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: TitleInsReg@dfs.ny.gov

RE: New York’s Proposed Title Insurance Regulations
Proposed new Part 228; regulation 11 NYCRR 228
"Title Insurance Rates, Expenses, and Charges"

Dear Commissioner Vullo:

Please accept this as our official comment upon the newly proposed title insurance regulation published on May 3, 2017, in the State Register, known as proposed new Part 228; regulation 11 NYCRR 228 (“Proposed Regulation 208”).

The New York State Land Title Association (“NYSLTA”; “the Association”) supports the apparent goals of the newly proposed regulation in so far as they protect the interests of consumers, ensure the health and solvency of the title insurance industry and serve the public policy established by Governor Cuomo and the state legislature.

It is our opinion as practitioners and providers of this financial product, that the Department of Financial Services (DFS) has, with proposed regulation 208, introduced factors with the unintended consequence of increasing costs to consumers, undermined the stability of the real estate finance marketplace, harmed the competitiveness of New York State in the national economy, overstepped its statutory authority and encroached on the purview of the legislature.

For these reasons as well as numerous technical problems, this regulation must be reformed and revised.

Regarding Section 228.0, we consider the Department’s comments unnecessarily insulting to the vast majority of title insurance providers in New York. We especially object to words such as “untrustworthiness” and “deceptive acts”. The statutory provisions enacted three years ago in Section 2113 of the Insurance Law require title providers to extensively and repeatedly disclose ALL rates AND fees to the consumer or their attorney during the closing process. Further, we are required to post such fees on our web sites so they can be shopped by possible title insurance consumers prior to applying for insurance. Given these current strict requirements, we fail to see how such rates and charges can be considered “deceptive” and how charging them can be considered “untrustworthy”.

Since, once adopted, these regulations become public record and are viewed frequently, we request that this language be substantially modified to avoid purposeless and unsubstantiated denigration of title insurance professionals.
Proposed Regulation 208 purports to accomplish two main purposes. First, it seeks to remove marketing expenses which violate Insurance Law §6409(d) from the statistical reports used to establish and justify title insurance premium rates. Second, it seeks to establish pricing parameters on ancillary services commonly charged by title insurance providers and closers so as to avoid excessive charges.

As regards the first goal, in 2015, a similar regulation to Proposed Regulation 208 was proposed by the New York State Department of Financial Services with the stated objectives to curb abuses in the title insurance industry and to provide supplemental guidance to the industry as to what marketing expenses constitute violations of Insurance Law §6409(d), titled “rebates and commissions”. As with the previously proposed regulation, Proposed Regulation 208 generally misconstrues the statute it implements, and is non-committal when it makes specific mention of particular marketing expenses.

Proposed Regulation 208 (i) provides an expansive interpretation of §6409(d) and (ii) requires “meals and beverages, entertainment, gifts, outings, parties, open houses, sponsorships, seminars and continuing education, charitable contributions, and political contributions,” to be reported separately from other expenses on any data calls and to affirm that all expenses reported do not violate §6409(d). In addition, Proposed Regulation 208 also requires either restatement of the last six years of schedules or an affirmation that all reported expenses did not violate §6409(d) or acquiescence to a five percent rate cut.

Implicit in these requirements is the self-contradicting notion that much of the marketing expenses previously reported to the DFS were, in fact, violations of §6409(d) when they were first reported, while at the same time offering a new unprecedentedly broad interpretation of §6409(d) to encompass transactions where there is no quid pro quo, and also transactions where the violating business referral may only happen (if at all) at some point in the future.

Although the specific expenses referred to above are not explicitly deemed §6409(d) violations in Proposed Regulation 208, the preamble of the regulation makes it clear that the DFS is highly suspicious of such expenses, for reasons which are not made clear, notwithstanding the regulation asserts that it provides guidance on the subject. Several of the enumerated expenses are specifically cited in the “preamble” of Proposed Regulation 208 as examples of past methods of violations of §6409(d). Proposed Regulation 208 claims that it, “provides guidance to the title insurance industry by clarifying, interpreting and implementing Insurance Law §6409(d), which prohibits giving any consideration or valuable thing as an inducement for title insurance business.”

However, while Proposed Regulation 208 requires that certain enumerated expenses be broken out into a separate expense schedule, it does not state that such expenses are per se §6409(d) violations. Instead, the oft-repeated and circular standard promulgated under Proposed Regulation 208 is that such reported expenses not violate Insurance Law Article 23, or Insurance Law §6409(d). The chief problem with Proposed Regulation 208, when it comes to marketing expenses, is that the interpretation of §6409(d) it offers to guide our conduct, is so broad that it arguably encompasses all possible marketing activity.

This section arbitrarily attempts to circumvent the established statutory mechanism for determining title insurance rates based on statistical evidence.

Section 228.2 essentially seeks to establish a rule against all forms of marketing but neglects to offer any safe harbors from that rule, resulting in an illogical inference that title insurance providers may not market themselves. Whereas, §6409(d), a statute that is entitled “commissions and rebates prohibited”, is simply stretched into incoherence so that it can be wrapped around marketing conduct without any necessary tailoring or refinement. In Proposed Regulation 208’s preamble, gifts and vacations are put into the same illicit “inducement” marketing costs “bucket” as continuing legal education seminars.
Ignored in the regulation’s interpretation of §6409(d) are the words, “any rebate of any portion of the fee, premium or charge made” (emphasis added). Also significantly omitted is any reference in the statute to the inducement going to the “applicant” or the applicant’s representatives, and is instead replaced by references to “any person or entity.” Also avoided in the DFS’s interpretation is the statute’s element that said commission or rebate be offered, “as compensation for,” such referred business.

As explained in the SAPA filing, the authors of this regulation are clearly of the opinion that §6409(d) does not require a quid pro quo, and that fact supposedly justifies finding violations where the relevant title insurance business may only happen, if at all, in the future. While the DFS insists that Insurance Law §6409(d) is a statute about inducements, it applies a meaning to “inducements” which is unworkable and far too broad and would inhibit normal marketing practices.

Section 6409(d) is instead a law which prohibits “commissions and rebates” when they are offered “as an inducement” to “the applicant” or its representatives for title insurance business. An essential element of a rebate or commission is that it is given or received in exchange for the business which generates the rebate or commission. Asserting that a commission or rebate under §6409(d) does not require a quid pro quo is not only unsupported by prior guidance, but it is fundamentally illogical. A statute about prohibiting commissions and rebates drifts far away from its mooring if it is no longer tethered to identifiable business. It is true that §6409(d) prohibits rebates, commissions, or “things of value”, given or received “as an inducement” for “any title insurance business”, but that is not the same thing as saying that all things of value are therefore inducements.

Title insurance is a service as much as it is insurance and, as such, title insurance can never be a true commodity.

Section 228.5(a) is presented as an exclusive list of permissible ancillary or discretionary fees, but it is followed by §228.5(c) which provides that, “If a title insurance corporation or title insurance agent charges a fee that is not specified in subdivision (a) of this section, the fee shall be reasonable.” In other words, subsection (a) states that a title provider can only charge for the fees enumerated therein, but subsection (c) essentially provides an alternative rather than an exception to subsection (a). Compliance with one, however, presently implies a violation of the other. Instead, subsection (c) should be renumbered as item #9 under subsection (a).

Section 228.5(a)(6), states that a title provider may only charge for a survey inspection, “$75 plus the out-of-pocket costs charged by the surveyor.” However, in order to save applicants’ money, survey inspections are rarely conducted by a surveyor. In addition, establishing a maximum fixed dollar amount for any service will cause a substantial financial burden over time due to inflation.

The stated price limits for items (a)(1) (Patriot Searches), (a)(2) (Bankruptcy Searches), and (a)(3) (municipal, departmental, and other searches) require title providers to ascertain the “out-of-pocket cost” and “fair market value” of the items in order to know how much can be charged for such services. Out-of-pocket cost is defined in the regulation as, “the actual cost charged by a non-affiliated third-party, excluding costs charged directly by a municipality to conduct a search.” Since an unaffiliated third-party provider would normally have at least some minimal “out-of-pocket cost” for any search product, it is unclear how one can ever determine that there is “no out-of-pocket cost”.

The fees presently charged by the majority of title companies and agents are reasonable, disclosed by title companies and subject to review by consumers and their attorney. The consumer is free to shop for these services and must authorize any charges at or prior to closing. The DFS does not recognize the time required to review, interpret, and rectify issues, nor the time needed to discuss the ancillary searches with
counsel for the seller, the purchaser and the lender. The department also fails to recognize that the consumer is protected at every step by an attorney – the attorney is the consumer’s shield against unearned and excessive fees. This is unlike any other type of insurance regulated by the DFS.

In the regulation, title providers can, by default, charge 200% of this “out-of-pocket cost”, except in the case where there is no such “out-of-pocket” cost, the charge can be as much as 200% of the “fair market value” of the search. Unfortunately, “fair market value” is not defined in Proposed Regulation 208, and it remains unclear if this is a “fair market value” as reckoned by the title provider (which may be purchasing the services in bulk), or by the consumer (who would only be purchasing the service once).

Section 228.5 (a)(8) (Escrow Services), specifies that the maximum charge for “escrow services” is $50 “per escrow”. However, it is not specified what exactly constitutes an escrow even though the complexity of required escrow services varies a great deal, both in workload and in commensurate risk to the title provider. In addition, establishing a maximum fixed dollar amount for any service will cause a substantial financial burden over time due to inflation.

Pursuant to §228.5(5), a title insurance corporation or title insurance agent can charge no more than $25 plus the out-of-pocket cost charged by the clerk. However, some clerks also require e-filing which involves additional third-party costs, or require personal delivery of documents to the clerk. As such, the allowable charge for recording services should include these other out-of-pocket expenses. In addition, establishing a maximum fixed dollar amount for any service will cause a substantial financial burden over time due to inflation.

The definition of ancillary or other discretionary fees in section 228.1(b), states that the charge is not necessary for issuance of a title insurance policy. The department does not have statutory authority to regulate non-title insurance products.

Regarding 228.5(d), the DFS states the regulation will result in lower costs to the consumer - we disagree. The paying of sellers’ liens is not included in the title premium and is provided as a service to the sellers. Additionally, the SAPA states that closers should “be paid by the entity or person who engages them to provide closing services.” If that is the case, then certainly the seller should be paying for the service of paying off their loan.

It is the responsibility of the seller’s attorney to obtain or produce the satisfaction of mortgage. A seller’s attorney typically delegates this duty of obtaining the satisfaction of an existing mortgage to a title closer, thereby saving the consumer money. This relieves the seller’s attorney of the burden of arranging for a representative of the existing lender to appear at the closing to deliver a satisfaction in exchange for payment of the loan. The seller will pay considerably more if his or her attorney must arrange for the mortgage satisfaction to be delivered at closing. The consumer will not only pay for their attorney an additional fee for making the arrangements to have the mortgage lenders representative at the closing to accept the pay off, but the consumer will also have to pay a fee to the lender’s representative for attending the closing. These fees will undoubtedly be higher than a pick-up fee to the title closers. Thus, the stated purpose of this regulation will not be achieved and will inevitably result in a greater expense to the consumer.

The Association again finds no statutory basis giving the Department authority to eliminate fees paid to title closers for services rendered.

This subsection does not account for the valuable services provided by title closers, who are typically independent contractors. The Department fails to recognize the role played by title closers. We are
concerned that changing the existing business model may result in the loss of experienced title closers. As daily practitioners, we anticipate a reduced population of closers and the loss of experienced closers will cause delays in the scheduling and duration of closings resulting in increased costs to consumer.

Summary

In summary, the Proposed Regulation does not achieve the stated purpose of saving the consumer money at a real estate closing. The DFS has no grounds to assert that all marketing expenses in the title insurance industry are illicit inducements. Notably, the Proposed Regulation 208 does not provide any guidance on when the marketing expenses become illicit inducements, and instead attempts to avoid doing so by promulgating an unworkable interpretation of New York’s anti-rebating law.

The limits proposed on ancillary fees fail to account for the time and expense expended in reviewing, analyzing and providing guidance to consumers and attorneys.

Any change to rates should be conducted according to the existing statutory mechanism.

Compensation to closers should not be prohibited, but paid for by the party requesting and benefitting from the services provided by closers.

The NYSLTA appreciates the Department’s consideration of the issues and concerns raised herein. We believe as the only organization which reflects the entire spectrum of businesses that comprise the land title insurance industry, we can be a good and fair resource to the Department. We look forward to engaging with the DFS in a meaningful way to amend the proposed regulations.

Thank you for considering our comments. If you have any questions or require further information, please do not hesitate to contact me.

Signed,

[Signature]

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