

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
11 NYCRR 228
(INSURANCE REGULATION 208)**

TITLE INSURANCE RATES, EXPENSES AND CHARGES

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202, 301, and 302 of the Financial Services Law and Sections 301, 2110, 2119, 2303, 2304, 2306, 2315, and 6409 and Articles 23 and 24 of the Insurance Law, do hereby promulgate a new Part 228 of Title 11 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (Insurance Regulation 208), to take effect 60 days after publication in the State Register, to read as follows:

(ALL MATERIAL IS NEW)

Section 228.0 Scope and purpose.

(a) Following examinations, investigations and analysis relating to the title insurance industry, the Department of Financial Services (“Department”) has identified concerns regarding certain practices that impact consumers and result in higher premiums and closing costs, including those that violate Insurance Law section 6409(d). This regulation thus addresses such practices and provides specific requirements. Consumers of title insurance usually rely upon the advice of real estate professionals, including attorneys or real estate agents, who order the policy on their behalf. Consumers also typically pay any invoice presented at the closing without seeking documentation or further clarification. The Department seeks to protect consumers from unnecessary costs stemming from practices that violate the Insurance Law.

(b) The Department’s investigation of the title insurance industry found that each year millions of dollars are spent by title insurance corporations and title insurance agents, which the industry has termed “marketing costs”, provided to attorneys and other real estate professionals involved in the purchase of title insurance to induce title insurance business, examples of which include meals, entertainment, gifts, vacations, and free classes to select individuals. These expenses are included in the calculation of future rates.

(c) The Department’s investigation of the title insurance industry further found that certain title insurance agents and title insurance corporations mark up ancillary charges excessively.

(d) The Department’s investigation further found that consumers are often encouraged at the closing to pay gratuities and required to pay pick-up fees to title insurance closers. These charges are often not disclosed to the consumer before the closing, and the consumer has no option but to pay the amount charged.

(e) The purpose of this Part is to promote the public welfare by proscribing practices that are not in accordance with Insurance Law section 2303, which provides that insurance rates shall not be excessive, inadequate, or unfairly discriminatory. This Part also provides standards for the title insurance industry with regard to the types of expenses the Superintendent finds appropriate with regard to Insurance Law section 6409(d), which prohibits giving any consideration or valuable thing as an inducement for title insurance business, Insurance Law section 6409(e), which states that title insurance premiums shall reflect the anti-inducement prohibition of Insurance Law section 6409(d) as well as other Insurance Law and Financial

Services Law provisions that authorize the superintendent to regulate market conduct in the title insurance industry.

(f) This Part further protects consumers, pursuant to the authority of Insurance Law sections 2110 and 2119 and article 24 and Financial Services Law sections 301 and 302, by ensuring that the title insurance industry provides valuable products and services to consumers at reasonable rates and fees and does not overcharge consumers or charge improper or excessive fees that constitute engaging in unfair and deceptive acts and practices.

Section 228.1 Definitions.

For purposes of this Part:

(a) *Affiliated third party* means an entity that controls, is controlled by, or is under common control with a title insurance corporation or title insurance agent.

(b) *Ancillary or other discretionary fee* means any fee for services related to a real estate transaction that is not included in the rate of premium approved by the superintendent, and that is not necessary for issuance of a title insurance policy, such as Patriot, bankruptcy, and municipal or departmental searches, or recording fees or charges. Ancillary or other discretionary fee does not include the actual recording fee or other charge imposed by a governmental entity.

(c) *Applicant for insurance or applicant* means:

(1) a person for whom the purchase or refinancing of the property that is the subject of the title insurance policy is financed, to whom a mortgage loan is made, or who owns or is purchasing the property or any interest therein,

(2) any other insured or prospective insured; or

(3) a person who is an attorney-in-fact for a person specified in paragraphs (1) or (2) of this subdivision.

(d) *Bankruptcy search* means a search of federal bankruptcy court filings to determine whether any seller or purchaser/borrower has filed a petition requesting bankruptcy protection.

(e) *Closing* means an event at which an interest in real property is created or transferred or a mortgage is created or refinanced, which is the subject of a title insurance policy.

(f) *Data call* means the annual request for data made, pursuant to Insurance Law section 2315, by a rate service organization or other agency designated by the superintendent as a statistical agent.

(g) *Escrow fee* means a fee paid at a closing to a title insurance corporation or title insurance agent to hold money in a fiduciary capacity, other than the insurance premium, for the purpose of paying or ensuring payment of judgments, liens or other legal obligations on the real property for which the title insurance policy is issued.

(h) *Municipal or departmental search* means a search of various municipal records to determine whether any violation of municipal codes and ordinances exists.

(i) *Out-of-pocket cost* means the actual cost charged by a non-affiliated third party, excluding costs charged directly by a municipality to conduct a search.

(j) *Patriot search* means a search of the specially designated nationals list maintained by the United States Office of Foreign Assets Control to determine whether the name of any seller or purchaser/borrower is on such list.

(k) *Person* means an individual or other entity, including an estate or trust.

(l) *Premium* means the rate charged for a title insurance policy

(m) *Recording fee or charge* means the charge by a county clerk, county register, or other governmental office for recording documents in connection with closing, including deeds, mortgages, satisfactions, powers of attorney, and Uniform Commercial Code forms.

(n)(1) *Residential real property* means:

(i) real property improved by a 1-4 family dwelling, including property used in part, but not entirely, as a professional office or business; and

(ii) an individual condominium or cooperative apartment or unit used as a dwelling;

(2) *Residential real property* does not include:

(i) land that is not improved at the time of the issuance of the title insurance policy;

(ii) property used as a hotel or motel; or

(iii) any property with any kind of mixed use not specified in paragraph (1) of this subdivision.

(o) *Statistical agent* means a rate service organization licensed pursuant to Insurance Law section 2313 or other entity designated by the superintendent as a statistical agent pursuant to Insurance Law section 2315.

(p) *Title insurance agent* shall have the meaning set forth in Insurance Law section 2101(y).

(q) *Title insurance business* means activities described in Insurance Law section 6403(b).

(r) *Title insurance closer* means any person who, for compensation or anything of value, represents a title insurance corporation or title insurance agent at a closing.

(s) *Title insurance corporation* shall have the meaning set forth in Insurance Law section 6401(a).

(t) *Title insurance policy* shall have the meaning set forth in Insurance Law section 6401(b).

Section 228.2 Prohibition on Inducements for Future Title Insurance Business; Permitted Expenses

(a) Pursuant to Insurance Law section 6409(d) as well as other Insurance Law and Financial Services Law provisions that authorize the superintendent to regulate market conduct in the title insurance industry, no title insurance corporation, title insurance agent, or any other person acting for or on behalf of such title insurance corporation or title insurance agent, including any employee or independent contractor thereof, shall offer or make any rebate, directly or indirectly, or pay or give any consideration or valuable thing, to any applicant, or to any person, firm or corporation acting as an agent, representative, attorney or employee of the actual or prospective owner, lessee, mortgagee of the real property or any interest therein, as an inducement for, or as compensation for, any title insurance business, including future title insurance business, and maintaining existing title insurance business, regardless of whether provided as a quid pro quo for specific business.

(b) No title insurance corporation, title insurance agent, or any other person acting for or on behalf of such title insurance corporation or title insurance agent, including any employee or independent contractor thereof, shall provide or offer to provide to any person, firm or corporation acting as an agent, representative, attorney or employee of the actual or prospective owner, lessee, mortgagee of the real property or any interest therein any payment, expense, compensation or benefit associated with the following:

- (1) Meals and beverages unless otherwise authorized under sub-division (c) of this section;
- (2) entertainment, including tickets to sporting events, concerts, shows or artistic performances;
- (3) gifts, including cash, gift cards, gift certificates, or other items with a specific monetary face value;
- (4) outings, including vacations, holidays, golf, ski, fishing, and other sport outings, gambling trips, shopping trips, or trips to recreational areas, including country clubs;
- (5) parties, including cocktail parties and holiday parties, open houses;
- (6) providing assistance with business expenses of another person, including but not limited to rent, employee salaries, advertising, furniture, office supplies, telephones, telecommunications, computers and other electronic devices and business equipment, or automobiles, or leasing, renting, operating, or maintaining any of such items, for use by other than a title insurance corporation or title insurance agent;
- (7) use of premises, unless a fair rental fee is charged that is equal to the market value in the premises' geographical area;
- (8) paying the fees or charges of any professional representing an insured as part of a real estate transaction, such as an attorney, engineer, appraiser, or surveyor, or paying rent or all or any part of the salary or other compensation of any employee or officer of any current or prospective customer; and
- (9) providing or offering to provide non-title services, without a charge that is commensurate with the actual cost thereof.

(c) Subject to subdivision (a) or (b) of this section, the following expenses shall be permissible provided that they are without regard to insured status or conditioned directly or indirectly on the referral of title business, and offered with no expectation of, or obligation imposed upon, to refer, apply for or purchase insurance. In addition, any expenses incurred pursuant to this subsection must be reasonable and customary, and not lavish or excessive:

(1) Advertising or marketing in any publication, or media, at market rates;

(2) Advertising and promotional items of a de minimus value that include a permanently affixed logo of a title insurance agent or title insurance corporation;

(3) Promotional or marketing events including complementary food and beverages that are open to and attended by the general public;

(4) Continuing legal education events including complementary food and beverages that are open to any member of the legal profession;

(5) Complementary attendance offered by a title insurance corporation, title insurance agent as a host of a marketing or promotional event, including food and beverages available to all attendees so long as (a) title insurance business is discussed for a substantial portion of the event including a presentation of title insurance products and services, (b) such events are not offered on a regular basis or as a regular occurrence, and (c) at least twenty-five diverse individuals from different organizations not affiliated with the host attend or were, in good faith, invited to attend in person;

(6) Charitable contributions made by negotiable instrument made payable only to the charitable organization in the name of the title insurance corporation or title insurance agent;

(7) Political contributions.

(d) The items listed in this section are intended as examples of permitted and prohibited practices under Insurance Law 6409(d), and should not be considered as exclusive or exhaustive.

Section 228.3 Expense reporting and rate filings.

(a)(1) A title insurance corporation or title insurance agent shall not include any expenditure that is prohibited or exceeds any expenditure permitted under the Insurance Law or this Part in its expense schedules reporting title expenses for underwriter direct operations; title expenses for underwriter subsidiary agents; underwriter title expenses for underwriting, claims, and agent remittance operations; or title revenue and expense for title insurance agents when responding to a statistical agent's data call. Every title insurance corporation and, except as provided in subdivision (d) of this section, every title insurance agent, in response to the annual data call shall affirm in writing that its expense schedules do not include any expenditure that is prohibited or exceeds any expenditure permitted under the Insurance Law or this Part.

(2) Every title insurance corporation and every title insurance agent, except as provided in subdivision (d) of this section, shall report all expenditures made for meals and beverages, entertainment, gifts, outings, parties, sponsorships, seminars and continuing education, charitable contributions, and political contributions as

separate line items in supplemental expense schedules to the expense schedules submitted annually to the department's statistical agent. The statistical agent shall include the supplemental expense schedule data in the annual statistical report submitted to the superintendent.

(b) A rate service organization or title insurance corporation that submits a rate filing shall not include, for rate setting purposes, any expenditure that is prohibited or exceeds any expenditure permitted under the Insurance Law or this Part.

(c)(1) Except as provided in paragraph (2) of this subsection, a title insurance corporation that submitted expense schedules to the statistical agent, including for allocated expenses, in response to the annual data call for any year of the most recent six-year period preceding the effective date of this Part shall:

(i) affirm in writing to the superintendent, within 120 days of the effective date of this Part, that no expense schedule submitted in response to the annual data call for the most recent six-year period preceding the effective date of this Part contains any expenditure that is not in accordance with this Part, Insurance Law article 23, or is prohibited under Insurance Law section 6409(d);

(ii) present reasonable data with actuarial support for the calculation of title rates that exclude the expenditures prohibited by this Part, Insurance Law article 23 or section 6409(d). This requirement shall be satisfied by the submission of expense schedules for the six-year period preceding the effective date of this Part to the statistical agent within 120 days of the effective date of this Part, in accordance with subdivision (a) of this section, that exclude all expenditures not in accordance with this Part, or prohibited by Insurance Law article 23 or section 6409(d). Within 180 days of the effective date of this Part, the title insurance corporation shall submit to the superintendent a rate filing that reflects the exclusion of expenditures that are not permissible under this Part, along with data and actuarial support. The submission shall include the title insurance corporation's expense schedules and an affirmation that no improper expenditures are included; or

(iii) submit a rate filing to the superintendent, within 180 days of the effective date of this Part, which provides for a uniform five percent reduction in the base rate schedule for each category of policy.

(2) A title insurance corporation shall not be required to comply with paragraph (1) of this subsection if a rate service organization of which the title insurance corporation is a member files, and the title insurance corporation adopts, within 180 days of the effective date of this Part, a rate filing providing for a uniform five percent reduction of the current base rate schedule for each category of policy.

(d)(1) Every title insurance corporation shall provide the annual agent data call to every title insurance agent that it has appointed to act as an agent in this State, with the exception of those title insurance agents on whose behalf the title insurance corporation reports revenue and expenses. Every title insurance agent who receives the agent data call shall complete an expense schedule and a revenue schedule, including premium and all other operating income, for each title insurance corporation that appointed it as an agent and shall timely submit to each such title insurance corporation revenue and expense schedules associated with the issuance of that title insurance corporation's policies. The title insurance agent shall allocate expenses based upon premiums written for each title insurance corporation unless a compelling reason exists to allocate in a different manner. If the title insurance agent allocates expenses on another basis, it shall specify the basis and the reason for doing so. Every title insurance agent whose revenue and expenses are not reported by another entity shall

also prepare and maintain an expense schedule and a revenue schedule setting forth the title insurance agent's total annual revenue and expenses.

(2) A title insurance agent who reports data on behalf of another title insurance agent shall submit to the title insurance corporation, along with its revenue and expense schedules, the names and license numbers of every title insurance agent whose data is included in its reported schedules. A title insurance agent whose revenue and expenses are reported by a title insurance corporation or another title insurance agent by whom such agent is employed or with whom such agent is affiliated shall not submit individual revenue and expense schedules in connection with the data call. A title insurance corporation or title insurance agent shall report to the superintendent the name and license number of any agent on whose behalf it reports expense and revenue data and shall notify the title insurance agent on whose behalf it reports data that it is not required to submit individual revenue and expense schedules.

(3) Every title insurance agent shall maintain all revenue and expense schedules in accordance with the requirements set forth in Part 243 of this Title (Insurance Regulation 152), in a durable medium, for a period of at least six years.

(4) Every title insurance corporation shall collect and compile revenue and expense schedules for its appointed agents and submit a single title insurance agent revenue schedule and a single title insurance agent expense schedule to the statistical agent. The statistical agent shall compile all title insurance agent data into a title insurance agent expense schedule and a title insurance agent revenue schedule, and include such schedules in the annual statistical report.

(5) Every title insurance corporation shall report to the superintendent, within 30 days after the title insurance agent was due to submit the revenue and expense schedules, the name and license number of any appointed title insurance agent that is required to submit the schedules but does not do so.

(e) Every title insurance corporation shall submit to the superintendent, by May 30 of each year, individual annual revenue and expense schedules, which shall include the supplemental expenditure schedules required pursuant to subdivision (a)(2) of this section.

Section 228.4 Allocation of expenses.

A title insurance corporation that reports, on expense schedules submitted pursuant to the annual data call, allocated expenses for expenses incurred outside this state in connection with title insurance business in this state, shall submit to the superintendent, within 30 days of the effective date of this Part, the method of the title insurance corporation's allocation. The title insurance corporation shall not allocate an amount for expenses incurred outside this state that exceeds the percentage of premium written in this state compared to nationwide, for that year. A title insurance corporation shall not allocate to this state any expenditure that is not in accordance with Insurance Law article 23, this Part, or prohibited under Insurance Law section 6409(d).

Section 228.5 Ancillary or other discretionary fee.

(a) A title insurance corporation or title insurance agent shall not charge an applicant in connection with a residential real property closing an ancillary or other discretionary fee more than those amounts set forth herein:

~~(1) For a Patriot search, 200% of the out-of-pocket cost paid for the search. A title insurance corporation or title insurance agent shall not charge a flat fee for a specified number of names searched. If no out-of-pocket cost is paid for the search, then the charge to the applicant shall be no more than 200% of the fair market value of the search as charged by a non-affiliated third party. If an affiliated third party conducts the search, then the search shall not be billed at more than 200% of the lesser of the amount charged by the affiliated third party and the fair market value of the search as charged by a non-affiliated third party; ***~~

~~(2) For a bankruptcy search, 200% of the out-of-pocket cost paid for the search. A title insurance corporation or title insurance agent shall not charge a flat fee for a specified number of names searched. If no out-of-pocket cost is paid for the search, then the charge shall be no more than 200% of the fair market value of the search as charged by a non-affiliated third party. If an affiliated third party conducts the search, then the search shall not be billed at more than 200% of the lesser of the amount charged by the affiliated third party and the fair market value of the search as charged by a non-affiliated third party; ***~~

~~(3) Except as provided in paragraph (4) of this subdivision, for a municipal or departmental search, or any other search that is not included in the premium of the title insurance policy issued, 200% of the out-of-pocket cost. If no out-of-pocket cost is paid for the search, then the charge shall be no more than 200% of the fair market value of the search as charged by a non-affiliated third party in that county. If an affiliated third party conducts the search, then the search shall not be billed at more than 200% of the lesser of the amount charged by the affiliated third party and the fair market value of the search as charged by a non-affiliated third party in that county; ***~~

(4) For a municipal or departmental search that is conducted and billed by a municipality, 100% of the fair market value of the search as charged by a non-affiliated third party in that county plus the charge by the municipality;

(5) For a recording fee or charge, \$25 per document plus the out-of-pocket cost charged by the county clerk, county register, or other governmental office;

(6) For a survey inspection, \$75 plus the out-of-pocket costs charged by the survey inspector. The cost of a survey shall be billed as a pass through;

(7) For overnight mail charges, the out-of-pocket cost; and

(8) For escrow services, \$50 per escrow.

(b) Every title insurance corporation and title insurance agent shall ensure that the amounts charged to like insureds or potential insureds are fair and nondiscriminatory.

(c) If a title insurance corporation or title insurance agent charges a fee that is not specified in subdivision (a) of this section, the fee shall be reasonable.

~~(d)(1) A title insurance corporation or title insurance agent shall be responsible for payment of the title insurance closer and shall prohibit the closer from receiving any compensation directly or indirectly from the applicant and shall advise the applicant that the closer may not accept any payment from or on behalf of the applicant. ***~~

~~(2) If a closer engaged by the title insurance corporation or title insurance agent will be remitting a payoff to a lender following the closing, the title insurance corporation or title insurance agent that engaged the closer shall provide notice to the seller at least three days in advance of the closing of any fee to be charged by the closer for remitting the payoff. Any fee so charged should be reasonable, and sellers should be charged the same amounts for the same services. If the closer is an employee of the title insurance corporation or title insurance agent, no separate fee may be charged. Any fee charged by a closer hired by a title insurance agent shall be treated as a fee of the title insurance agent and shall be subject to Insurance Law section 2119(f) and any regulation thereunder. ***~~

Section 228.6 Filings to demonstrate continued compliance with Insurance Law article 23.

At least once every four years, a rate service organization or a title insurance corporation that has submitted a rate filing that is in use shall submit a filing to the superintendent, supported by data and actuarial analysis, which demonstrates that the current rates continue to meet the standards set forth in Insurance Law section 2303.

*** In accordance with the Appellate Court decision, January 15, 2019.



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

I, Maria T. Vullo, Superintendent of Financial Services, do hereby certify that the foregoing is the addition of new Part 218 (Insurance Regulation 208) of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York signed by me on September 29, 2017 pursuant to the authority granted by Sections 202, 301, and 302 of the Financial Services Law and Sections 301, 2110, 2119, 2303, 2304, 2306, 2315, and 6409 and Articles 23 and 24 of the Insurance Law, to take effect 60 days after publication in the State Register.

Pursuant to the provisions of the State Administrative Procedure Act, prior notice of the proposed rule was published in the State Register on May 3, 2017. No other publication or prior notice is required by statute.

Maria T. Vullo
Superintendent of Financial Services

Date: September 29, 2017