

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
PROPOSED
11 NYCRR 228
(INSURANCE REGULATION 208)**

TITLE INSURANCE RATES, EXPENSES AND CHARGES

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202, 301, and 302 of the Financial Services Law and Sections 301, 2110, 2119, 2303, 2304, 2306, 2315, and 6409 and Articles 23 and 24 of the Insurance Law, do hereby promulgate a new Part 228 of Title 11 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (Insurance Regulation 208), to take effect 60 days after publication in the State Register, to read as follows:

(ALL MATERIAL IS NEW)

Section 228.0 Scope and purpose.

(a) The Department of Financial Services' ("department") investigation into practices of the title insurance industry revealed industry-wide practices that violate Insurance Law section 6409(d) and contribute to excessive rates and that constitute untrustworthiness and deceptive acts and practices. Many of these practices have flourished because consumers generally are unfamiliar with title insurance, as it is purchased typically once for the duration of the ownership of the real property. They usually rely upon the advice of real estate professionals, including attorneys or real estate agents, who order the policy on their behalf. Consumers typically pay any invoice presented at the closing because they lack the sophistication to challenge the invoice, and fear risking a delay in the closing in order to obtain clarification.

(b) The department's investigation of the title insurance industry revealed that each year, in violation of Insurance Law section 6409(d), millions of dollars are spent by title insurance corporations and title insurance agents on inducements, which the industry has termed to be "marketing costs", provided to attorneys and other real estate professionals who order title insurance on behalf of their clients, in the guise of meals, entertainments, gifts, vacations, free CLE classes to select individuals, and the like, in exchange for the attorney or other professional referring title insurance business to that title insurance corporation or title insurance agent. Title insurance corporations report these expenses in expense schedules submitted in response to the rate service organization's annual data call. The expenses are then included in the calculation of the rates, resulting in consumers paying higher, excessive rates.

(c) The department's investigation of the title insurance industry further found that certain title insurance agents and title insurance corporations mark up ancillary charges excessively. Charging onerous fees constitutes untrustworthiness on the part of title insurance agents, and engaging in unfair and deceptive acts and practices on the part of both title insurance corporations and title insurance agents.

(d) The department's investigation further found that consumers are often encouraged at the closing to pay gratuities and pick-up fees to title insurance closers. These gratuities are routinely not disclosed to the consumer before the closing or otherwise reported and are unnecessary extra costs imposed on consumers that contribute to excessively high total closing costs.

(e) The purpose of this Part is to promote the public welfare by proscribing practices that are not in accordance with Insurance Law section 2303, which provides that insurance rates shall not be excessive, inadequate, or unfairly discriminatory. This Part provides guidance to the title insurance industry by clarifying, interpreting and implementing Insurance Law section 6409(d), which prohibits giving any consideration or valuable thing as an inducement for title insurance business, as well as Insurance Law section 6409(e), which states that title insurance premiums shall reflect the anti-inducement prohibition of Insurance Law section 6409(d).

(f) This Part further protects consumers, pursuant to the authority of Insurance Law sections 2110 and 2119 and Article 24 and Financial Services Law sections 301 and 302, by ensuring that the title insurance industry provides valuable products and services to consumers at reasonable rates and fees and does not overcharge consumers or charge improper and excessive fees that constitute engaging in untrustworthy behavior and unfair and deceptive acts and practices.

Section 228.1 Definitions.

For purposes of this Part:

(a) *Affiliated third party* means an entity that controls, is controlled by, or is under common control with a title insurance corporation or title insurance agent.

(b) *Ancillary or other discretionary fee* means any fee for services related to the title transaction that is not included in the rate of premium approved by the superintendent, and that is not necessary for issuance of a title insurance policy, such as Patriot, bankruptcy, and municipal or departmental searches, or recording fees or charges.

(c) *Applicant for insurance or applicant* means:

(1) a person for whom the property that is the subject of the title insurance policy is financed;

(2) a person to whom a mortgage loan is made;

(3) a person who owns or is purchasing the property or any interest therein;

(4) any other insured or prospective insured; or

(5) a person who is an attorney-in-fact for a person specified in paragraphs (1) through (4) of this subdivision

(d) *Bankruptcy search* means a search of federal bankruptcy court filings to determine whether any seller or purchaser/borrower has filed a petition requesting bankruptcy protection.

(e) *Closing* means the closing of title of real property or the closing of a refinanced mortgage.

(f) *Data call* means the annual request for data made, pursuant to Insurance Law section 2315, by a rate service organization or other agency designated by the superintendent as a statistical agent.

(g) *Escrow fee* means a fee paid at a closing to a title insurance corporation or title insurance agent to hold money in escrow for the purpose of paying judgments or encumbrances on the real property for which the title insurance policy is issued.

(h) *Gratuity* means any gift of money, including payments made at a closing by a purchaser to a title insurance closer other than for premium, ancillary or other discretionary fees, or any other closing charges reflected on the settlement statement or closing statement or invoice.

(i) *Municipal or departmental search* means a search of various municipal records to determine whether any violation or potential lien exists with regard to the real property for which the title insurance policy is issued.

(j) *Out-of-pocket cost* means the actual cost charged by a non-affiliated third party, excluding costs charged directly by a municipality to conduct a search.

(k) *Patriot search* means a search of the specially designated nationals list maintained by the United States Office of Foreign Assets Control to determine whether the name of any seller or purchaser/borrower is on such list.

(l) *Person* means any individual or any other entity, including an estate or a trust.

(m) *Pick up fee* means any payment made at a closing for remitting a loan payoff to a lender.

(n) *Premium* means the rate charged for a title insurance policy.

(o) *Recording fee or charge* means the charge by a county clerk, county register, or other governmental office for recording documents in connection with a transaction in which a title insurance policy is issued, including deeds, mortgages, satisfactions, powers of attorney, and Uniform Commercial Code forms.

(p) *Statistical agent* means a rate service organization licensed pursuant to Insurance Law section 2313 or other entity designated by the superintendent as a statistical agent pursuant to Insurance Law section 2315.

(q) *Title insurance agent* shall have the meaning set forth in Insurance Law section 2101(y).

(r) *Title insurance business* means activities described in Insurance Law section 6403(b).

(s) *Title insurance closer* means any person who, for compensation or anything of value, represents a title insurance corporation or title insurance agent at a closing.

(t) *Title insurance corporation* shall have the meaning set forth in Insurance Law section 6401(a).

(u) *Title insurance policy* shall have the meaning set forth in Insurance Law section 6401(b).

Section 228.2 Prohibition on Inducements for Future Title Insurance Business

Pursuant to Insurance Law section 6409(d), no title insurance corporation, title insurance agent, or any other person acting for or on behalf of such title insurance corporation or title insurance agent, including any employee or independent contractor thereof, shall offer or make any rebate, directly or indirectly, or pay or give any consideration or valuable thing, to any person or entity as an inducement for any title insurance business, including future title insurance business, and maintaining existing title insurance business, regardless of whether provided as a quid pro quo for specific business.

Section 228.3 Expense reporting and rate filings.

(a)(1) A title insurance corporation or title insurance agent shall not include any expenditure that is not in accordance with Insurance Law article 23 or that is prohibited under Insurance Law section 6409(d) in its expense schedules reporting title expenses for underwriter direct operations; title expenses for underwriter subsidiary agents; underwriter title expenses for underwriting, claims, and agent remittance operations; and title revenue and expense for title insurance agents when responding to a statistical agent's data call. Every title insurance corporation and, except as provided in subdivision (d) of this section, every title insurance agent, in response to the annual data call shall affirm in writing that no expense schedule submitted in connection with the data call includes any expenditure that is not in accordance with Insurance Law article 23 or that is prohibited under Insurance Law section 6409(d).

(2) Every title insurance corporation and every title insurance agent, except as provided in subdivision (d) of this section, shall report all expenditures made for meals and beverages, entertainment, gifts, outings, parties, open houses, sponsorships, seminars and continuing education, charitable contributions, and political contributions as separate line items in supplemental expense schedules to the expense schedules submitted in response to the annual data call. The statistical agent shall include the supplemental expense schedule data in the annual statistical report submitted to the superintendent.

(b) A rate service organization or title insurance corporation that submits a rate filing shall not include, for rate setting purposes, any expenditure that is not in accordance with Insurance Law article 23 or that is prohibited under Insurance Law section 6409(d).

(c)(1) Except as provided in paragraph (2) of this subsection, a title insurance corporation that submitted expense schedules to the statistical agent, including for allocated expenses, in response to the annual data call for any year of the most recent six-year period preceding the effective date of this Part shall:

(i) affirm in writing to the superintendent, within 120 days of the effective date of this Part, that no expense schedule submitted in response to the annual data call for the most recent six-year period preceding the effective date of this Part contains any expenditure that is not in accordance with Insurance Law article 23 or is prohibited under Insurance Law section 6409(d);

(ii) restate its expense schedules for the six-year period preceding the effective date of this Part and submit the schedules to the statistical agent within 120 days of the effective date of this Part, in accordance with subdivision (a) of this section. The restated expense schedules shall exclude all expenditures not in accordance with Insurance Law article 23 or prohibited by Insurance Law section 6409(d). Within 180 days of the effective date of this Part, the title insurance corporation shall submit to the superintendent a rate filing that reflects the exclusion of such expenditures, along with data and actuarial support. The submission shall include the title insurance corporation's restated expense schedules and an affirmation that no improper expenditures are included; or

(iii) file a rate filing with the superintendent, within 180 days of the effective date of this Part, which provides for a uniform five percent reduction in the base rate schedule for each category of policy.

(2) A title insurance corporation shall not be required to comply with paragraph (1) of this subsection if a rate service organization of which the title insurance corporation is a member files, and the title insurance corporation adopts, within 180 days of the effective date of this Part, a rate filing providing for a uniform five percent reduction of the current base rate schedule for each category of policy.

(d)(1) Every title insurance corporation shall provide the annual agent data call to every title insurance agent that it has appointed to act as an agent in this State, with the exception of those title insurance agents on whose behalf the title insurance corporation reports revenue and expenses. Every title insurance agent who receives the agent data call shall complete an expense schedule and a revenue schedule, including premium and all other operating income, for each title insurance corporation that appointed it as an agent and shall timely submit to each such title insurance corporation revenue and expense schedules associated with the issuance of that title insurance corporation's policies. The title insurance agent shall allocate expenses based upon premiums written for each title insurance corporation unless a compelling reason exists to allocate in a different manner. If the title insurance agent allocates expenses on another basis, it shall specify the basis and the reason for doing so. Every title insurance agent whose revenue and expenses are not reported by another entity shall also prepare and maintain an expense schedule and a revenue schedule setting forth the title insurance agent's total annual revenue and expenses.

(2) A title insurance agent who reports data on behalf of another title insurance agent shall submit to the title insurance corporation, along with its revenue and expense schedules, the names and license numbers of every title insurance agent whose data is included in its reported schedules. A title insurance agent whose revenue and expenses are reported by a title insurance corporation or another title insurance agent by whom such agent is employed or with whom such agent is affiliated shall not submit individual revenue and expense schedules in connection with the data call. A title insurance corporation or title insurance agent shall report to the superintendent the name and license number of any agent on whose behalf it reports expense and revenue data and shall notify the title insurance agent on whose behalf it reports data that it is not required to submit individual revenue and expense schedules.

(3) Every title insurance agent shall maintain all revenue and expense schedules in accordance with the requirements set forth in Part 243 of this Title (Insurance Regulation 152), in a durable medium, for a period of at least six years.

(4) Every title insurance corporation shall collect and compile revenue and expense schedules for its appointed agents and submit a single title insurance agent revenue schedule and a single title insurance agent expense schedule to the statistical agent. The statistical agent shall compile all title insurance agent data into a title insurance agent expense schedule and a title insurance agent revenue schedule, and include such schedules in the annual statistical report.

(5) Every title insurance corporation shall report to the superintendent, within 30 days after the title insurance agent was due to submit the revenue and expense schedules, the name and license number of any appointed title insurance agent that is required to submit the schedules but does not do so.

(e) Every title insurance corporation shall submit to the superintendent, by May 30 of each year, individual annual revenue and expense schedules, which shall include the supplemental expenditure schedules required pursuant to subdivision (a)(2) of this section.

Section 228.4 Allocation of expenses.

A title insurance corporation that reports, on expense schedules submitted pursuant to the annual data call, allocated expenses for expenses incurred outside this state in connection with title insurance business in this state, shall submit to the superintendent, within 30 days of the effective date of this Part, the method of the title insurance corporation's allocation. The title insurance corporation shall not allocate an amount for expenses incurred outside this state that exceeds the percentage of premium written in this state compared to nationwide, for that year. A title insurance corporation shall not allocate to this state any expenditure that is not in accordance with Insurance Law article 23 or that is prohibited under Insurance Law section 6409(d).

Section 228.5 Ancillary or other discretionary fee.

(a) A title insurance corporation or title insurance agent shall not charge an applicant in connection with a closing an ancillary or other discretionary fee except as follows:

(1) For a Patriot search, more than 200% of the out-of-pocket cost paid for the search. A title insurance corporation or title insurance agent shall not charge a flat fee for a specified number of names searched. If no out-of-pocket cost is paid for the search, then the charge to the applicant shall be no more than 200% of the fair market value of the search as charged by a non-affiliated third party. If an affiliated third party conducts the search, then the search shall not be billed at more than 200% of the lesser of the amount charged by the affiliated third party and the fair market value of the search as charged by a non-affiliated third party;

(2) For a bankruptcy search, more than 200% of the out-of-pocket cost paid for the search. A title insurance corporation or title insurance agent shall not charge a flat fee for a specified number of names searched. If no out-of-pocket cost is paid for the search, then the charge shall be no more than 200% of the fair market value of the search as charged by a non-affiliated third party. If an affiliated third party conducts the search, then the search shall not be billed at more than 200% of the lesser of the amount charged by the affiliated third party and the fair market value of the search as charged by a non-affiliated third party;

(3) Except as provided in paragraph (4) of this subdivision, for a municipal or departmental search, or any other search that is not included in the premium of the title insurance policy issued, more than 200% of the out-of-pocket cost. If no out-of-pocket cost is paid for the search, then the charge shall be no more than 200% of the fair market value of the search as charged by a non-affiliated third party in that county. If an affiliated third party conducts the search, then the search shall not be billed at more than 200% of the lesser of the amount charged by the affiliated third party and the fair market value of the search as charged by a non-affiliated third party in that county;

(4) For a municipal or departmental search that is conducted and billed by a municipality, more than 100% of the fair market value of the search as charged by a non-affiliated third party in that county plus the charge by the municipality;

(5) For a recording fee or charge, more than \$25 per document plus the out-of-pocket cost charged by the county clerk, county register, or other governmental office;

(6) For a survey inspection, more than \$75 plus the out-of-pocket costs charged by the surveyor. The cost of a survey shall be billed as a pass through;

(7) For overnight mail charges, more than the out-of-pocket cost; and

(8) For escrow services, more than \$50 per escrow.

(b) Every title insurance corporation and title insurance agent shall ensure that the amounts charged to like insureds or potential insureds are fair and nondiscriminatory.

(c) 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.

(d) A title insurance corporation and title insurance agent shall prohibit any closer that it engages from receiving any compensation directly or indirectly for the closing other than the compensation paid by the title insurance corporation or title insurance agent, including any gratuity or additional payment by or on behalf of any applicant borrower, or seller; any pick up fee; or any other compensation not paid directly by the title insurance corporation or title insurance agent. The title insurance corporation or title insurance agent shall advise the applicant that the closer may not accept any payment from or on behalf of the applicant.

Section 228.6 Filings to demonstrate continued compliance with Insurance Law article 23.

At least once every four years, a rate service organization or a title insurance corporation that has submitted a rate filing that is in use shall submit a filing to the superintendent, supported by data and actuarial analysis, which demonstrates that the current rates continue to meet the standards set forth in Insurance Law section 2303.