



## 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

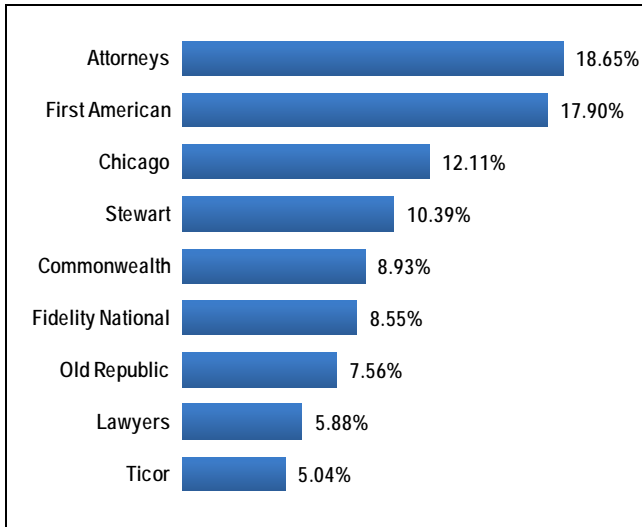
Title insurance is intended to protect a property owner or lender against loss in the event of dispute or discrepancy over property ownership rights.<sup>1</sup> Title insurance is a monoline product, which means that insurers selling title insurance cannot sell other types of insurance products. Industry 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.<sup>2</sup> In Florida and across the country, title insurance is highly concentrated. Nationally, five insurers account for 92% of the business.<sup>3</sup> 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.

<sup>1</sup> 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.

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

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

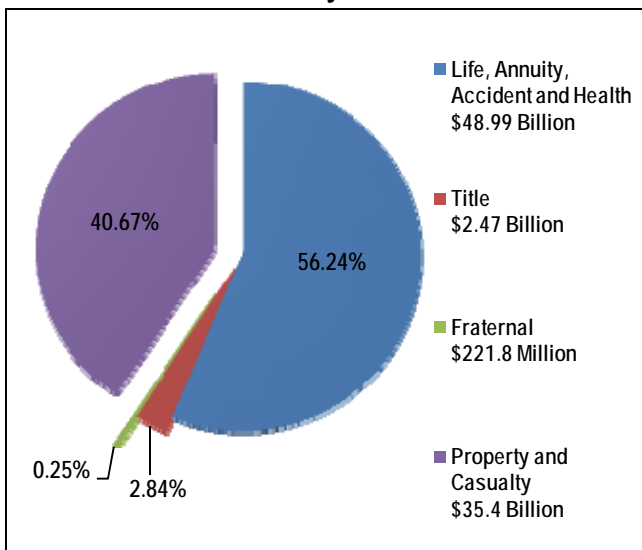
**Exhibit 1**  
**The Title Insurance Industry Is Highly Concentrated in Florida**



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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup>

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

<sup>7</sup> 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.

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.<sup>8</sup> 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.<sup>9</sup> Exhibit 3 shows that nationally, losses for the title insurance industry make up only 5% of total premium costs.<sup>10</sup> 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,

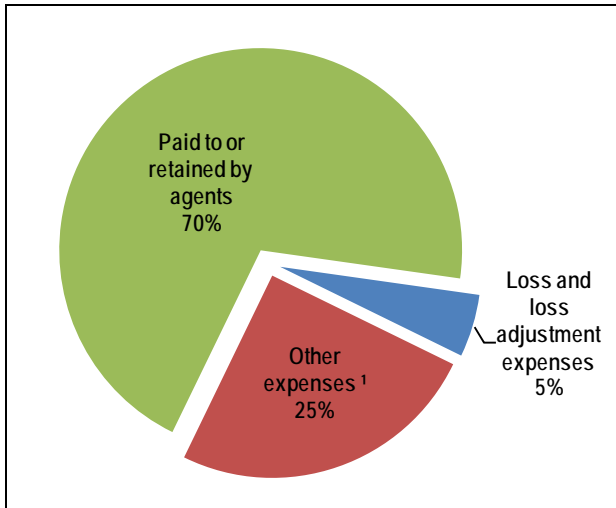
<sup>8</sup> A.M. Best. *Special Report: Strong Housing Market Drives Title Insurance Growth in 2005, but Possible Slowdown Ahead*, p.6.

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

<sup>10</sup> 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.

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**



<sup>1</sup>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.<sup>11</sup> 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

<sup>11</sup> 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.<sup>12</sup>

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.<sup>13, 14</sup>

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.<sup>15</sup>

<sup>12</sup> 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.

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

<sup>14</sup> 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).

<sup>15</sup> *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.<sup>16</sup>

***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

<sup>16</sup> 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.<sup>17</sup>

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
<b>Total</b>	<b>10,819</b>	<b>7,125</b>

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.<sup>18</sup> 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.<sup>19</sup>

<sup>17</sup> 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.

<sup>18</sup> Chapter 626, Part V, F.S.

<sup>19</sup> 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 <sup>1</sup>	16
Fine Only	18
<b>Total</b>	<b>121</b>

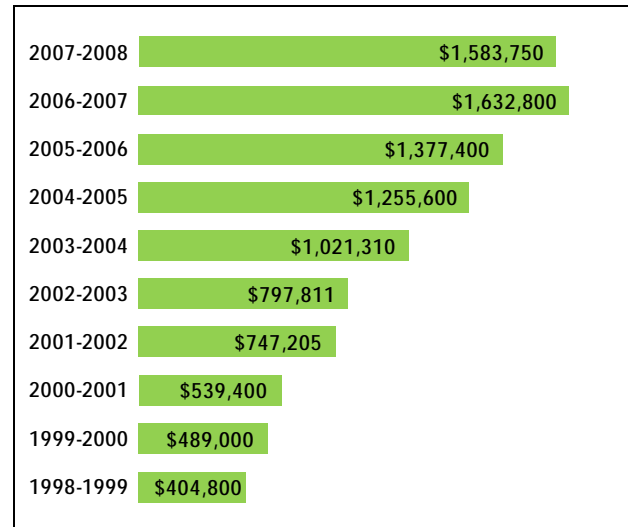
<sup>1</sup> Fines amounted to \$34,800.  
 Source: Department of Financial Services.

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.<sup>20</sup> These investigations focused on insurer activities involving reinsurance, commissions, contracts, rebating and affiliated

<sup>20</sup>Title 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.<sup>21, 22</sup> 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.<sup>23</sup>

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*.<sup>24</sup> 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.<sup>25</sup> Reissue rates for refinanced homes are somewhat lower.<sup>26</sup>

<sup>21</sup> Section 624.15(1), *F.S.*

<sup>22</sup>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.

<sup>23</sup> *Office of Insurance Regulation 2007 Annual Report*.

<sup>24</sup> *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.

<sup>25</sup> 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.

<sup>26</sup> 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%.<sup>27</sup> 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.

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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.

<sup>27</sup> *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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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

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

<sup>29</sup> 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.

<sup>30</sup> *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.<sup>31</sup> 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.<sup>32</sup>

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

<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.

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

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

<sup>35</sup> National Association Insurance Commissioners' financial statement form.

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OPPAGA supports the Florida Legislature by providing evaluative research and objective analyses to promote government accountability and the efficient and effective use of public resources. OPPAGA conducted this project in accordance with applicable evaluation standards. To obtain copies of this report in print or alternate accessible format, contact OPPAGA by telephone (850/488-0021), by FAX (850/487-3804), in person, or by mail (OPPAGA Report Production, Claude Pepper Building, Room 312, 111 W. Madison St., Tallahassee, FL 32399-1475). Cover photo by Mark Foley.

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