



Illinois Department of Financial and Professional Regulation
Division of Financial Institutions

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Governor

BRENT E. ADAMS
Secretary

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Director
Division of Financial Institutions

MEMORANDUM

TO: VICKI THOMAS, EXECUTIVE DIRECTOR
JOINT COMMITTEE ON ADMINISTRATIVE RULES

FROM: BRENT E. ADAMS, SECRETARY
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

RE: SECOND NOTICE

DATE: November 18, 2009

- B) A list of specific criticisms, suggestions, and comments raised by interested persons, and the agency's analysis of each of these criticisms, suggestions and comments.

The Department of Financial and Professional Regulation promulgated the proposed rule in order to address upcoming new regulations (Effective on January 1, 2010) from the U.S. Department of Housing and Urban Development (HUD) under the Real Estate Settlement and Procedures Act (RESPA) that will require mortgage lenders to provide a list of title insurance companies for borrowers to choose from at the time of loan application. Since Illinois has been one of the few states where the seller already has the obligation to provide and pay for the owner's title insurance policy, the simultaneously issued mortgage policy is customarily generated by that same title insurer. Illinois borrowers typically do not retain counsel until after they apply for a mortgage. This has allowed situations where a borrower unwittingly selects a different title insurer than that selected by the seller which causes several legal complications not to mention a cost penalty if they cancel a policy. Upon review of the federal regulations, the Department determined that the RESPA-HUD rule were intended to be applicable to all states but would not have their intended effect in Illinois since it is a "seller pay" state as opposed to most states which are "buyer pay" jurisdictions. For this reason, the Department determined it necessary and in the best interest of Illinois consumers to allow them the opportunity to cancel and/or alter a lender placed title order at any time prior to the closing without cost or penalty.

There were numerous comments in support of the Department's rule, mostly from those attorneys who practice or specialize in residential real estate law who, base their support on the premise that the rule will help prevent several of the same issues referred to by the opponents of the rule (in this particular case, the Illinois Land Title Association (ILTA) are the only opposition that responded to the proposed rule). The supporters agree with the Department's position that the rule (which has been referred to by many of the supporters

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as the "Informed Bifurcation Rule") necessarily enhances the Upcoming RESPA-HUD regulations which can only provide more protection for the home buyer/consumer.

The ILTA opposes the rule on several grounds. The ILTA states that Section 19 of the Illinois Title Insurance Act (215 ILCS 155/19) prohibits the Department from setting or otherwise adjusting fees charged to the parties. The ILTA has determined that an intended consequence of the rule will be increases in transaction costs that would ultimately translate to an increase of fees. The Department disagrees with this assessment as there is no language whatsoever in the proposed rule where fees are addressed and/or adjusted in any way.

As for the Department having the statutory authority for the proposed rule, ample authority for the proposed rule exists under Sections 18.1 and 20 of the Illinois Title Insurance Act (215 ILCS 155); Section 401 of the Illinois Insurance Code (215 ILCS 5/401); and Sections 1-70, 1-90, 5-35 and 5-40 of the Illinois Administrative Procedures Act (5 ILCS 100/1-70, 1-90, 5-35, 5-40). The legal rationale for Section 8100.2406 in the proposed rule is that under Section 18.1 of the Act, it provides that in a residential transaction, whoever pays for the policy gets to choose his or her title company. In a sales transaction the majority of the contracts in use require the seller to pay for the owner's (borrower's) policy and the buyer (borrower) to pay for the lender's policy. The last sentence in the proposed rule's Section 8100.2406 ("The foregoing shall not be construed or applied in such a way as to alter the rights and obligations of any party to a contract for the sale and purchase of such residential property.") simply says that if the borrower cancels a choice the mortgage lender made, that cancellation will not deprive the seller of the right under 18.1 to choose the title company to be used for the policy the contract requires the seller to purchase. In the absence of that language, some could argue that the borrower's right to cancel could be used to force the seller to change the seller's choice. The proposed language preserves the rights of both sets of consumers.

The ILTA also believes that the Department is misinterpreting the ramifications of the new RESPA-HUD rule. The Department believes that the ramifications of the RESPA-HUD rule necessitates the our proposed rule because it reconciles Illinois customs with the legislative intent of informed consumer choice behind the Federal rule which was written to accommodate the more prevalent "buyer pay" jurisdictions as opposed to Illinois where the seller pays for the owner's title insurance policy. When lenders in Illinois provide borrowers with a form to "check off the box" of title insurance companies suggested by the lender, consumers are likely to do so not realizing that their real estate contract is already dispositive of the issue. The Department's rule allows the buyer sufficient time to determine if the "checking of the box" regarding the mortgage policy provider is consistent with the real estate contract terms and/or otherwise in their best interests.

Another problem that the ILTA has with the Department's rule is that the provision to allow the borrower to cancel at any time prior to the closing of the transaction would essentially force title companies into producing a commitment that can be cancelled up to the closing without the ability to charge for their services. They state that the provision will lead to title companies and agents waiting to produce a commitment until they are confident that the order will not be cancelled. The Department by contrast would question why the consumer should be expected to utilize the lender-steered title provider.

The ILTA also cites the consumer damages of policy bifurcation such as, higher closing costs, additional escrow closing fees, conveyance contract uncertainty, as well as post closing and claims issues. The Department agrees that policy bifurcation is not in the

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consumers' best interest which is why the Department believes that home buyers should be afforded with the opportunity to consult with legal counsel (who could advise of any of the potential drawbacks of bifurcation) or otherwise perform due diligence to make an informed decision. The Department firmly believes that the Informed Bifurcation Rule accomplishes this