

**AFFILIATED BUSINESS REQUIREMENTS:**

The “significant and multiple” requirement for affiliated businesses must be preserved. The deletion of this provision is in direct contravention with RESPA, opinions issued by HUD and with §6409(d) of the Insurance Law as interpreted by numerous opinions issued by the Office of General Counsel and by the New York Insurance Department. We strongly urge the Department of Financial Services (DFS) to include the multiple and significant requirement which will promote a level playing field with free and fair competition in the title industry. Absent such a provision, the consumer and many of the small, independent title insurance agents operating throughout the state will be in jeopardy.

The Office of General Counsel of the New York State Department of Insurance has repeatedly opined about the impropriety of single-client affiliated title providers. “Where there is one owner that is the sole source of business for the joint venture, whatever compensation such owner receives, in terms of profits, would constitute a rebate, in violation of N.Y. Ins. Law § 6409(d) (McKinney 2000), because there will not be multiple sources of business available to such joint venture.” - OGC Op. No. 02-01-20. “It is the
Department’s position that, where an owner or part owner of a title agent is the sole source of business for such title agent and belongs to one of the prohibited class of persons in §6409(d), whatever compensation such owner or part owner receives, in terms of profits, constitutes a rebate on the title insurance business that it referred to the title agent. The profits of the title agent must be obtained from significant and multiple sources of business to enable such owner or part owner to share in the overall profits of the title agent.” - OGC Op. No. 02-05-03

Proposed Regulation 206 would instead only “require that a title insurance agent or title insurance corporation “make a good faith effort to obtain, and be open for, title insurance business from all sources and not business only from affiliated persons.”

Further, §35.5(a)(6) explicitly permits single-client affiliate title insurance providers by replacing the currently required applicant disclosure from an assertion of having significant and multiple sources of business to a mere statement of “whether the title insurance agent or title insurance corporation generates non-affiliated business from more than one source.” The Department of Insurance has previously stated that a title insurance provider that only had a single client which was an owner of the title provider is a violation of §6409(d). - OGC Opinion No. 01-05-12 (May 11, 2001)

Section 35.1(b)

Existing Emergency Regulation 206 had a significantly broader definition of “Affiliated Person” to include persons owning “any interest” in, or an employee of, or partner in a title insurance agency, or a subsidiary or affiliate. The newly proposed 206 more narrowly defines affiliated person as one who must “own or control” a Title Insurance agency to be considered affiliated. This completely exempts many, if not most, “affiliated business” agencies from all the requirements and disclosures of Section 35.4 (b-f), since many affiliated title insurance agencies are only partially owned by referring entities who do not necessarily control them. This hides from consumers the fact that the party who referred them to the title provider will be getting additional compensation in the form of return on investment. NYSLTA urges the Department to retain the existing language of Emergency Regulation 206, which we had supported when it was proposed and adopted.

Section 35.1(d) further narrows the scope of this section by requiring operational control of the agency for extra consumer protections to kick in, not just a financial interest in, or influence over, as in the current Emergency Regulation.

Insurance Law §2113(d) requires an affiliated title insurance agent to provide a disclosure to prospective title insurance applicants. Proposed Regulation 206 §35.5 seeks to alter the implementation of this statutory notice requirement by prescribing a slightly different set of disclosures. Proposed Regulation 206 only roughly follows the statutory framework set out for the ISC §2113(d) disclosure, and it does not even fully implement the statute. Where the statute requires disclosure of the nature of the relationship between the title provider and the referral source, the regulation only requires a disclosure of whether the referrer has a financial “or other” interest in the title insurance provider. It is apparent from the SAPA document that the added disclosure regarding whether the title insurance agent has more than one non-affiliated source of business indicates the DFS no longer believes that single-source title insurance agency business models violate ISC §6409(d).
The proposed regulation does not provide any more detail or guidance on the requirements of ISC §2113(d) than can be learned by reading the statute it implements. The proposed regulation provides neither a promulgated format for the disclosure nor does it refine and clarify the statutory language. Full compliance with the proposed regulation may not satisfy the statutory notice requirements. However, the Association does support the addition of a requirement that core title services must be performed by affiliated title agencies, though we feel that the definition of a title insurance agent recited in ISC 2101(y) would be a clearer standard.

PREMIUM ACCOUNTS

New wording in §20.3(b) of this regulation requires that Title Insurance Agents deposit checks containing both title insurance premium and escrowed funds into a “Premium Account”, then non-premium funds be withdrawn and transferred into other accounts. Most of the money given to a title agent in the form of a closing check is for the payment of mortgage, transfer and real estate taxes as well as payoffs and other escrowed money. A relatively small portion of the funds collected at closing is allocated to premium dollars and an even smaller amount of funds that will be remitted to an Underwriter. Generally Accepted Accounting Principles (GAAP) call for escrowed money to be first placed in a clearing/exchange account. Additionally, we understood that the Department’s priority was that premium monies have as few withdrawals as possible, to maintain the integrity of the premium accounts. This goal would be better served by depositing mixed checks first into a clearing/exchange account and then having the premiums transferred to the premium accounts. The premium accounts would then be segregated accounts from which remittance withdrawals will be made to the Underwriter.

Regarding §20.6(a)(1), the inclusion of “commission” in this definition tries to extend the whole of Insurance Law 2119 to Title Insurance Agents, when under the statute, only subsection (f) applies to title insurance agents, and does not contain a requirement that commission be disclosed. Section 2113 of the Insurance Law already requires disclosure of commission on the Good Faith Estimate form. No purpose is served by requiring two separate disclosures for the same information.

EXPANSION OF THE MEANING OF ISC 6409(d) IN Section 35.4(a)

The addition of “or may be issued” to the restatement of Insurance Law §6409(d) language contained in §35.4(a) expands its scope to almost the entire population of the country and beyond, not just those persons who are shopping or applying for title insurance or have already ordered title insurance. This is far beyond the scope of the current statute. The language in this section is similar to, but not identical with, §228.2 in new Regulation 208. We have extensive comments about this seeming expansion of the language of Insurance Law §6409(d) in our comment letter on Regulation 208. We object to the expansion of the scope of Insurance Law §6409(d) through regulation rather than through the legislative process.

NYSLTA supports rigorous enforcement of the law and adherence to the highest levels of professional conduct. We continue to support title insurance regulations for the benefit of the consumers of New York. Our Association and our members have demonstrated that commitment throughout the years by advancing legislation to license title insurance agents and bringing compliance issues to the attention of
the Department on frequent occasions. But this proposed regulation should not be adopted without taking into account the concerns expressed in these comments.

We must ask the Department to consider the unique qualities of title insurance and to work with us to put into place procedures which ensure compliance with existing laws and the survival of our businesses.

Summary

In summary, Proposed Regulation 206, while well-intentioned, would not accomplish its goal of benefitting the consumer. The rules provided for premium accounts contradict GAAP principles, and the inclusion of commission in the definition of compensation creates confusing, duplicative disclosures. More seriously, however, the combined effect of Proposed Regulation 206’s changes to how affiliated business are identified, with the effect of tacitly renouncing the long-held “significant and multiple sources of business” standard, will create a highly corrosive environment for unaffiliated title insurance business. The unaffiliated title insurance market will shrink as referral sources establish their own captive affiliated title providers. Title insurance is unique in that the agent performs the risk analysis and underwriting, therefore affiliated title businesses present special risk for the insurer and this regulation will profoundly negatively affect the risk portfolios of all New York title insurers.

We look forward to collaborating with the State Legislature, the Governor’s Office, the Department of Financial Services and others in the real estate finance industry to develop regulations that are necessary to protect residential and commercial consumers and enable us to continue offering a sound financial product.

Thank you for your consideration.

Signed,

[Signature]

Robert Treuber
Executive Director
New York State Land Title Association, Inc.