

## **Banking and Insurance Departments Developments**

**June 12, 2009**

Certain questions come up that require guidance from the Banking and Insurance Departments.

**Q.** Can a lender require a borrower to use their specified title company as a condition to obtaining a loan?

**A.** No. This is specifically prohibited by the Lopez Law, Section 595A of the Banking Law.

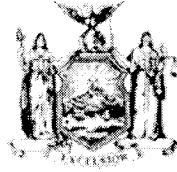
Please see the letter of Richard H. Neiman Superintendent of Banks attached.

**Q.** Can a title insurance company or agent eliminate some of their fees associated with obtaining title insurance?

**A.** No. Mortgage tax and fees for recording satisfactions may not be eliminated or discounted. This violates 6409(d) of the Insurance Law which prohibits giving anything of value in order to obtain title insurance business. See Insurance Dept. Opinion dated May 12th, 2009 attached.

**Q.** Can a title insurance agent offer financial incentives to customers in order to induce them to use the services of the title agent or an affiliated homeowner's insurance company?

**A.** No. Regulatory agencies generally disfavor any type of "one stop shopping" as bad for the consumer. More specifically the Insurance Department has opined in an opinion on 12-29-06 (attached) that such practice violates N.Y. Ins. Law 6409(d), It is simple, the law prohibits a title insurance company from giving any consideration or valuable thing as an inducement for any title insurance business.



**STATE OF NEW YORK  
INSURANCE DEPARTMENT**  
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NEW YORK, NEW YORK 10004

George E. Pataki  
Governor

Howard Mills  
Superintendent

The Office of General Counsel issued the following opinion on December 29, 2006, representing the position of the New York State Insurance Department.

**Re: Proposal to Give Financial Incentives to Customers Who Obtain  
Title Insurance from Title Agent or Homeowners Insurance from  
Affiliate**

**Question Presented:**

May a title agent offer financial incentives to customers who elect to utilize the services of the title agent for title insurance, or the services of its affiliate for homeowners insurance?

**Conclusion:**

The provision of such incentives to applicants for insurance in return for the applicants utilizing the services of the title agent or its affiliate would violate N.Y. Ins. Law § 2324 (McKinney 2006) and/or N.Y. Ins. Law § 6409(d) (McKinney 2000).

**Facts:**

The inquirer asks whether it is permissible for a title agency, and its affiliate, a property/casualty insurance company, to engage in an arrangement whereby:

"The title agency plans to offer its customers certain incentives if the customer elects to obtain title insurance from the title agency and homeowners insurance from the title agency's affiliate company. Although the title agency has not settled on the exact incentive to be offered under the plan, the title agency may offer to discount the customer's settlement costs or other ancillary services unrelated to the title insurance premium. Alternatively, the title agency may offer the customer a gift certificate to a home improvement retail store or discount the cost of its affiliate's homeowners insurance policy.... In many cases, the title agency will offer the incentive to existing customers that have already placed an order for title insurance with the title agency."

The inquirer argues that any incentive offered to the applicant for using the title agency or

property/casualty company "has no effect on the customer's selection of a title insurer as such insurance has already been ordered. For these reasons, [the inquirer] believe[s] the proposed incentives are intended to generate homeowners insurance business and do not qualify as inducements to title insurance."

### **Analysis:**

N.Y. Ins. Law § 6409(d) (McKinney 2000) provides:

(d) No title insurance corporation or any other person acting for or on behalf of it, shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business. Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof.

The question presented is whether a title agency may offer financial incentives to customers who utilize the services of the title agency for title insurance or, alternatively, the services of its affiliate property/casualty company for homeowners insurance. Section 6409(d) prohibits a title insurance corporation *or any other person acting for or on behalf of it* from directly or indirectly making, or offering to make, any rebate of any portion of the fee or charge or give any consideration or valuable thing as an inducement for, or as compensation for any title insurance business. Consequently, if the title agent gives or offers to give financial incentives such as reduction in settlement cost or gift certificates to its customers (applicants for insurance) who obtain title insurance from its title agency, such an arrangement would constitute a violation of Section 6409(d), even if made after the title insurance has been ordered.

Similarly, N.Y. Ins. Law § 2324 (McKinney 2006),<sup>1</sup> which governs property/casualty insurance, including homeowners and title insurance, provides, in pertinent part, as follows:

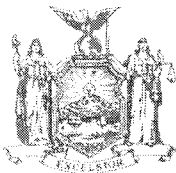
(a) No authorized insurer, no licensed insurance agent, no licensed insurance broker, and no employee or other representative of any such insurer, agent or broker shall make, procure or negotiate any contract of insurance other than as plainly expressed in the policy or other written contract issued or to be issued as evidence thereof, or shall directly or indirectly, by giving or sharing a commission or in any manner whatsoever, pay or allow or offer to pay or allow to the insured or to any employee of the insured, either as an inducement to the making of insurance or after insurance has been effected, any rebate from the premium which is specified in the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or shall give or offer to give any valuable consideration or inducement of any kind, directly or indirectly, which is not specified in such policy or contract, other than any article of merchandise not exceeding fifteen dollars in value which shall have conspicuously stamped or printed thereon the advertisement of the insurer, agent or broker....

The proposal to offer financial incentives to customers who utilize the services of the inquirer's affiliate property/casualty company to obtain homeowners insurance would also violate Section 2324(a).

For further information you may contact Associate Attorney D. Monica Marsh at the New York City Office.

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<sup>1</sup> See also N.Y. Ins. Law § 4224 (McKinney Supp. 2006), which governs life, accident and health insurance and annuities.



STATE OF NEW YORK  
INSURANCE DEPARTMENT  
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David A. Paterson  
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Eric R. Dinallo  
Superintendent

May 12, 2009

Sharon Sabol  
NYSLTA, Inc.  
Two Rector Street, Suite 901  
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**Re: Elimination of Certain Title Insurance Fees under N.Y. Ins. Law § 6409**

Dear Ms. Sabol:

I write in response to your inquiry, which asks whether a title agent or title abstract company may eliminate certain fees associated with obtaining title insurance.

**Question Presented:**

Pursuant to N.Y. Ins. Law § 6409 (McKinney 2008), may a title agent or title abstract company eliminate the mortgage recording or mortgage satisfaction fee as required by the city, county and/or state of New York?

**Conclusion:**

No. A title agent or title abstract company may not eliminate the mortgage recording and mortgage satisfaction fees.

**Facts:**

You report that a title abstract company's summary of charges does not include certain recording charges, such as mortgage recording fees and mortgage satisfaction fees, that are due the city, county and/or state of New York. You ask whether a title abstract company may eliminate such fees.

Analysis:

N.Y. Ins. Law § 6409(b) & (d) (McKinney 2008) is relevant to your inquiry. That statute reads as follows:

(b) Every title insurance corporation shall file with the superintendent its rate manual, if any, its basic schedule of rates and classification of risks, its rating plan and rules in connection with the writing or issuance of policies of title insurance and shall thereafter likewise file any changes therein. After any such filing no such corporation shall, in connection with the writing or issuance of any such policy, deviate from the rates, classifications of risks and rules last filed by it, either by making any reduction in rates without having filed the same as herein provided, or by way of any discriminations in favor of or against any insured. The superintendent shall have the powers specified in article twenty-three of this chapter applicable to title insurers.

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(d) No title insurance corporation or any other person acting for or on behalf of it, shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business. Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof.

Thus, Insurance Law § 6409(b) prohibits a title insurance company from deviating from its filed rates. Further, Insurance Law § 6409(d) further prohibits a title insurance corporation, or anyone acting for or on behalf of it (including a title agent or title abstract company) from, among other things, rebating any portion of its fee or charges made, or giving to any applicant for insurance, either directly or indirectly, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business. Because a title insurance agent or title abstract company acts for or on behalf of the insurer, the agent must abide by the provisions pertaining to the charging or rebating of fees and premiums. See N.Y. Ins. Law § 6409(d).

Additionally, Circular Letter No. 9 (2009), which the Department issued on March 3, 2009, is germane to the inquiry. That letter provides in pertinent part as follows:

Apart from an arrangement pursuant to Insurance Law § 2119, an insurer or insurance producer may provide a service not specified in the insurance policy or contract to an insured or potential insured without violating the anti-rebating and inducement provisions of the Insurance Law if:

1. the service directly relates to the sale or servicing of the policy or provides general information about insurance or risk reduction; and
2. the insurer or insurance producer provides the service in a fair and nondiscriminatory manner to like insureds or potential insureds.

Therefore, a title agent or title abstract company conceivably may eliminate certain fees provided that the fees directly relate to the sale or servicing of the title insurance policy or provide general information about insurance or risk reduction; the title agent or title abstract company charges the service fees in a fair and non-discretionary manner to like insureds or potential insureds; the fees are not part of the title insurer's rates, otherwise contained in the rate manual; and the fees are not charged by any other entity. Id.; see also OGC Opinion 05-03-01 (March 2, 2005) (discussing specific conditions under which a title agent may eliminate certain discretionary fees). However, in the situation presented here, the service charges for mortgage recording and mortgage satisfaction are fees of other entities, such as the city, county and/or state of New York. For this reason, eliminating the fees would appear to violate Insurance Law § 6409(d).

With respect to the specific entity that you have brought to our attention, the Department's Office of General Counsel will refer this matter to the Department's Consumer Services Bureau for appropriate action.

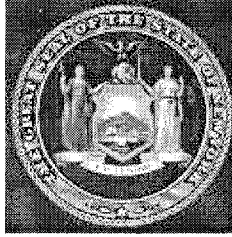
Sincerely,



D. Monica Marsh  
Supervising Attorney



Matthew Cohen  
Legal Intern



STATE OF NEW YORK  
BANKING DEPARTMENT  
ONE STATE STREET PLAZA  
NEW YORK, NY 10004-1417

RICHARD H. NEIMAN  
Superintendent of Banks

July 9, 2008

To the President of the Institution Addressed:

Re: Statutory Prohibitions Against "Tying" Title Insurance to Mortgage Financing

We have become aware that, despite specific prohibitions in both the Banking and Insurance Laws, certain lenders continue to encourage mortgage applicants to use specific title insurance agents or agencies.

New York Banking Law Section 595-a precludes a mortgage banker or a mortgage broker from requiring a borrower to purchase title insurance from a specific title company, agency or agent as a condition for securing a mortgage commitment. Likewise, Section 2503(a)(2) of the Insurance Law imposes the same restrictions on banks, trust companies, savings banks, and loan associations and national banks.

Please be advised that we intend to expand our examination process to identify and follow up on any referrals to determine the proper enforcement action.

We urge you to fully comply with the aforementioned statutes.

Any questions regarding this letter should be addressed to Tom Barletta, Director of Legislations and Governmental Affairs at (518) 486-4300.

Very truly yours,

Richard H Neiman  
Superintendent of Banks