



2009 Title Insurance Study Advisory Council

Final Report and Recommendations





JEFF KOTTKAMP
LIEUTENANT GOVERNOR

December 31, 2009

The Honorable Charlie Crist
Governor, State of Florida
The Capitol, Plaza Level 05
Tallahassee, FL 32399

The Honorable Jeff Atwater
Senate President
312 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399

The Honorable Larry Cretul
Speaker of the House of Representatives
The Capitol, Room 420
Tallahassee, FL 32399

RE: Title Insurance Study Advisory Council Final Report

Dear Governor Crist, President Atwater, and Speaker Cretul:

During the 2008 Legislative Session, the legislature found that a stable and efficient title insurance delivery system is important to the economic well being of Floridians. Therefore, it established the 2008 Title Insurance Study Advisory Council to undertake a comprehensive examination of the title insurance delivery system of this state with the ultimate goal of making recommendations for legislation to promote a sound and stable title delivery system and promote the safety of property transfers in the state.

As directed by House Bill 937 – An act relating to title insurance, (Chapter 2008-198, Laws of Florida), the 2008 Title Insurance Study Advisory Council has completed its final report which includes recommendations for further legislative action. On behalf of the title council, I am pleased to submit this report to you at this time. The recommendations were formulated by title insurance agents, title insurers, banking representatives, representatives from the Real Property and Probate Section of the Florida Bar, representatives of the real estate industry, and other government officials. As required by the bill, the report was approved by two-thirds of the council members with the chair on the prevailing side.

The Honorable Charlie Crist
The Honorable Jeff Atwater
The Honorable Larry Cretul
December 31, 2009
Page -2-

Thank you for the honor of serving on behalf of citizens of our great state.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Kottkamp", written in a cursive style.

Jeff Kottkamp
Chairman

JK/wl

cc: The Honorable Alex Sink
Florida Chief Financial Officer

The Honorable Kevin McCarty
Florida Insurance Commissioner

TABLE OF CONTENTS

Transmittal Letter to Governor Crist, Senate President Atwater and House Speaker Cretul

Page

1 Title Insurance Study Advisory Council Membership

3 Preamble

4 Findings

5 Recommendations

11 Appendices

A: House Bill 937 – An act relating to Title Insurance (Chapter 2008-198, Laws of Florida)

B: Office of Program Policy Analysis & Government Accountability (OPPAGA)
Report No. 08-53: Florida's Current Regulatory Framework Creates Challenges for
State's Title Insurance Regulation

ADVISORY COUNCIL MEMBERSHIP

- Lieutenant Governor Jeff Kottkamp, appointed as Chair, representing the Governor.
- Daniel Sumner, of Tallahassee, appointed as Vice-Chair, representing the Chief Financial Officer.
- Sean Shaw, of Tallahassee, representing the Insurance Consumer Advocate's Office.
- Steve Parton, of Tallahassee, representing the Commissioner of the Office of Insurance Regulation.
- Robert Beitler, of Tallahassee, representing the Commissioner of the Office of Financial Regulation.

Senate President Appointments

- Senator Ted Deutch, of Delray Beach, representing the Florida Senate.
- Patricia Hancock, of Maitland, FL, representing title insurers.
- Norwood Gay, of Orlando, representing title insurers.
- John LaJoie, of Tallahassee, representing title insurers.
- Sue Geigle, of Tarpon Springs, representing independent title insurance agents.
- Shelley Stewart, of Daytona Beach, representing independent title insurance agents.

Speaker of the House Appointments

- Representative Kevin Ambler, of Tampa, representing the Florida House of Representatives.
- Mary O'Donnell, of Winter Park, representing title insurers.
- Barry A. Scholnik, of Boca Raton, representing title insurers.
- James C. Russick, of Tampa, representing title insurers.
- William L. Randol Jr., of Miami, representing title insurers.
- Beverly McReynolds, of Miami, representing independent title insurance agents.

Real Property, Probate and Trust Law Section of the Florida Bar Appointments

- Melissa Murphy, of Gainesville, representing the Real Property and Probate and Trust Section of the Florida Bar.
- Homer Duvall, III, of Tampa, representing the Real Property and Probate and Trust Section of the Florida Bar.

Commissioner of Financial Regulation Appointment

- Ned Shandloff, of Fort Lauderdale, representing the mortgage lending industry.

Chief Financial Officer Appointment

- Clay Phillips, of Jacksonville, representing the real estate industry.

PREAMBLE

On June 17, 2008, Governor Charlie Crist signed House Bill 937, (Chapter 2008-198, Laws of Florida) that created the 2008 Title Insurance Study Advisory Council. The Council was charged with making recommendations to promote a sound, stable and safe system of real property transfers in this state.

Title insurance provides assurance to both property owners and lenders that a buyer's investment is protected from unforeseen liens or claims of ownership. It differs from most types of insurance in that title insurers seek to identify and eliminate risk prior to issuing a policy. Florida's regulation of title insurance is guided by state law, administrative rules, and judicial decisions.

Until January 2003, the Department of Insurance regulated Florida's title insurance industry. As part of the 2002 Cabinet reorganization, the Legislature required the Department of Financial Services to regulate title insurance agents and agencies. The Legislature assigned the Office of Insurance Regulation responsibility for regulating title insurance companies. Divided oversight of the title insurance industry creates regulatory challenges, such as establishing agent licensing standards and oversight, setting rates as well as title insurance premium tax payments in a cohesive manner.

During its deliberations, the Council completed a comprehensive examination of the state's title insurance delivery system and also reviewed the following areas:

- The historical development of the title insurance industry in this state and its uniqueness among other lines of insurance.
- The current regulatory structure under which oversight responsibility is shared among different state agencies.
- The adequacy of funds and agency personnel to exercise regulatory oversight.
- The adequacy of current mechanisms and expertise to gather meaningful data to properly evaluate and adopt title insurance rates.
- Such other topics as the Chair, in consultation with the Council, deemed necessary to conduct a thorough examination of the title insurance industry.

During the past months, the Council heard expert testimony and received comments from the public. Further, Council members discussed and debated all aspects of the title industry. The Council has established the following key findings and has developed recommendations for improving the regulation of the title insurance industry in order to protect the investments that consumers have made as well as the viability of the title insurance industry in Florida.

KEY FINDINGS

- Title insurance promotes investments in property by protecting owners and lenders against discrepancies or defects in the ownership rights to real property.
- The recent downturn in the economy makes title insurance more important than ever to ensure consumer's investments are protected.
- Title insurance is different from other forms of insurance in many respects, including scope of coverage, policy term, role of the agent, and level of competition.
- Currently, Florida Statutes require the Financial Services Commission to adopt a rule specifying the premium to be charged for title insurance and requires that no less than 30 percent of the premium charged shall be retained by the insurer.
- The current regulatory dichotomy that has the Department of Financial Services regulating the title insurance agents and the Office of Insurance Regulation regulating the title insurance companies creates uncertainty and ambiguity for consumers, agents, and insurers.
- No standard data collection methodology for rate determination has been implemented or enforced.
- Title insurance agents are inextricably linked to the delivery and execution of the title insurance product, and some closings are more complicated than others.
- Laws relating to title insurance need to be unified in a single chapter in statute to ensure uniform and unambiguous regulation.

Florida Title Insurance by the Numbers as of November 2009:

Licensed Title Agents: 6,918

Licensed Title Agencies: 2,573

Title Insurers: Six title insurance companies write approximately 80 percent of title insurance policies in Florida.

RECOMMENDATIONS

PREMIUM RATING STRUCTURE

One of the most controversial aspects of title insurance regulation revolves around the development and implementation of actuarially sound title insurance premiums. A careful balance must be struck between seeking the optimal cost savings for the consumer and the solvency of the title insurer.

Most states require insurers to submit rates and rate increases to a state authority for review and approval, or a “file and use” method. Only three states: Florida, New Mexico, and Texas set title insurance rates through a single promulgated rule used by all title insurers in the state. However, rate setting has been difficult for Florida regulators due to industry challenges concerning the state’s authority to obtain certain information for use in rate setting.¹

Currently, section 627.782, Florida Statutes, requires the Financial Services Commission to adopt by rule the premium to be charged in Florida by title insurers for the respective types of title insurance contracts and for policies issued through agents or agencies. Specifically, 30 percent of the premium is remitted to the title insurer and 70 percent is retained by the title insurance agent. In adopting premium rates, the commission is required to give due consideration to the title insurers’ loss experience and prospective loss experience under closing protection letters and policy liabilities, as well as past expenses and prospective expenses for administration and handling of risks, and liability for defalcation. Further, consideration must be given to ensuring a reasonable margin for underwriting profit and contingencies, including contingent liability, sufficient to allow title insurers, agents, and agencies to earn a rate of return on their capital that will attract and retain adequate capital investment in the title insurance business and maintain an efficient title insurance delivery system. As with other forms of insurance in Florida, rates may not be excessive, inadequate, or unfairly discriminatory.

The Office of Insurance Regulation and its predecessor the Department of Insurance has attempted over that past ten years to review title insurance rates. However, the office has had difficulty acquiring useful financial data from title agents or insurers during that same time period. The office asserts that it has attempted over the past several years to promulgate rules pertaining to the rate setting process and obtain data from the title insurers through a data call process, but the proposals have been successfully challenged by the insurers. It also should be noted that the Department of Financial Services lacks the rulemaking authority to obtain data from the insurance agents even though it is the principal regulator of title insurance agents and agencies.

¹ Office of Program Policy Analysis & Government Accountability Report No. 08-53: Florida’s Current Regulatory Framework Creates Challenges for State’s title Insurance Regulation, p. 4.

For the promulgated rate mechanism to work, the regulator must have sufficient data to review the current rate and make a determination about the adequacy of the rate. The current regulator has had problems in the past in obtaining sufficient data in a timely manner. For the promulgated rate mechanism to work correctly, data collection requirements must be strengthened and enforced.

Therefore, the Council recommends the following premium rate structure:

1. Maintain the current premium rate determination through a promulgated rule.
2. Maintain the current economic premium split 70/30 between title insurance agent and insurer for three years following enactment of title insurance regulatory reform legislation.
3. Standards for data collection must be established, and all data collected from the insurance agents must be evaluated by the regulator every three years to determine whether adjustments to promulgated rate and premium splits are appropriate based on the data analysis and actuarial soundness.
4. Adopt section 626.572, Florida Statutes, relating to rebating, for the title insurance industry.

REGULATORY STRUCTURE

The title insurance industry in Florida is currently governed by two regulators. The Department of Financial Services regulates title agents and agencies and the Office of Insurance Regulation regulates the insurers. This divided oversight creates challenges for both the title insurance industry and the regulating bodies. Some of the challenges that have been discussed during the title insurance Council involve lack of rulemaking authority for one or both of the regulators, inability to efficiently approve new forms, and insufficient authority to enforce a meaningful data call for purposes of rate making. In addition, the complex and intertwined relationship between the agent and the insurer coupled with the split regulatory responsibilities makes it even more difficult to adequately oversee the industry.

Therefore, the Council recommends the following regulatory structure:

1. Consolidate all laws relating to title insurance in Florida into a single stand-alone chapter within the Florida Statutes.
2. Consolidate title insurance regulation under the auspices of a single title insurance regulator with appropriate rule making authority governing title agents, agencies, and insurers.
3. Require automatic suspensions for licensees convicted of a felony related to the insurance industry or mortgage fraud. Provide that whenever a licensee is charged with a felony related to the insurance industry or mortgage fraud, licensee's regulator is permitted to file with the Department of Administrative Hearings (DOAH) and to serve on the licensee and on all title insurers from whom the licensee has received an appointment, an order to show cause why the licensee's license should not be

suspended or why a receiver should not be appointed to operate the licensee's business, or both. The hearing before DOAH on said order to show cause shall be within ten days from the date the licensee is served with the order to show cause. If the decision by DOAH is adverse to the licensee, then the regulator may either suspend the licensee's license or appoint a receiver to operate the licensee's business until such time as the regulator has completed its investigation of the felony for which licensee was charged.

4. Require title insurance agencies to assign an Agent-in-Charge for each physical office location to assume responsibility for agent actions.
5. Specify timeframes in which new forms must be approved or rejected by the regulating body.
6. Establish appropriate levels of bonding and insurance requirements for title insurance agents.

CONTINUING EDUCATION

Almost all licensed professionals in Florida are required to complete continuing education courses to maintain currency with changing industry practices. During the Council's deliberations, agents often lamented the fact that they are required to take continuing education courses relating to all insurance products sold in the state, including life, health, property and casualty, and automobile insurance. However, title insurance is a monoline insurance product. Title insurance agents do not sell other insurance products and should not be required to maintain knowledge of those products as part of the continuing education requirement. There was consensus that title insurance industry specific continuing education would be beneficial.

Therefore the Council recommends the following continuing education requirements:

1. Require that continuing education requirements for all licensed title insurance agents in Florida be tailored specifically for title insurance.
2. Permit the regulating body to competitively outsource its continuing education review and approval functions.

REAL ESTATE CLOSING

Real estate closings require the purchaser to sign an array of forms and documents that in most cases are confusing and overwhelming. This, coupled with the fact that the buyer is often making the largest financial transaction of his or her life, can be very stressful. Title insurance agents play a critical role in ensuring a smooth transaction during this closing process. The agent is often delegated the responsibility of establishing an escrow account to collect funds over the course of the real estate transaction and to disburse the funds to the various involved parties at the appropriate time. It is extremely important for the title agent to remit payments in a timely and precise manner ensuring the smoothest and most dependable transaction possible. It also is important to note that the closing fees are by law separate from fees paid for title agent services.

During Council deliberations, title insurers often expressed concern that some agents do not remit premium payments in a timely manner, and that the regulatory body does not have the appropriate enforcement mechanisms to require the timely remittance of payments. Questions also were raised regarding who should be allowed to establish escrow accounts and remit funds to preclude the misuse of those funds.

Therefore, the Council recommends the following:

1. Require the identification of the title insurer and title agent on the HUD-1 form.
2. Provide regulatory oversight of the funds held in escrow accounts in connection with the business of title insurance. For those persons holding escrow funds for a real estate transaction in which title insurance is to be issued, require the escrow agent to hold a title insurance agent license, a Florida Bar license, or realtor-broker license. Require attorneys engaged in title insurance to maintain in a separate escrow account for the funds to be held in escrow in which title insurance will be issued.
3. For residential real estate transactions, require signatures of the buyer/borrower, closing agent and seller, if any, on the closing statement upon which the closing was consummated.
4. Set statutory time limits for:
 - a. Delivery and issuance of the title insurance policy not later than 30 days after limited requirements of the regulatory approved title commitment have been met.
 - b. Recordation of documents required to be signed at closing.
 - c. Payment of premiums to the insurer based on the closing date and accompanied by a completed standardized worksheet supporting the calculation of the premium charged.
 - d. Disbursement of funds, other than premium unless otherwise addressed in an escrow agreement, with an exception for longer term escrows subject to a written escrow agreement.
5. Authorize regulatory enforcement of violations for not meeting the statutory timeframes.
6. Subject to other applicable law, title insurance agents shall be prohibited from charging more than the actual cost of third party services that the closing agent is charged.

DATA COLLECTION

The structure of the title insurance market tends to limit the consumers' ability to exert pressure on title agents and insurers to compete on price. Therefore, regulatory efforts to ensure reasonable premiums and maximum consumer protection are critical. Collection and analysis of key data from agents and insurers provide the regulatory agency the necessary information to determine the best price for both the consumer and to ensure the viability and solvency of the title insurance company.

Currently, state regulators have had difficulty collecting sufficient data needed to adequately determine an appropriate pricing structure for the title insurance premium. In 1999, the

Legislature froze title insurance rates at the 1992 level for three years. While the rates should have changes over time, they have not. The rates in 2009 remain the same as the 1992 levels. This is due to administrative challenges title insurance agents and companies have made in response to the past data calls. Since 1992, the state has lacked the financial and statistical data needed to determine whether the 1992 rates are representative of the costs to provide the same level of title insurance in 2009. Data collection must be timely, accurate, and complete. Rates determined by the data must be adequate, not excessive, or unfair.

During Council deliberations, data collection was often a central point of discussion. Members generally agreed that for a data call to be useful, it is important to establish a commonly agreed upon and meaningful set of financial and statistical data, and to establish a predetermined timeframe for submissions.

Therefore, the Council recommends the following data collection method:

1. Establish data collection methodologies and timelines for collecting data.
 - a. Require all insurers and licensed title insurance agencies to report specific information on an annual basis.
 - b. Data collected should be designed to be reasonably tracked by modified closing software.
 - c. Authorize regulatory enforcement and penalties for non-compliance of data call.
 - d. Require the regulator to adopt reasonable criteria to select a data call reviewer, including relevant qualifications related to the title insurance industry and establish timelines for conducting the evaluation.

INSOLVENCY

Despite strong statutory guidelines to guard against title insurance company insolvency, these companies sometimes face financial challenges and require rehabilitation and/or liquidation of their assets. Since title insurance has a long tail of coverage, a question arises that if a company becomes insolvent and is placed in receivership, what recourse does a policyholder have if a previous owner places a claim or lien against the property and was unknown at the time the title insurance policy was issued? Currently, if a title company goes into receivership, the title insurance industry informally decides how to handle future claims for that company in the best interest of ensuring consumer protection and confidence in the industry.

During Council deliberations, the members agreed that a statutory mechanism was needed to deal with companies that become insolvent and went into receivership.

Therefore, the Council recommends:

1. Provide for a Guarantee Fund to ensure consumer protection in case a title insurance company becomes insolvent.

2. Provide a statutory assessment mechanism for agents to collect assessments which will go toward paying future claims of a company that may become insolvent, and such assessment may or may not be a factor in the promulgated rate.

Appendix A

House Bill 937 – An act relating to Title Insurance (Chapter 2008-198,
Laws of Florida)

ENROLLED

CS/HB 937, Engrossed 1

2008 Legislature

A bill to be entitled

An act relating to title insurance; creating the Florida 2008 Title Insurance Study Advisory Council; providing for membership; providing for administrative support for the council; providing responsibilities of the council; authorizing the council to invite independent actuaries to provide certain information; requiring the Office of Program Policy Analysis and Government Accountability to conduct a review and report to the council; requiring that the report be submitted to the council by a certain date; providing council meeting requirements; requiring the council to file a report with the Governor and the Legislature; providing for termination of the council; providing appropriations and authorizing additional positions; providing an effective date.

WHEREAS, the Legislature finds that a stable and efficient title insurance delivery system is necessary to promote the economic well-being of the residents of Florida, and

WHEREAS, Florida consumers have a right to effective and affordable title insurance, and

WHEREAS, title insurance is essential to ensure homeowners and landowners of the safety of real estate transfers in Florida, and

WHEREAS, investors and lienholders require the security accorded their business interests by a financially stable and regulated title insurance industry, and

WHEREAS, a viable title insurance delivery system requires

ENROLLED

CS/HB 937, Engrossed 1

2008 Legislature

efficient and comprehensive state oversight to regulate insurer and agent solvency, education, licensing, and discipline and the establishment of nondiscriminatory title insurance rates and forms, and

WHEREAS, it is the express intent of the Legislature to conduct a comprehensive review of the title insurance industry, the current regulatory scheme, and the rules affecting the conduct of the industry, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) This act may be cited as the "Florida 2008 Title Insurance Study Advisory Council Act."

(2) The purpose of this act is to create an advisory council to undertake a comprehensive examination of the title insurance delivery system of this state with the ultimate goal of making recommendations for legislation to promote a sound and stable system to promote the safety of real property transfers in this state.

(3) The Florida 2008 Title Insurance Study Advisory Council is created. The council shall consist of the following 21 members:

(a) The Governor or the Governor's designee, who shall serve as chair of the council.

(b) The Chief Financial Officer or the Chief Financial Officer's designee, who shall serve as vice chair of the council.

(c) One member of the Senate appointed by the President of

ENROLLED

CS/HB 937, Engrossed 1

2008 Legislature

the Senate.

(d) One member of the House of Representatives appointed by the Speaker of the House of Representatives.

(e) The Insurance Consumer Advocate appointed pursuant to s. 627.0613, Florida Statutes.

(f) The Commissioner of Insurance Regulation or the commissioner's designee.

(g) The Commissioner of the Office of Financial Regulation or the commissioner's designee.

(h) Three representatives of title insurers doing business in the state from three different title insurers, appointed by the President of the Senate. No more than one representative may be named from each affiliated group of corporations as defined in s. 624.509(5)(a)2., Florida Statutes. Such appointments may not overlap with those insurer appointments made under paragraph (i).

(i) Four representatives of title insurers doing business in the state from four different title insurers, appointed by the Speaker of the House of Representatives. No more than one representative may be named from each affiliated group of corporations as defined in s. 624.509(5)(a)2., Florida Statutes. Such appointments may not overlap with those insurer appointments made under paragraph (h).

(j) Two independent licensed title insurance agents appointed by the President of the Senate from a list of three agents submitted by the Florida Land Title Association.

(k) One independent licensed title insurance agent appointed by the Speaker of the House of Representatives from a

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CS/HB 937, Engrossed 1

2008 Legislature

list of three agents submitted by the Florida Land Title Association.

(l) Two members of the Real Property, Probate and Trust Law Section of The Florida Bar who are practicing real estate attorneys not employed by a title insurer. The designation of such members shall be made by the Real Property, Probate and Trust Law Section of The Florida Bar.

(m) One member of the banking industry from a bank performing home and commercial mortgage lending, appointed by the Commissioner of Financial Regulation.

(n) One member of the real estate industry, either an independent realtor or one representing a company handling home and commercial real estate transactions, including closings, appointed by the Chief Financial Officer.

(4) The council shall be administratively supported by the staff of the Executive Office of the Governor. The Department of Financial Services, the Office of Insurance Regulation, and other agencies of the state, as well as staff of the applicable legislative committees, shall supply any information, assistance, and facilities that are deemed necessary by the council to carry out its duties.

(5) The council shall undertake a comprehensive examination of the title insurance delivery system in this state and shall include in its study consideration of:

(a) The historical development of the title insurance industry in this state and its uniqueness among other lines of insurance.

(b) The current regulatory structure under which oversight

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CS/HB 937, Engrossed 1

2008 Legislature

responsibility is shared among different state agencies.

(c) The adequacy of funds and agency personnel to exercise regulatory oversight.

(d) The adequacy of current mechanisms and expertise to gather meaningful data to properly evaluate and adopt title insurance rates.

(e) Such other topics as the chair, in consultation with the council, deems necessary to conduct a thorough examination of the title insurance industry.

(6) The council, at the direction of the chair, may invite independent actuaries who have expertise in title insurance to provide information and appear before the council to aid in performing its duties. In order to assist the council, the Office of Program Policy Analysis and Government Accountability shall conduct an independent review of the historical development of the title insurance industry in this state and the current fragmented regulatory framework and shall report its findings to the council. Such report shall be submitted to the council by September 30, 2008.

(7) The council shall hold its initial meeting no later than August 1, 2008, in Tallahassee. Staff for the council chair shall schedule and organize the initial meeting. Subsequent meetings of the council must be held in Tallahassee according to a schedule developed by the chair.

(8) The council shall submit a final report, setting forth findings and specific legislative recommendations, to the Governor, the President of the Senate, and the Speaker of the House of Representatives on or before December 31, 2009. The

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CS/HB 937, Engrossed 1

2008 Legislature

council's final report shall be approved by at least two-thirds
of the council's membership and the chair must be in the
prevailing majority. The council shall terminate after
submitting its final report but not later than December 31,
2009.

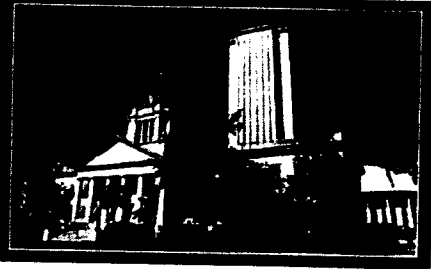
Section 2. The sum of \$242,003 in nonrecurring funds is
appropriated from the Insurance Regulatory Trust Fund in the
Department of Financial Services for transfer to the Executive
Office of the Governor for the 2008-2009 fiscal year for the
purpose of implementing the Florida 2008 Title Insurance Study
Advisory Council.

Section 3. The sum of \$242,003 is appropriated from the
Grants and Donations Trust Fund in the Executive Office of the
Governor for the 2008-2009 fiscal year, and two full-time
equivalent positions are authorized for the duration of the
Florida 2008 Title Insurance Study Advisory Council.

Section 4. This act shall take effect upon becoming a law.

Appendix B

Office of Program Policy Analysis & Government Accountability (OPPAGA)
Report No. 08-53: Florida's Current Regulatory Framework Creates
Challenges for State's Title Insurance Regulation



Florida's Current Regulatory Framework Creates Challenges for State's Title Insurance Regulation

at a glance

Title insurance provides assurance to both property owners and lenders that a buyer receives clear title to property. It differs from most types of insurance in that title insurers seek to identify and eliminate risk prior to issuing a policy.

Florida's regulation of title insurance is guided by state law, administrative rules, and judicial decisions. Until January 2003, the Department of Insurance regulated Florida's title insurance industry. As part of the 2002 Cabinet reorganization, the Legislature gave the Department of Financial Services responsibility to regulate title insurance agents and agencies. The Legislature assigned the Office of Insurance Regulation responsibility for regulating title insurance companies. Divided oversight of the title insurance industry creates challenges related to standards for agent licensing and oversight, rate setting, and payment of the title insurance premium tax.

Scope

Through Ch. 2008-198, *Laws of Florida*, the 2008 Legislature directed OPPAGA to assist the Florida Title Insurance Study Advisory Council in its study of the title insurance industry. As directed by this law, OPPAGA reviewed the historical development of the title insurance industry in Florida and the state's current regulatory framework for the industry and answered three questions.

1. What is the history of title insurance in Florida?
2. How is title insurance regulated in Florida?
3. What are the consequences of the current regulatory framework?

Background

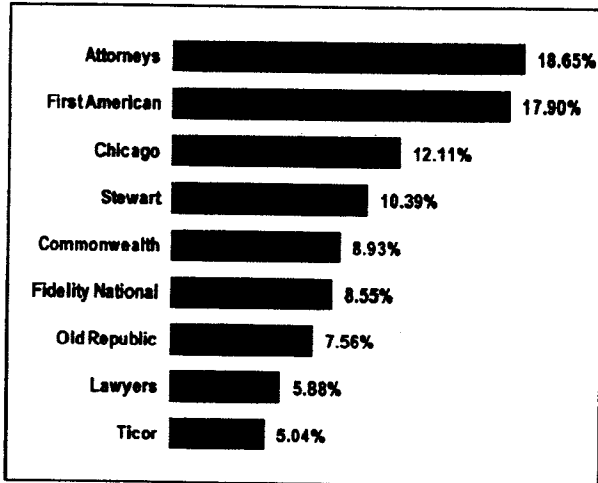
Title insurance is intended to protect a property owner or lender against loss in the event of dispute or discrepancy over property ownership rights.¹ Title insurance is a monoline product, which means that insurers selling title insurance cannot sell other types of insurance products. Industry analysts suggest that the fact that title insurers cannot sell other insurance products makes the industry susceptible to more volatility and dependence on regional and national economic conditions.² In Florida and across the country, title insurance is highly concentrated. Nationally, five insurers account for 92% of the business.³ Exhibit 1 shows the market share for the largest title insurance companies that write most of the business in Florida. The top three companies writing policies in the state are Attorneys' Title Insurance Fund, First American Title, and Chicago Title.

¹ Section 624.608, *F.S.* expands the definition of title insurance to include insurance of owners and secured parties of the existence, attachment, perfection and priority of security interests in personal property under the Uniform Commercial Code. These matters fall outside the scope of the current review.

² A.M. Best. *Special Report: Strong Housing Market Drives Title Insurance Growth in 2005, but Possible Slowdown Ahead*, p.4.

³ *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, U.S. Government Accountability Office, April 2007.

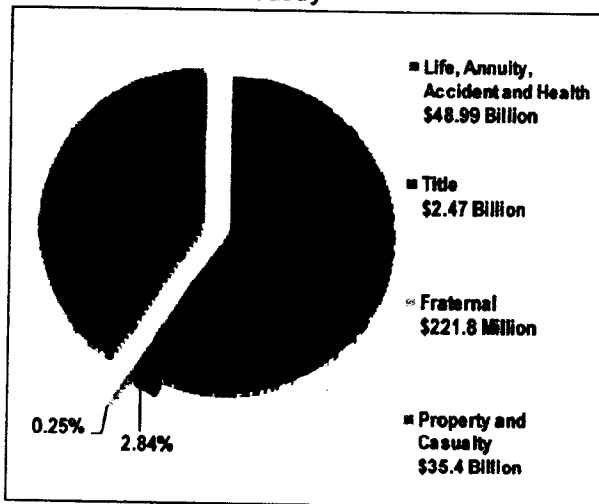
Exhibit 1
The Title Insurance Industry Is Highly Concentrated in Florida



Source: Florida Office of Insurance Regulation 2007 Annual Report.

As shown in Exhibit 2, title insurance makes up only 2.84% of all insurance sold in the state. Nevertheless, title insurance represents a \$2.5 billion industry in Florida.

Exhibit 2
Title Insurance Represents a Small Portion of Florida's Insurance Industry



Source: Florida Office of Insurance Regulation 2007 Annual Report.

Purpose of Title Insurance. Title insurance protects owners and lenders against discrepancies or defects in the ownership rights to real property. Title means that one has the legal right to control

and dispose of a piece of real property. Questions concerning legal title to a property that arise during a transaction may interfere with or prevent the sale or transfer of property from one party to another.

Title insurance takes two forms: an owner's (or buyer's) policy and a loan (or lender's) policy. An owner's policy protects the buyer for as long as s/he owns the property and guarantees a clear title to the property up until the time of closing or transfer of title. Since the buyer often borrows the money for the purchase, lenders typically require borrowers to purchase a title insurance loan policy to ensure a clear title. The lender's policy guarantees that the lender is in the first claim position, which means the lender is paid first before all other liens. These loan policies are required for lenders to sell the loans on the secondary mortgage market.

As part of issuing a title insurance policy and to protect against title problems that may interfere with or prevent a sale, title agents or insurers conduct a search of public records, including property, court, and other records to identify any defects. For example, liens against the property such as unpaid property taxes, encroachments, covenants, or easements could affect title to a property.⁴ The title agent or insurer examines existing court records and other documents to determine whether any of these title defects pose a threat of loss to the buyer or lender.⁵ Based on the title search and examination of any title defects, title agents can clear property titles or remedy any outstanding liens or other problems prior to the sale or exclude them from coverage. If the parties cannot resolve the problems or defects, then the sale would not go forward. Once the search and remediation actions are completed, the title agent issues the insurance policy.⁶

⁴ Encroachment is the extension of a structure from the real estate to which it belongs across a boundary line and onto adjoining property. Covenants are formal agreements or contracts between two parties in which one party gives the other certain promises and assurances. Easements are rights held by a person to enjoy or make limited use of another's real property.

⁵ In some states, title agents can access indexed databases or "title plants" when conducting their title searches. Private firms own and operate title plants. Their staff maintains historical data on property titles and agents can pay to access the title plant.

⁶ In industry terms, the title agent issues a commitment that commits or binds the insurer to providing the coverage outlined in the policy.

Cost of title insurance. Individuals pay for title insurance as a one-time fee paid at the time of the sale—with the buyer and/or seller paying for the owner's and/or loan policies as a condition of the sale. The premium amount typically depends on the property's sale price (in the case of the owner's policy) and the loan amount (in the case of the lender's policy).

The total cost to the consumer for title insurance also depends on the extent that other costs are included or not included along with the title insurance premium. In Florida, the premium price depends on the rate in administrative rule at the time. Along with the premium, the consumer often pays for the title search, as well as for services such as recording the deed and escrow disbursement. In Florida, these charges are known as "closing services" and along with the title search are not included in the premium for title insurance.⁷

Regulatory experts agree that due to limited knowledge of title insurance and limited market competition, consumers generally do not make informed choices about title insurance when purchasing property. Usually someone else involved in the transaction such as the real estate agent or the lender recommends a title company, local agency, or law firm. Consumers often pay little attention to the cost of title insurance or related charges.

Title insurance differs from other forms of insurance. Title insurance is different from other forms of insurance in several respects, including scope of coverage, policy term, and level of competition. Two key differences between title insurance and property and casualty insurance are related to the role of the agents and the role of risk.

For most types of insurance, the agent acts as a salesperson and assists the purchaser with forms and applications while the insurance company's underwriters make the determination and commit the insurer to providing the policy. In contrast, title insurers authorize title agents, based on their review, to make the final decision to provide coverage. Therefore, the insurer has extended its

authority to the agent and as a result, title agents are often compared to insurance underwriters.

Title insurance differs from other types of insurance with regard to the amount of risk that the insurer undertakes upon execution of the policy. For example, property and casualty insurers determine the probability of future loss based on the characteristics of the insured party. In contrast, title underwriters focus on reducing the possibility of loss by discovering as much information as possible about the past ownership of a property.⁸ As a result, the title policy does not cover discrepancies or defects in the ownership of the property that occur after the policy's effective date.

Because title problems can be uncovered and addressed during a thorough title search, title insurance has a much lower average loss ratio in terms of policy claims when compared to property and casualty insurance.⁹ Exhibit 3 shows that nationally, losses for the title insurance industry make up only 5% of total premium costs.¹⁰ Therefore, the primary costs of title insurance are for the search and other business expenses but not for losses associated with policy claims.

In considering the apparent low losses associated with title insurance, industry experts also point out that title insurance has much higher administrative and/or operating costs when compared to property and casualty insurance. The high operating costs result from two factors: title plant maintenance and technical expertise of title agents. First, the complexity of local tax, probate, and other records led to the development of privately held indexed databases called title plants, which must be continually updated. Firms incur the costs to keep the title plant up to date regardless of current business or economic conditions. Second, because title insurance involves an evaluation of an individual parcel by someone familiar with varying local laws,

⁸ A.M. Best. *Special Report: Strong Housing Market Drives Title Insurance Growth in 2005, but Possible Slowdown Ahead*, p.6.

⁹ *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, U.S. Government Accountability Office, April 2007.

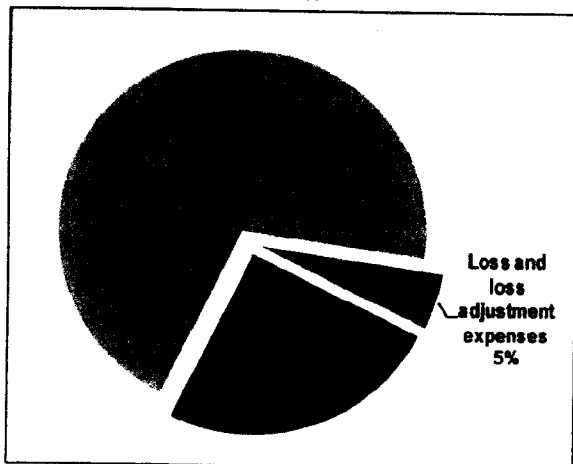
¹⁰ Industry experts note, however, that title insurance losses typically include only reported claims while property and casualty losses typically include reported and unreported (incurred but not reported) claims.

⁷ Florida is considered a non-inclusive rate state because the costs of related title services such as title search and closing services are not included in the premium. However, even all-inclusive states differ in what they charge in a premium.

customs, and records, title agents must have local as well as title expertise necessary to make the determinations to underwrite the policy.

Exhibit 3

Nationally, 5% of Title Premium Costs Cover the Potential Loss to the Insurer



¹ The "other expenses" category includes salaries, rent, and equipment costs, among other things.

Source: U.S. Government Accountability Office.

States regulate many aspects of the title insurance industry. All states and the District of Columbia regulate various aspects of title insurance. States use assorted approaches to regulate the companies that provide title insurance policies (the insurers), the individuals that conduct the title searches and examinations (the agents), and certain business practices (e.g., incentives for business referral). Among all the states, Iowa stands out as unique, because it banned the private sale of title insurance in 1947 and offers its own equivalent called a title guarantee policy.

The most controversial aspects of title insurance regulation surround state regulation of title insurance rates, the cost structure for title insurance, and consumer protection. Rate regulation creates controversy nationally because state regulators note that title insurance prices are higher than the underlying costs to provide the insurance. To address this cost structure, states mandate varying levels of consumer disclosure of title insurance and related costs. Consumer advocates and others have raised concerns relating to the limited public information that is available to assist consumers in making informed decisions about title insurance purchases.

States typically require insurers to submit rates and rate increases to a state authority for review and approval. Exhibit 4 shows that most states use a prior approval method or a "file and use" method for approving rates before policies are sold.¹¹ However, three states—Florida, New Mexico, and Texas—set title insurance rates (see Exhibit 4). Rate setting has been difficult for Florida regulators due to industry challenges concerning the state's authority to obtain certain information for use in rate setting. In Texas, increasing property values and loan amounts led consumers to argue that title insurance rates were too high. As a result, Texas regulators have reduced rates by 17% over the last eight years. Opponents of state rate setting assert that it reduces competition as it is pointless for consumers to shop around for the lowest title insurance rate because there is one statewide rate for all insurers.

Exhibit 4

Florida Is One of Three States That Sets Title Insurance Rates

| Filing Method | 50 States and District of Columbia | Number of States |
|------------------------|--|------------------|
| Prior Approval | AK, CT, DC, ID, IA, LA, MD, NE, NJ, NY, ND, OH, OR, PA, SC, SD, WY | 17 |
| File and Use | AL, AZ, CA, CO, IL, KS, KY, MA, ME, MI, MN, MT, NV, NC, RI, TN, UT, WA | 18 |
| Use and File | MO, NH, VT, WI | 4 |
| State Promulgates Rate | FL, NM, TX | 3 |
| Exempt or No Provision | AR, DE, GA, HI, IL, MS, OK, VA, WV | 9 |

Source: National Association of Insurance Commissioners.

States also regulate the costs of title insurance by specifying the services for which agents can charge fees as part of the transaction. Some states also require that all costs be disclosed in a list of each specific charge (e.g., charges for title search, recording the deed, and loan closing). Some states also have recently begun to provide consumer information on websites to educate and encourage consumers to shop around for title insurance to obtain the best price. For example, the Colorado Division of Insurance maintains a website with a comparison tool that allows consumers to compare

¹¹ Under a file-and-use system, insurers submit rate changes to the state regulating agency but they do not have to wait for approval to put the new rates into effect. If state insurance regulators do not approve of the rate changes, they can then force companies to repeal the changes and return to the original rates.

prices among insurers by county for a given residential property price range.

The federal government also plays a role in title insurance regulation. While states are primarily responsible for regulating title insurance, federal law applies to title insurance under the 1974 Real Estate Settlement Procedures Act (RESPA). The act sets out the procedures and requirements to be used when performing a real estate closing. Failure to follow these guidelines may result in action by the U.S. Department of Housing and Urban Development. Section 8 of RESPA generally prohibits the giving or accepting of illegal payments and referral fees among persons involved in the real estate settlement process, and it regulates the activities of certain affiliated business entities that can be involved in a real estate transaction.

Questions and Answers—

What is the history of title insurance in Florida?

Title assurance systems in America were derived from the English conveyance system, which relied on attorneys, known as conveyancers, to search private documents, since there were no public documents to determine the condition of a title. Over time, the American system developed four additional mechanisms for guaranteeing title to real estate—title abstracts, which provide a permanent record of a title search; title certificates, which combine the title search and the opinion of the title; title insurance, which affords protection against errors in the conveyance process; and land registration systems, which rely on judicial proceedings to convey title assurance. Collectively, these mechanisms rely on researching the chronological ownership of property to identify recorded events that have contributed to a title's present condition. This ownership history is then evaluated in light of legal decisions and the requirements demanded by the real estate investment community.¹²

After World War II, title insurance became a national standard for the real estate industry. Institutional lenders required borrowers to use title insurance

services to guarantee clear title to property as a condition of purchasing mortgage loans.

Florida's title insurance industry developed through several historical regulatory benchmarks. The title insurance industry's development in Florida is tied to statutory and administrative law as well as key judicial decisions (see Exhibit 5). Prior to 1954, only attorneys could process title transfers and issue opinions on the status of property titles. Insurers then issued policies based on these opinions. However, in 1954, the Florida Supreme Court ruled in the *Cooperman* case that corporations could issue title policies and supervise property transfers, holding that these activities did not constitute the practice of law and thus could not be limited to attorneys.^{13, 14}

The Legislature recognized and defined title insurance in 1959. In 1965, the Legislature gave the insurance commissioner authority to promulgate rates for title insurance premiums. This established the foundation for the state's current regulation of title insurance, as much of the statutory history of title insurance relates to regulation of rates and establishing the qualifications and procedures for licensing and monitoring agents and insurers.

In 1992, the Legislature mandated the licensing of title agents and agencies unless the agents are direct employees of a registered title insurance company. The Legislature also allowed the Department of Insurance to establish limits on charges made by agents for title services.

In 2000, the Florida Supreme Court ruled in the *Butler* case that agents could rebate a portion of their income to their customers. The court held as unconstitutional any limits on the bargaining power of the consuming public. The court allowed title agents to rebate a portion of their payment, known as a "Butler Rebate," to customers paying for title insurance but not to any other individuals involved in the transaction.¹⁵

¹² Rosenberg, Moses K. "Historical Perspective of the Development of Rate Regulation of Title Insurance," *The Journal of Risk and Insurance*, Vol.44, No. 2, (June, 1977), pp.193-209.

¹³ *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954).

¹⁴ The *McPhee* case further defined what activities title insurance companies were allowed to undertake. *The Florida Bar v. McPhee*, 195 So. 2d 552 (Fla. 1967).

¹⁵ *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000).

Exhibit 5

Several Key Milestones Have Affected the Regulation of Florida's Title Insurance Industry

| Year | Action |
|-------------|---|
| Before 1965 | The state has regulated insurance since 1872. By 1925, the state requires minimum qualifications for licensure to sell certain types of insurance. In 1954, the Florida Supreme Court authorizes corporations to sell title insurance. In 1959, title insurance is defined in Ch. 59-205, <i>Laws of Florida</i> . |
| 1965 | Through Ch. 65-359, <i>Laws of Florida</i> , the Legislature gives the insurance commissioner the power and responsibility to promulgate title insurance rates, contracts, and related services. |
| 1969 | Through Ch. 69-106, <i>Laws of Florida</i> , the Department of Insurance is created under the state's elected Insurance Commissioner/Treasurer. |
| 1982 | The Legislature defines risk premium as the premium on which a tax is paid in Ch. 82-243, <i>Laws of Florida</i> . The law also requires the department to review the risk premium for title insurance at least once every three years, and if warranted, revise the risk premium. |
| 1989 | Ch. 89-305, <i>Laws of Florida</i> , requires the department to promulgate the amount or percentage of the risk premium retained by the title insurer for policies sold by agents. |
| 1992 | Through Ch. 92-318, <i>Laws of Florida</i> , the Legislature restricts the sale of title insurance to a licensed title insurance agent employed by a licensed title agency or employed by a title insurer or an employee of the title insurance agency. The law establishes qualifications for title agent examination. The law authorizes the department to set limits on charges made in addition to the risk premium based on expenses for services rendered and other relevant factors. The statutes mandated that the insurer for policies sold by agents must retain not less than 30% of the risk premium. The law authorizes the department to require licensees to submit statistical information annually, including loss and expense data, in order to analyze the risk premium and related services rate, retention rates, and the condition of the title insurance industry. |
| 1999 | Chapter 99-286, <i>Laws of Florida</i> , prohibits payment or retaining of the premium for the provision of primary title services by any person who does not actually perform services. The law also provides that the department cannot ask licensees for data related to title services, such as title search and examination, closing and recording services. |
| 2000 | The Florida Supreme Court issues an opinion in the <i>Chicago Title Ins. Co. v. Butler</i> , referred to in the industry as "the Butler Rebate," that finds that it is unconstitutional for title insurers to prohibit agents to offer rebates to persons purchasing title insurance, holding that this practice unconstitutionally limited the bargaining power of the consuming public. |
| 2003 | As part of cabinet reform, Ch. 02-404, <i>Laws of Florida</i> , creates the Department of Financial Services to replace the Departments of Banking and Finance and Insurance (effective January 2003). The law divides the regulation of the title insurance industry between the new Office of Insurance Regulation under the Financial Services Commission and the Department of Financial Services. |
| 2007 | Pursuant to Ch. 07-44, <i>Laws of Florida</i> , the department can no longer establish limits on charges for closing services or the title search made in addition to the premium. Charges for the title search and other costs of closing must be shown separately on the HUD 1 closing statement. |

Source: OPPAGA analysis.

The most recent significant change concerning title insurance regulation occurred in 2002 when voters passed a constitutional amendment to create the position of Chief Financial Officer. As part of the cabinet reform initiative the Legislature eliminated the Departments of Insurance and Banking and Finance and created the Department of Financial Services and the Financial Services Commission. The Department of Financial Services operates under the Chief Financial Officer. The Insurance Commissioner and the Office of Insurance Regulation are administratively housed in the department and operate under the Financial

Services Commission but not directly under the authority of the Chief Financial Officer.¹⁶

How is title insurance regulated in Florida?

In Florida, two state entities govern various aspects of the title insurance industry—the Department of Financial Services and the Office of Insurance Regulation. The department and the office have ongoing regulatory responsibilities involving title insurance agents and agencies and title insurers. In addition, the Supreme Court

¹⁶ The Financial Services Commission, comprised of the Governor and Cabinet, appoints the commissioner of the Office of Insurance Regulation and the commissioner of the Office of Financial Regulation.

prescribes and enforces standards for all attorneys including those that issue title policies.

The Department of Financial Services licenses title agents and agencies and enforces licensing provisions. Licensing is intended to ensure that title agents have the technical expertise needed to perform their duties. Prior to the 2002 reorganization that created the Department of Financial Services, the Department of Insurance had these licensing and enforcement responsibilities. However, department officials indicated that the oversight of title agents and agencies was carried out along with oversight and regulation of title insurers.

The department has the authority to license and regulate title agents and agencies that operate in the state. While individuals offering title insurance (except for attorneys) must have a title agent license, they work through title agencies that must also be licensed. The department licenses each title agency separately and each agency must have at least one licensed agent who can make policy determinations.

In order to be licensed, individual title agents must (1) be at least 18 years old; (2) meet minimum education or experience requirements; (3) pass an examination; (4) be deemed trustworthy and competent; and (5) pay the \$10 licensing and \$58.25 fingerprint fee. Agencies must file a detailed application using forms provided by the department and must meet certain financial requirements. Further, each agency must pay an annual administrative surcharge of \$200.

In addition to a state license, title agents and agencies must have authority from a title insurer to offer the insurer's policies. Title insurers authorize agents and agencies through an appointment. Appointments are signed contracts that authorize the agent or agency to conduct title insurance transactions on behalf of the insurer. Insurers have certain responsibilities for their appointed agents and agencies. The insurer must file and maintain copies of credit and character reports from an independent reporting service for each appointee. Insurers that appoint agencies must also file an application that certifies that the

agency has obtained both a fidelity bond and "errors and omissions" insurance.¹⁷

As shown in Exhibit 6, the department currently regulates over 10,000 licensed title agents and agencies.

Exhibit 6
DFS Regulates over 10,000 Licensed Title Agents and Agencies

| | Licensees | Licensees with Appointments |
|--------------|---------------|-----------------------------|
| Agents | 7,243 | 4,247 |
| Agencies | 3,576 | 2,878 |
| Total | 10,819 | 7,125 |

Source: Department of Financial Services as of June 30, 2008.

The department may investigate title agents and agencies and may impose a variety of sanctions if it determines that they have violated state law or department rules. Most often, investigations result from complaints filed with the department. These complaints typically involve failure to pay fees, escrow disputes, rebating violations, unlicensed activity, and fraudulent or deceptive practices. The department also opens investigations for agents and agencies that fail to pay the required annual administrative surcharge.

Staff of the department's Bureau of Investigation conducts investigations. If the investigations determine that grounds exist, the department can fine, suspend or revoke an agent or agency license.¹⁸ In Fiscal Year 2007-08, the department reported investigating 320 title insurance complaints and spent \$781,719 on title insurance investigations and enforcement activities. Of these investigations, 63 resulted in license suspension, 20 resulted in license revocation, and 38 resulted in probation, fines, and/or cease and desist orders (see Exhibit 7). Of the remaining cases, 75 are pending further legal action, while the rest were dismissed or otherwise closed.¹⁹

¹⁷ Errors and omissions insurance is business or professional liability insurance that covers a company or individual in the event that someone holds them responsible for a service provided or for services that were not provided according to the contract.

¹⁸ Chapter 626, Part V, F.S.

¹⁹ The 320 title cases represent about 10% of all new insurance cases opened, with 3,467 new cases opened during Fiscal Year 2007-08.

Exhibit 7

The Department of Financial Services Took 121 Disciplinary Actions Against Title Insurance Agents in Fiscal Year 2007-08

| Disciplinary Action | Number of Subjects |
|--|--------------------|
| Revoked | 20 |
| Suspended | 63 |
| Probation and Fine | 4 |
| Cease and Desist Order and Fine ¹ | 16 |
| Fine Only | 18 |
| Total | 121 |

¹ Fines amounted to \$34,800.

Source: Department of Financial Services.

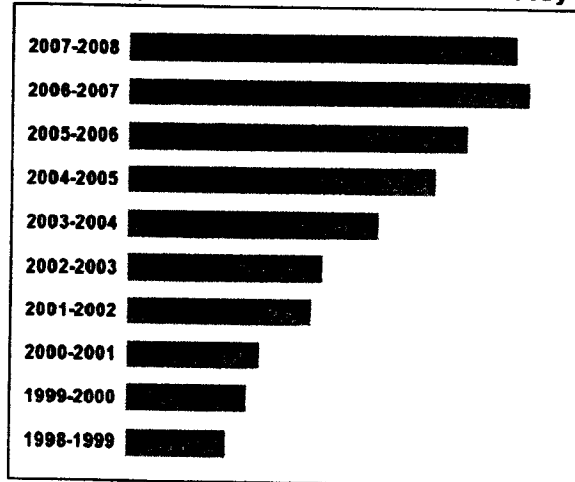
The Office of Insurance Regulation licenses title insurers and enforces licensing provisions. Title insurers provide the financial guarantee behind title policies and as a result, the state seeks to ensure that the companies can meet their legal obligations. The Office of Insurance Regulation has three general responsibilities for such insurers: licensing insurers and ensuring company solvency; taking enforcement actions when it detects violations of regulatory requirements; and setting rates for title insurance premiums.

The office issues certificates of authority to insurance companies conducting insurance transactions in Florida. The Uniform Certificate of Authority Application requires the filing of the articles of incorporation, bylaws, plan of operation, biographical information, and back-ground checks on all company officers. Insurers must also file financial data to confirm compliance with statutory requirements and solvency. Applicants for a certificate of authority must pay an application fee of \$1,500 and an annual fee of \$1,000 thereafter.

In addition to licensing fees, title insurers must pay an annual administrative surcharge of \$200 for each agency appointed to represent their company and for each retail office they operate. Surcharge revenues are deposited into the Insurance Regulatory Trust Fund and may be used to defray the cost of regulatory activities such as audits, statistical gathering, and rate setting. Exhibit 8 shows how surcharge revenues have increased over time.

Exhibit 8

Title Insurance Surcharge Revenues Have Grown with the Expansion of the Title Insurance Industry



Source: Department of Financial Services.

Insurers must also pay a premium tax to the Department of Revenue on the gross amount of premiums sold in the state. State law requires insurers to remit a 1.75% premium tax on the amount of the premium. While insurers submit the taxes to the Department of Revenue, the Office of Insurance Regulation can audit the companies to ensure that they pay the appropriate taxes.

The office also conducts investigations and takes enforcement actions when it detects apparent violations of statutory requirements. Most investigations are initiated by consumer complaints; however, some result from the office's efforts to determine whether insurers are complying with state law concerning business practices and the insurance code. The office's approach focuses on the company that employs agents, rather than individual agents. In other words, the office holds the company ultimately responsible for the actions of its employees and agents.

Since 2003, the office has opened 11 investigations involving eight title insurers.²⁰ These investigations focused on insurer activities involving reinsurance, commissions, contracts, rebating and affiliated

²⁰Title investigations represent only a portion of all investigations carried out by the office. Officials reported that the office conducted 1,137 investigations in 2007 across all the different types of insurance regulated. The office does not track investigation costs related to title insurance and has no staff dedicated specifically to such investigations.

business arrangements and included allegations of illegal inducements, inappropriate rebates, and fraud.

The office may impose administrative sanctions when its investigations determine that violations of the insurance code or commission rules have occurred. These sanctions include fines, suspension, and revocation of a certificate of authority.^{21, 22} If a violation occurs for which criminal prosecution is provided, officials refer the matter to the appropriate state attorney. Following an investigation conducted by the Department of Financial Services, the office, the department, and the U.S. Department of Housing and Urban Development have settled one of the 11 cases opened since 2003. This case resulted in a Florida insurer closing 84 business partnerships and paying a \$5 million fine to the state and the federal government. The remaining cases are still pending.²³

Section 627.782(1), *Florida Statutes*, requires the Financial Services Commission to adopt rates for different types of title insurance once the Office of Insurance Regulation establishes the appropriate rates. Minimum rates for owner's and lender's residential title policies, reissue rates, endorsements, and other charges related to these premiums must be set through rule promulgation pursuant to Ch. 120, *Florida Statutes*.²⁴ Regulators seek to set title insurance premium rates that are representative of the underlying risks and costs associated with the policies issued. Exhibit 9 shows current rates for title insurance based on the purchase price of a property; these rates are expressed as cost per \$1,000 of sales price. For example, for a home price of \$193,600, the base price for an owner's title policy would be \$1,043.²⁵ Reissue rates for refinanced homes are somewhat lower.²⁶

²¹ Section 624.15(1), *F.S.*

²² The office has never revoked an insurance company's certificate of authority. Officials reported that the ramifications of doing so could be significant because, if the office revoked a certificate of authority, policyholders may need to obtain coverage from another insurer.

²³ *Office of Insurance Regulation 2007 Annual Report*.

²⁴ *A Review and Critique of 'An Analysis of Florida's Title Insurance Market' issued by the Florida Office of Insurance Regulation in July 2006*, Robert B. Scherer, August 2006.

²⁵ For June 2008, the median home price according to the Florida Office of Economic and Demographic Research in Florida was \$193,600. The base rate excludes charges for any lender required endorsements and charges for related title services such as title search.

²⁶ Discounted rates for new owners' policies issued within three years

Exhibit 9

Title Insurance Rates Are Established Based on a Property's Insurable Value

| Purchase Price | Title Insurance Cost per Thousand |
|---------------------------------|--------------------------------------|
| \$0 - \$100,000 | \$5.75 |
| \$100,000 - \$1 million, add | 5.00 |
| \$1 million - \$5 million, add | 2.50 |
| \$5 million - \$10 million, add | 2.25 |
| Over \$10 million, add | 2.00 |

Source: Office of Insurance Regulation.

To establish rates, the office requires agents and insurers to submit statistical information regarding their business operations and current and expected expenses for handling risks. Using this information, the office seeks to determine a reasonable underwriting profit margin and contingencies to allow insurers, agents, and agencies to earn enough profit to attract insurers to the state. A 1992 study reported that the target profit margin for the industry was 12%.²⁷ The state used this information to establish title insurance rates.

However, since 1992, the Office of Insurance Regulation and its predecessor Department of Insurance has been unable to collect sufficient information to revise title insurance rates. The state has issued four requests to agents, insurers, and attorneys to voluntarily submit statistical data (i.e., data calls). These information requests have met with varying degrees of success but have been hampered by low response rates. The office attributes the low response rate to the nature, extent, and complexity of the requested business operations information.

In 1999, the Legislature froze title insurance rates at the 1992 level for three years. Rates have continued at this level due to administrative challenges made in response to the data calls, as the state lacks the statistical data needed to determine whether the 1992 rates are representative of the costs to provide title insurance in 2008.

from the previous policy on the sale of the same property, and when refinancing a home if an owner's policy was previously issued to the current owner.

²⁷ *The Economic Analysis of Current Rates and Charges in the Florida Title Insurance Industry*. Regulatory Research Corporation, April 2, 1992.

There is a growing need to re-examine the 1992 rates given changes since that time. While rates have remained constant, housing prices in Florida, on which the title insurance costs are based, increased 321% from 1980 to 2008; as a result, title insurance premiums paid by homeowners have increased substantially.²⁸ In addition, advances in technology potentially have reduced the underlying costs for conducting title searches and establishing title policies. Further, industry experts note that the current downturn in the housing market has negatively affected the title insurance industry in Florida and across the country. Together these changes create a highly volatile environment for title insurance and highlight the need to ensure that consumers pay fair and equitable rates for title insurance.

The Florida Supreme Court regulates attorneys who process titles and offer title insurance. An estimated 6,000 to 7,000 attorneys offer title insurance services in Florida. State law exempts attorneys from title insurance licensing requirements. Instead, all attorneys including those whose services include title insurance are regulated by the Supreme Court, which oversees their admission to the bar as well as any disciplinary actions. The Supreme Court authorizes the Florida Board of Bar Examiners to apply criteria for bar admission and The Florida Bar Association carries out complaint investigations. The Supreme Court, admits attorneys to the bar and, when necessary, takes disciplinary action such as suspension or revocation of an attorney's license to practice law based on the respective recommendations of the Board of Bar Examiners or the bar association.

Title insurance companies appoint attorneys in the same way they appoint independent agents and agencies. The parties sign an agreement that outlines the responsibilities and payment for services. The bar association initiates an investigation upon receipt of a consumer complaint to determine if an attorney has violated the law or breached the ethical rules of the bar. If so, the association can take action against the attorney's license. Bar association officials reported that they receive approximately 12 title related complaints annually, most from insurers related to the failure to

remit premiums. However, while the bar tracks disciplinary action by type of complaint, it does not record outcomes or costs related to title complaints.

What are the consequences of the current regulatory framework?

While the Department of Financial Services and Office of Insurance Regulation work to coordinate title insurance licensing and enforcement, the current regulatory framework presents challenges. Specifically, the current framework

- makes rate setting difficult;
- results in differences in licensing and oversight; and
- creates uncertainty about the amount of insurance premium tax due to the state.

Divided authority makes it difficult to gather comprehensive information needed for rate setting. The Office of Insurance Regulation has been unable to collect from agents and insurers all the information it considers critical to developing fair and equitable title insurance rates.²⁹ Only the Department of Financial Services has authority over licensed agents who, with the exception of attorneys, issue most of the title insurance policies in Florida.

In November 2005 and March 2007, the office issued data calls that requested voluntary submission of information from both agents and insurers. The data calls asked for extensive historical information on business operations and claims experience. The office planned to use this information to ensure that the prices charged to consumers for title insurance are in line with the underlying costs to provide the insurance.

However, only a small portion of agents and insurers responded.³⁰ Title agents objected to the data call because they do not typically collect the information requested by the office as part of their normal business operations. The agents asserted that they would need additional advance notice

²⁸ According to the 2008 House Price Index, Office of Federal Housing Enterprise Oversight, housing prices in Florida increased 321% from 1980 to 2008.

²⁹ Differing opinions exist as to the office's authority to request information from agents concerning business operations and expenses. However, the office considers information on these costs essential to a complete understanding of title insurance costs and rate setting.

³⁰ *Analysis of Florida Title Insurance Rates for the Florida Office of Insurance Regulation*. AIS Risk Consultants, Inc., September 21, 2007.

and time to collect the requested data. Insurers were more likely to respond, but the information they provided was often incomplete. Insurers expressed concern that if they required independent agents and agencies to provide certain information, they would risk losing the services of these entities.

To assist the Office of Insurance Regulation in gathering the information necessary to establish rates the Department of Financial Services has worked with the agents to develop a framework for obtaining the information on agent costs and expenses. Nevertheless, challenges by agents, agencies, and insurers continue to delay the office's efforts to establish new rates through the administrative rule process.

Due to the difficulty in obtaining data from agents and insurers, the office supported legislation in 2008 to make Florida a "file and use" rate state like the majority of other states in the nation. A file and use system would require insurers to submit and justify rates and allow the office to review and approve rates based on information provided by the company. This change would eliminate the state's rate setting responsibilities. The office indicates that a "file and use" method for rate setting would require agents and insurers to justify rates, increase competition, and could result in lower rates because the new rates would recognize business efficiencies realized in the title industry since 1992 through automation and technology. The office plans to support the file and use proposal prior to the 2009 legislative session.

Differences in licensing authority may inhibit oversight and lead to inconsistent enforcement. The current regulatory structure for title insurance creates varied licensing standards and differences in enforcement, which can result in a lack of direct state scrutiny for some title agents. In addition, no single state-level entity has complete information on the individuals who issue title insurance policies in Florida. Recent national and state-level concerns about the actions of some title agents and insurers highlight the importance of strong oversight to ensure consumer protection.

Independent agents licensed by the Department of Financial Services must comply with specific licensing requirements. Agents directly employed by insurers may also choose to obtain a license while those who forgo a state license operate under the rules and policies of the insurer, which is regulated by the Office of Insurance Regulation. A third group, attorneys that issue title policies are subject to separate admission criteria to practice law as established by the Supreme Court.

The Department of Financial Services, Office of Insurance Regulation, and the Florida Bar Association each have different responsibilities and regulatory focus. As a result, their ability to monitor inappropriate business practices varies.

For example, the Department of Financial Services has statutory authority to oversee title agents and agencies. Consequently, the department can revoke the license of individual agents found to be engaged in fraudulent or dishonest practices.

Conversely, the Office of Insurance Regulation focuses on the business operations of insurers, with oversight of the activities and conduct of individual agents being secondary. The office relies on insurers to supervise and audit the activities of the agents they employ to sell title insurance, which may result in reduced state oversight of individual agent activities. For example, if a direct operations employee engages in inappropriate business practices, the office could take action against the insurer if the company was aware of the employee activities or willfully ignored the conduct.

Moreover, The Florida Bar Association does not specifically oversee the business practices of attorneys issuing title insurance.³¹ Instead, all attorneys must abide by the same professional code of conduct and ethical standards, regardless of their speciality area. As such, the bar has no specific mechanisms in place to monitor attorney compliance with title-related laws and rules, and would typically only become involved in a title issue if a consumer filed a complaint.³²

³¹ The Department of Financial Services reported that Bar Association representatives had participated in state-level meetings on issues involving title insurance.

³² An attorney that engages in inappropriate title insurance practices could lose both his/her ability to conduct title insurance business and also to practice law.

In recent years, the national title industry has faced problems related to inappropriate or otherwise anti-competitive business practices, which has highlighted the need for strong and cohesive oversight. These practices have involved activities designed to induce business referrals, actual illegal payments for business referrals, price fixing, or the creation of shell companies to channel money back to others in the real estate business (e.g., real estate agents, developers, and construction contractors).

Some of these inappropriate practices by title agents and insurers resulted in a class action lawsuit by Florida consumers. Specific allegations include price fixing, payoffs, kickbacks, and other unrelated charges to consumers. These and other problems across the nation led the U.S. Government Accountability Office in 2007 to call for increased state oversight of title insurance practices.³³ The Government Accountability Office report emphasized the need for coordinated state and federal regulation of title insurance that would include the other parties involved in the marketing and sale of title insurance, such as real estate agents, mortgage brokers, lenders, builders, and attorneys, all of which are regulated by different entities.

Divided regulatory authority may create uncertainty about the amount of premium tax owed the state. State law mandates that insurers remit 1.75% of the title insurance premium to the Department of Revenue. However, title agents, not insurers, usually handle the financial transaction for title policies. That is, the consumer pays the title

agent for the premium and other services at the real estate closing. The agent retains his or her agreed upon share and remits the remaining portion to the insurer.

Title insurers negotiate the share that the agents receive when the two entities enter into a signed agreement and the insurer grants the appointment. State law requires that the insurer receive a minimum 30% to cover its costs, with the agent retaining 70%. The 30% - 70% split between insurers and agents is the industry standard in Florida, although the amount may vary depending on specific circumstances.³⁴

Because of the way insurers and agents handle these financial transactions, the state may not receive what is owed in premium taxes. According to the Office of Insurance Regulation, insurers do not collect documentation of the amounts charged by agents and others. Instead, the insurer estimates the total cost for tax purposes based on the 30% remitted by the agents or attorneys.

Insurers must file quarterly and annual financial statements with the Office of Insurance Regulation stating the amount of premiums paid to them.³⁵ However, the Department of Revenue has found disparities between the amount of premium reported to the office on financial statements and the amount paid in premium tax to the department. The department currently has one case pending and has settled with two other insurers over the underpayment of the amount of tax owed to the state of Florida.

³³ *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, U.S. Government Accountability Office, April 2007.

³⁴ Direct operations employees are not appointed and state law would not bind the financial arrangements between employer and employee.

³⁵ National Association Insurance Commissioners' financial statement form.

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