NEW YORK STATE
DEPARTMENT of
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

Supplement No. 2 to
Insurance Circular Letter No. 1 (2003)
January 31, 2019

TO: All Title Insurance Corporations and Title Insurance Agents

RE: Insurance Regulation 208, 11 NYCRR Part 228

STATUTORY REFERENCES: N.Y. Insurance Law §§ 301, 2110, 2119, 2303, 2304, 2306, 2315, and 6409 and Articles 23 and 24; N.Y. Financial Services Law §§ 202, 301 and 302.

On January 15, 2019, the Appellate Division, First Department, unanimously upheld the Prohibition on Inducements for Future Title Insurance Business provisions in 11 NYCRR 228.2 and the Expense Reporting and Rate Filing Provisions in Insurance Regulation 208, 11 NYCRR 228.3. See In re N.Y. State Land Title Ass'n, Inc. v. Dep't of Fin. Servs., No. 151562/18, 2019 NY Slip Op 00245, 2019 N.Y. App. Div. LEXIS 243 (1st Dept. Jan. 15, 2019) (NYSLTA v. Vullo). This circular letter provides industry guidance to both title insurance corporations and title insurance agents regarding this decision.

Summary of the January 15, 2019 Decision

This January 15, 2019 Decision includes three critical holdings that will be addressed in this circular letter.

First, the Decision upheld the ban on inducements for future title insurance business as specified in Section 228.2. After recognizing that DFS's title insurance industry investigation "found that lavish gifts were routinely being offered in anticipation of receiving business from intermediaries such as lawyers, generally unbeknownst to and at the expense of consumers, who ultimately pay higher premiums as a result", the Appellate Division upheld the validity of the ban on such inducements:

> DFS reasonably sought to put an end to this ethically dubious scheme by clarifying that such practices are impermissible under Insurance Law §6409(d) … We find that Insurance Regulation 208's ban on such practices is harmonious with the legislative language and intent to prevent consumers from being required to subsidize unscrupulous exchanges of valuable things for real estate professionals.

NYSLTA v. Vullo, 2019 N.Y. App. Div. LEXIS 243, *17-*18. The Appellate Division further held that the plain language of Insurance Law §6409(d) was not limited to a prohibition on *quid*

pro quo exchanges for specific business and rejected the *quid pro quo*-only interpretation that NYSLTA offered as a "narrow interpretation" that "failed to accord proper deference to DFS's rational interpretation of a statute within the field of its expertise." Id. at *17.

Second, the Decision upheld the expense reporting and rate filing rules in Section 228.3. The Appellate Division concluded that NYSLTA's retroactive and arbitrary and capricious challenges to this section were "without merit" and that "[r]ather than violate insurers' due process rights, [the 5% safe harbor provision] allows insurers to avoid having to explain and submit documentation of its previous expense schedules, less the expenditures that violated Insurance Regulation 208." Id. at *17-*18.

Third, the Decision severed and annulled the ancillary fee and closer payment restrictions in Section 228.5, but held that the remainder of the regulation was not impacted by the ruling on these two restrictions.

Impact of the January 15, 2019 Decision on New York's Title Insurance Industry

I. Prohibition on Inducements for Future Title Insurance Business

In accordance with the January 15, 2019 Decision, all title insurance corporations, title insurance agents, and any person acting on behalf of such a corporation or agent must again comply with all of the provisions in Section 228.2, including the prohibitions on inducements for future title insurance business included in that section. For the 2019 calendar year and beyond, this compliance requirement became effective on January 16, 2019.

II. Expense Reporting and Rate Filing Rules

In accordance with the January 15, 2019 Decision, all title insurance corporations, title insurance agents, and any person acting on behalf of such a corporation or agent must again comply with all of the provisions in Section 228.3, including the expense reporting and rate filing rules. Except as provided in the following paragraphs for Section 228.3(c), for 2019 and beyond, the compliance requirement for Section 228.3 became effective on January 16, 2019.

Section 228.3(c) was promulgated to ensure that title insurance rates are not excessive under Insurance Law § 2303 or otherwise reflect illegal inducement expenses. Section 228.3(c) requires all title insurance corporations to file new rate applications and provides several options to present an actuarial basis to project the future rates without the inclusion of historic expenses that are not allowed. Because the title insurance rates that are currently being charged in New York reflect expenses from past years when millions of dollars of illegal inducement expenses were incurred and passed on to the consumer, Section 228.3(c) requires title insurance corporations to remove the impact of these historic illegal inducement expenses on future title rates. Section 228.3(c) provides four options for title insurance corporations to do so.

First, a title insurance corporation that did not incur any illegal inducement expenses during the most recent six-year period could have filed, by April 16, 2018, an affirmation with the superintendent confirming that the insurer did not incur any such expenses during this period. See 11 NYCRR § 228.3(c)(1)(i). In such case, no prospective adjustment of rates would be necessary

for such insurer. No title insurance corporation filed such an affirmation as required by April 16, 2018.

Second, a title insurance corporation could have presented reasonable data with actuarial support for the calculation of prospective title rates that excluded all illegal inducement expenses. See 22 NYCRR § 228.3(c)(1)(ii). Insurers were permitted to comply with this option by submitting expense schedules for the immediately preceding six-year period to TIRSA by April 16, 2018, that excluded all prohibited inducement expenses. No title insurance corporation submitted the required schedules by April 16, 2018, and thus no insurer is eligible to submit a rate filing that eliminated the exclusion of the prohibited expenses.

Third, by June 16, 2018, an insurer could have submitted a rate filing to the superintendent that provides for a uniform five percent reduction in the prospective title insurance rates. See 11 NYCRR § 228.3(c)(1)(iii). This third option is a safe harbor that permitted insurers to comply with the regulation without having to recalculate expenses from the preceding six-year period to eliminate the illegal inducement expenses. And fourth, an insurer could have adopted, by June 16, 2018, a rate filing submission made by TIRSA that included the same uniform five percent reduction in the title insurance rate. See 11 NYCRR § 228.3(c)(2).

On June 14, 2018, Supreme Court Justice Rakower stayed the deadline for the third and fourth options. This stay was mooted by the January 15, 2019 Decision.

As a result of the January 15, 2019 Decision, title insurance corporations are now required to comply with rate submission rules in Section 228.3(c). Because the deadline for the first and second options have already expired, an insurer must comply with the rules in either Section 228.3(c)(1)(iii) or 228.3(c)(2) (the third or fourth options) in order to be in compliance with the requirements of Section 228.3(c).

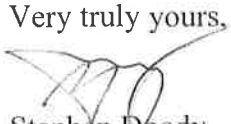
The Department is providing title insurance corporations until February 15, 2019, to meet its obligations under Section 228.3(c). After February 15, 2019, all title insurance policies issued in New York at rates that do not reflect compliance with either Section 228.3(c)(1)(iii) or 228.3(c)(2) will be in violation of New York law.

III. Ancillary Fee and Closer Payment Restrictions

As noted above, the ancillary fee and closer payment restrictions in Section 228.5 were annulled by the January 15, 2019 Decision. Title insurance corporations and title insurance agents are therefore not required to comply with the provisions.

Please direct any questions regarding this circular letter to Nathaniel Dorfman, General Counsel, by mail at New York State Department of Financial Services, Health Bureau, One Commerce Plaza, 17th Floor, Albany, New York 12257, or by email at nathaniel.dorfman@dfs.ny.gov.

Very truly yours,



Stephen Doody
Deputy Superintendent