Questions and Answers regarding title agent licensing and regulations

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October 6, 2014

The DFS continues to refine and evolve their responses and the Association continues to advocate for standards that are compatible with established business practice. This document will be updated regularly as we ascertain information from the DFS. This document reflects our current understanding of the DFS position on these questions.

Please refer to the NYSLTA website for the most current version.

Questions and Answers regarding title agent licensing and regulations

***Indicates new information since the last set of questions and answers**

I. Licensure

A. Licensees:

1. Who must obtain a license?

Answer: A business entity or an individual who meets the conditions of Section 2101(y)(1) of the insurance law must become licensed. Further, when a business entity is a licensee, at least one person with a financial or other beneficial interest in the business entity who meets the requirements of an agent, must become a sub-licensee of the business entity. Individuals who are not sub-licensees and who meet the definition of a title agent in Section 2101(y)(1) must obtain individual licenses**.** Additionally, the business entity and an individual licensee must have a Certificate of Appointment naming that entity or individual as an agent filed with the DFS by one or more title insurance corporations in order to conduct business and collect a commission.

It is within the title insurance company's discretion to issue a certificate of appointment for a business entity or an individual licensee.

Individuals who engage in the activities specified in Section 2101(y)(1) must be licensed individually as title agents or appointed as sub-licensees on behalf of business entities. A business entity must be licensed as a title agent if it engages in the activities described in Section

2101(y)(1). A business entity may engage in activities only through licensed individuals, known as sub-licensees. Every business entity must have at least one person appointed as a sub-licensee. At least one sub-licensee with a financial or other beneficial interest in the business entity must be appointed as a sub-licensee. Every sub-licensee must be an officer or director (if the business entity is a corporation) or a partner (if the business entity is a partnership), member (if the business entity is an LLC) or a manager. A sub-licensee may obtain his or her own individual title agent license or may be appointed as a sub-licensee without obtaining an individual license so long as the individual would otherwise meet the requirements to obtain a license. A business entity may in addition employ licensee title agents that are not sub-licensees.

There is no "sub-agent" status. Typically, that term refers to an agent that places business through another agent. Each agent involved in the placement of the business must be licensed if they do the activities set forth in Section 2101(y)(1).

Additionally, any employee of a title agent or title insurer performing the functions in Section 2101(y)(1) may not receive a commission or otherwise be compensated based upon business generated unless licensed as a title agent or listed as a sub-licensee on an entity's license. Therefore, this may result in some people who are currently receiving commissions to no longer be able to receive commissions unless they obtain individual licenses or are listed as a sub-licensee on an entity's license. ***(8/29/14)***

2. Is there ever an instance where an employee of an UNDERWRITER needs to obtain a license?

Answer: Yes, an employee of an underwriter receiving a commission and performing the functions set forth in Section 2101(y)(1) must obtain a license. ***(8/29/14)***

3. Do employees of a title agent or an underwriter, who are earning commissions and are to be issued individual licenses, need to first obtain a Certificate of Appointment from an underwriter?

Answer: Yes, the title insurance company may issue a Certificate of Appointment to the DFS if they deem it appropriate. The employee must be appointed by the insurer no later than 15 days from the date the agency contract is executed or the first insurance application is accepted by the DFS. ***(8/29/14)***

4. Most commissioned salespeople, who are either title agent or title company employees, receive a percentage of the premium as a commission, but do not perform functions that would qualify them to obtain a title agent license. Would this be considered an impermissible "sharing or splitting of the premium"?

Answer: No, this would not be considered an impermissible "sharing or splitting of the premium". See Section 2101(y)(1) of the Insurance Law:

An employee of a title agent or title insurance corporation that is compensated based upon sales does not need to be licensed as a title agent unless the employee:
(A) sells or negotiates the sale of a title insurance policy;
(B) evaluates the insurability of title, based upon the performance or review of a title search;
AND
(C) performs one or more of the following functions:
(i) collects, remits or disburses title insurance premiums, escrows or other related funds;
(ii) prepares, amends, marks up or delivers a title insurance commitment or certificate of title for the purpose of the issuance of a title insurance policy by a title insurance corporation;
(iii) prepares, amends or delivers a title insurance policy on behalf of a title insurance corporation; or
(iv) negotiates the clearance of title exceptions, in connection with the issuance of a title insurance policy. ***(8/29/14)***

5. Do examining counsels need to apply for an agent license?

Answer: Yes, if they engage in activities that require licensing as set forth in Insurance Law Section 2101(y)(1). ***(8/29/14)***

6. On occasion, personnel (NON employees) may be compensated as independent contractors, as such they will be issued 1099's at the end of the year, as opposed to employees who receive W-2's. Must a person be an employee and receive a W-2 form to earn a commission under the agent licensing bill?

*** Answer:** A person does not need to be an employee to receive a commission provided that person is licensed as a title insurance agent. ***(10/6/14)***

7. Does an individual who receives commissions and performs "a), b) and one of c)" but for 3 different entities, have to be licensed? This person is not an employee of any entity, they are a "freelancer" who performs either a, b, or c for numerous entities.

*** Answer:** As we previously advised, the law requires licensing only for a person who engages in (A), (B) and one of the activities in (C) with respect to a particular transaction, however, the department would be concerned with any arrangement that appeared to be structured to evade the insurance law. To the extent that any licensee aided any person in evading the law, such activity may be deemed to be untrustworthy behavior. Further, a licensee who engages unlicensed persons to perform certain functions on behalf of the licensee (assuming such engagement was not structured to evade the licensing requirements) is responsible for the proper performance of such activities. ***(10/6/14)***

8. Is a closer who is paid a commission for his or her sales activities required to be licensed if the closer does not evaluate the insurability of title, an act required for a license to be obtained, under Insurance Law Section 2101(y)(1)(B)?

*** Answer:** Any person who is compensated for sales activities but who does not evaluate the insurability of title does not need to be licensed as a title insurance agent. ***(10/6/14)***

B. Sub-licensees:

1. Who may apply as a sub-licensee?

Answer: The only sub-licensees that this regulatory scheme contemplates are officers, directors, members, managers, and officers of an entity that is applying for a license. At least one sub-licensee must have a financial interest in the entity that seeks a license. The application form for an entity license clearly states that only the aforementioned parties are to be designated as sub-licensees. For entities, this is the DFS's way of identifying who is or may be acting on behalf of a corporate or LLC licensee in performing the duties of a title agent as outlined above. If it is determined that a salesperson or any other person receiving a commission performs the functions set forth in all three categories of Section 2101(y)(1), and that person is not a sub-licensee, he or she must obtain an individual title agent license. ***(8/29/14)***

2. Does each individual sub-licensee need to apply for a license?

Answer: See 3 and 4 below. ***(8/29/14)***

3. Do sub-licensees obtain an actual license?

Answer: No, the sub-licensee is listed on the entity's license. However, the sub-licensee must satisfy the statutory qualification for licensing; the sub-licensees must take the Continuing Education (CE) courses to meet the CE requirement for license renewal. ***(8/29/14)***

4. Two sub-licensees, one of which is an attorney:

Assume a business entity agent re-applying for a license has two sub-licensees, one of whom is a practicing attorney and one who is not. Will the agent's license be re-issued if both of them do not complete their respective CE and CLE (Continuing Legal Education for attorneys) requirements?

Answer: Each sub-licensee must meet his/her individual CE/CLE requirements to qualify or remain qualified as a licensed title agent or to act as sub-licensee. In addition, in order to become licensed the non-attorney would have had to meet the pre-licensing education requirements and pass the examination, unless the non-attorney was otherwise exempt from those requirements. ***(8/29/14)***

5. Sub-licensee attorneys not involved in the operation of the agency:

Assume an agent applying for a license has two or more sub-licensees, all of whom are practicing attorneys. However, the agency is operated by a non-attorney who is not a sub-licensee, and the attorneys take no active role in the operation of the title agency. How are the requirements for the pre-licensing course and exam, as well as the continuing education requirements applied to the non-attorney who is operating the title agency?

Answer: The non-attorney generally must take the initial examination (unless he or she meets one of the exemptions) and must meet the CE requirements. The attorney sub-licensees must remain certified in good standing in New York and, as sub-licensees, are responsible for the actions of the business entity. ***(8/29/14)***

6. Section 2139 (b) refers only to "officer and directors" as sub-licensees – however, the title entity application refers to "qualified officers/directors/partners/members/managers". Can a manager of a department/unit or an office manager be a sub-licensee? This person has no financial or beneficial interest in the entity and is not an officer.

*** Answer:** The Status of the sub-licensee varies for each type of business entity. For example, for a corporation, including a professional corporation, the sub-licensee must be an officer or director. For a partnership, the sub-licensee must be a member, which means a partner.

Although the insurance law does not specifically reference limited liability companies, the department has licensed such companies because their structure closely resembles that of a partnership. The sub-licensee must be a member or manager of the LLC.

The term "Manager" as used here refers to the person who occupies a position in a LLC that is analogous to the position of an officer or director in a corporation. Thus, the manager of a department/unit or an officer manager would not qualify to be a sub-licensee.

A business entity may have multiple sub-licensees. But only one sub-licensee needs to have a financial or other beneficial interest. ***(10/6/14)***

C. Multiple licenses:

1. Can I be a sub-licensee under an entity's license AND a licensee with an individual license?

Answer: Yes, a person can be a sub-licensee under an entity license and also have an individual license. A sub-licensee MAY have an individual license, but does not have to. However, if an individual does not have an individual license, he/she may act only on behalf of the business entity that has included him/her as sub-licensee. ***(8/29/14)***

2. Can an employee be a sub-licensee of more than one entity?

*** Answer:** An individual may be the sub-licensee of more than one business entity provided that individual qualifies to be a sub-licensee for each business entity. An ordinary employee (without more), however, may not be a sub-licensee, as noted above. ***(10/6/14)***

II. Certificates of Appointment:

A. Must a Certificate of Appointment be filed by the underwriter before the agent license application is approved?

Answer: A title agent application may be approved before a Certificate of Appointment is filed with the DFS. The title agent, however, may not engage in activities as a title agent for an insurer unless the notice of appointment is filed with the Superintendent within 15 days from the date the agency contract is executed or the first insurance application is accepted. ***(8/29/14)***

B. Does a sub-licensee need a Certificate of Appointment from an underwriter?

Answer: No, however, the entity under which they are listed as a sub-licensee must have a Certificate of Appointment naming them as an agent filed with the DFS by one or more title insurance corporations. An agent may do business only on behalf of a title insurer that has appointed that agent. ***(8/29/14)***

III. Application, pre-licensing examination and Continuing Education:

A. Is there a waiver form for a practicing attorney or a person with more than 5 years' experience in the title industry?

Answer: No, exempt persons are only exempt from the pre-licensing course and examination requirements. They must comply with all other application and renewal procedures. The application form contains a box to check and requests a Certificate of Good Standing for an attorney. The DFS has indicated they will accept a Certificate of Good Standing issued by the appropriate Appellate Divisions to satisfy Section 2139(g)(3) (the statute mistakenly states the Certificate of Good Standing be issued by the Office of Court Administration). This "grandfathering" provision set forth in Section 2139(g) (1) applies to applications submitted prior to September 27, 2015 (one year from the date that the law goes into effect). ***(8/29/14)***

B. Who are the permitted affiants on the Statement of Experience for:

i) an LLC which has a single member LLC;
ii) a corporation that has a sole shareholder (and that shareholder is the only officer);
iii) for the owner(s) of an entity;
iv) if there is more than one owner, can another owner (member, shareholder, partner) be the affiant? Technically they have no supervisor.

Answer: Generally speaking, a subordinate employee should not be completing the Statement of Experience. Another owner, if sufficiently knowledgeable to answer the questions truthfully, may do so. In addition, it may be completed by a knowledgeable person at a title insurance corporation. It should be noted that more than one person can submit a statement if that person's

knowledge only encompasses a portion of the 5-year period as long as the entire period is vouched for in total. ***(8/29/14)***

C. Can an employer, who has not worked with a person who holds or is applying as an individual licensee or a sub-licensee for the past 5 years, but has personal knowledge that the person has been in the industry for at least the last 5 years sign the Statement of Experience?

Answer: The employer must be sufficiently knowledgeable to answer the questions truthfully. ***(8/29/14)***

***** Every applicant seeking to become licensed utilizing the five-year experience provision must demonstrate that he or she has five years of continuous experience. If a person was employed by a particular employer for less than five years, then that employer may give a statement of experience covering the period during which the applicant was employed by that employer but the applicant will still need to obtain an additional statement(s) from one or more other employers that collectively demonstrate that the applicant has the five years of experience.

The Department was informed that some applicants were not able to obtain statements of experience from employers for any number of reasons, including because they were self-employed or the employer no longer exists. In many cases, those applicants have obtained statements from the title insurance corporations for which they have done business. If an applicant cannot obtain statements from such title insurance corporations, an employer who did not actually employ the applicant for the entire period may sign a statement of experience for the applicant provided the employer is sufficiently knowledgeable to answer the questions truthfully. However, the applicant must submit an explanation as to why he or she cannot obtain a statement from the title insurance corporation or the other employer as well as a resume and the employer must explain the basis for making the statement; merely stating that he/she has personal knowledge is not sufficient for the Department to evaluate and verify whether the person does in fact have such knowledge. ***(Clarified on 10/10/14)***

D. Will all business entity sub-licensees be required to have fully completed their statutory Continuing Education credits by the time they have to renew their licenses prior to April 30, 2015?

Answer: No, there is no CE requirement at the time of the first renewal in 2015. Continuing Education is required upon renewal or relicensing ***IF*** the license has been in effect for 2 full years. Therefore, any title agent licenses expiring in 2015 will not require continuing education to renew because no title agent license will have been in effect for 2 years. ***(8/29/14)***

E. Who is providing the Pre-Licensing Classes?

Answer: As of now the only currently approved provider of pre-licensing education for title insurance is http://nyreii.com/insurance.html. The NYSLTA plans on applying to be an approved provider in the near future. ***(8/29/14)***

F. How do we register to take the examination?

Answer: The administrator of the examination can be found on the license application. To register and reserve an examination date, contact Prometric, Inc. at 1-800-324-7147 or online at http://www.prometric.com/newyork/ins. ***(8/29/14)***

IV. Fees:

A. Are licensing fees required to be paid for sub-licensees?

*** Answer:** Yes, the fee is required to be paid for each sub-licensee. Please note: "Business Entity" agents and their sub-licensees will each be charged a $40.00 fee to apply for licenses, which will expire June 30, 2015. They will have to submit a renewal application prior to that date in order to remain licensed. For "Individual" (i.e. natural persons) agents, their initial licensing fees will depend on their birthdays- "Individual" agent licenses expire on the birthday of the agent. An Individual agent can pay $40.00 for any license lasting 1 year or less, but has to pay $80.00 for any license lasting over one year. Most Individual agents who have a birthday in an even numbered year will therefore have to pay $80.00 for their initial licenses.

All license renewals, for both agents and sub-licensees, will cost $80.00 and last two years. If a renewal application is submitted less than 60 days prior to expiration of the license, a late fee of $10.00 is required. All "Business Entity" agents will have to file renewal applications every April 30 of odd-numbered years to avoid late charges. ***(10/6/14)***

V. Deadline for Application Submission:

A. When is the deadline for title agents to file the application for a license to continue doing business after September 27, 2014? There is some confusion among members as to whether the deadline is September 27, 2014 or January 1, 2015?

Answer: In order for the agent to continue doing business after January 1, 2015 while the application is pending, the application must be received by the Superintendent no later than January 1, 2015. We strongly encourage license applications to be submitted as soon as possible to facilitate the process. No one who submits an application after January 1, 2015 may engage in title agent activities unless a license is issued. ***(8/29/14)***

VI. Commissions:

A. Is it permissible to share commissions with an agent having a home state outside of NY if so, must they be licensed in NY?

*** Answer:** Commissions for acting as a title insurance agent may be shared only with another New York licensed title insurance agent, whether or not the agent is in New York. ***(10/6/14)***

B. Can 2 New York licensed title agents share a premium? If so, does 2101 (y)1 (b) and (c) have to be performed by both agents to split the premium, or can one agent merely refer work and still receive a portion of the premium? The question rephrased is; if ABC title agency refers a deal to XYZ title agent (say because ABC does not have the expertise to do insure the transaction). So XYZ performs all the functions noted in 2101 Y and closes the transaction and issues the policy on behalf of the title company; can XYZ pay any % of the premium to ABC, a NY Licensed title agent for referral of the deal?

*** Answer:** Preliminarily, to clarify, under the insurance law, "premium" is the amount charged by the insurer for the insurance. Agents may not share premium since only an insurer is entitled to retain premium. You described a practice whereby the title insurance agent retains a portion of the premium and remits the balance to the insurer. But technically, the agent is merely retaining its commission or other compensation, not premium. This is what is meant in the regulation by an account current system.

With respect to compensation paid for acting as a title insurance agent, the insurance law does not prohibit a licensed title insurance agent from sharing commissions with another licensed title insurance agent, except as prohibited in section 2128. A title insurance agent would nonetheless be subject to any other restriction or limitation, under RESPA or any other applicable laws. ***(10/6/14)***

VII. Disclosure:

A. Below is a proposed sample disclosure as required by §2119(f) of the Insurance Law and 11 NYCRR §35.6(a) of the regulations. Can you kindly confirm you have no objection to the proposed disclosure.

……

NOTICE: Title costs for this transaction may include charges for certain services not specified in the state approved Rate Manual. The issuance of the title policy is not dependent upon the performance of such additional ancillary and/or discretionary services.

The Undersigned acknowledges that the following charges are ancillary and/or discretionary to the issuance of the title insurance policy in accordance with §2119(f) of the Insurance Law and 11 NYCRR §35.6(a). The remaining charges shown on the attached invoice are non-discretionary, including, but not limited to title premiums and endorsements.

CHARGE DESCRIPTION

Municipal Searches + $

Patriot Search + $ per name

PREP/ACRIS + $ .00

Recording service charge + $ per instrument

TOTALS:

Reviewed and agreed to: _____ Seller

Reviewed and agreed to: _____ Purchaser

…….

*** Answer:** There may be some confusion out there as to the purpose of the 35.6 notice as opposed to the 2119 agreement, which may have been fueled by our reference to 2119 in 35.6 in the proposed reg (but which has been deleted in the emergency.)

It has long been the opinion of this Department that, pursuant to section 2119, agents of insurers may not charge service fees for services related to insurance placement and that only insurance brokers may do so. Accordingly, we amended Section 2119 to provide a limited exception so that a title insurance agent may receive compensation for ancillary services not encompassed in the rate of premium approved by the Superintendent, provided that the agent obtains the written signed agreement specifying the amount or extent of compensation as well as the total amount or extent of the compensation to be charged. Section 2119 is not a disclosure requirement; it is a requirement that there may be a written agreement. The timing of the 2119 agreement is not specified in the law and the agreement may be entered into at any time prior to the charging for the services. For practical reasons, insurance brokers usually obtain the agreement before providing the services since insureds may balk at signing the agreement afterwards.

However, the 35.6 notice is just a disclosure, which must be provided at the closing, and must list **all** of the actual fees, including the discretionary or ancillary fees, as well as the premium. Whereas section 2119(f) only applies to title insurance agents and not insurers, the 35.6 notice must be provided by the insurer if there is no title agent used. ***(10/6/14)***

B. We have a question on DFS's interpretation and intention concerning the language of § 30.3(g) of the regulations.

Section 30.3(g) incorporates into the GFE disclosure under Ins. Law § 2113(b) a *"description of the title insurance agent's role in the title insurance transaction and provide the information required by subdivision (b) of this section."* Are the enumerated remaining four disclosures of § 30.3(b) mandatory under new sub-paragraph (g) of § 30.3 as a part of the GFE disclosure under NY Ins. Law § 2113(b) notwithstanding the language of existing § 30.3(b) which states *"[i]f the purchaser* [who we read to mean *"applicant"* as defined in § 35.1] *requests more information about the producer's compensation . . .[?]"*

*** Answer:** That is correct-the disclosures are mandatory. Under Insurance Regulation 194 for insurance producers, the rule generally is that the producer only needs to disclose the producer's role and the other information under section 30.3(a), but is only required to disclose the information required by section 30.3(b) if the purchaser (applicant) requests additional information about the actual compensation. However, section 2113(a) makes the compensation disclosure mandatory for title agents. Since Insurance Regulation 194 would automatically apply to title insurance agents because they are insurance producers, we had to modify the requirements of Section 30.3 to be consistent with section 2113(a). Because we believe the disclosures under section 30.3(b) are critical when providing information about the actual compensation, the amendment makes all of the disclosures under 30.3(b) mandatory for title insurance agents. To the extent that the answer is "none" with respect to any of the items—such as whether there were any alternative quotes, it would suffice to just indicate that. ***(10/6/14)***

C. Section 2113(b) recites certain fees that are expected to be disclosed to the applicant, among which are listed "filing fees" and "recording charges". In "Zone 2" counties, the title insurance provider typically collects those fees. However, in "Zone 1" counties (north and west of Albany), the title insurance provider does NOT collect those fees- they are collected by the attorneys for the parties that pay those fees, and those attorneys then issue checks made payable directly to the appropriate County Clerk. Typically, the abstract company that issued the title search (NOT the title insurance) will then record the papers using those checks.

Will "Zone 1" agents now have to recite those fees on our Good Faith Estimates, even though we don't collect or use those fees?

*** Answer:** The title insurance agent must provide a good faith estimate of all fees that may be incurred by the applicant, regardless of whether the agent collects or uses the fees. The purpose of section 2113 is to provide the applicant with as much information as possible about the financial costs that the applicant will incur early in the process, including all filing fees, recording charges and closing costs, and any other ancillary or discretionary charges to be incurred, as well as the compensation to be paid to the title insurance agent. ***(10/6/14)***

* A further response regarding question 3:

"The abstractor usually does **not** charge a separate fee for recording in Zone 1 counties- the closing search of the seller's names and recording of papers are included in the initial title search charge. The seller's attorney usually chooses the abstract company, and the seller pays for the search.

In question 3, does the abstractor charge. A fee for recording and, if so, who engages the abstractor? If by abstractor you are referring to the title agent – the title agent charges for its search and perhaps its premium however, the title agent does not attend the closing or record the documents and therefore does not technically "collect" the recording fees. ***(10/6/14)***

VIII. Miscellaneous:

A. The DFS has stated "For non-sub-licensee insurer or agent employees who hold individual licenses, the insurer must appoint each such employee as an agent and submit the certification". Does this mean that said individual licensees will be subject to the Data Call?

Answer: For licensees that are employed by a business entity, the business entity will be responsible for the data call. The DFS will issue guidance clarifying this issue.) ***(8/29/14)***

B. Are there words I am not permitted to use in my company name?

Answer: Pursuant to Section 204(f) of the LLC Law and Section 301(a)(5)(b) of the Business Corporation Law (BCL), the use of certain words in your company name is restricted. These names are NOT necessarily prohibited; however, an additional approval is required from the Department of Financial Services (DFS) if your company name includes one of the words listed at this link: **http://www.dos.ny.gov/corps/restricted_words.html**. You may have obtained this approval when your company was formed. If so, attach a copy of said written approval with your application. ***(8/29/14)***

C. How will we be advised of the interpretation of the licensing statute and the regulations?

Answer: To the extent necessary, the DFS will use its discretion to select the method of notifying its licensees about its requirements, including the possible use of a circular letter, website posting or other method. Information is currently available on the DFS website (http://www.dfs.ny.gov/insurance/lic_title.htm) with respect to the licensing process. ***(8/29/14)***

D. Under Insurance Law Section 2101(y) the term "title insurance agent" does not include a regularly salaried officer or employee unless the officer or employee receives a

commission and performs acts set forth in Section 2101(y)(1). Does the term "employee" encompass an employee who is incorporated and whose company is paid for services he or she renders by the title insurance corporation or title insurance agent?

*** Answer:** The term “employee” does not encompass an employee who is incorporated and whose company is paid for services by the title insurance corporation or title insurance agent. An employee must be an individual. If a title insurance corporation or title insurance agent enters into a business relationship with a business entity, and the business entity engages in all of the functions of a title insurance agent through one or more of its employees, that business entity would need to be licensed as a title insurance agent. ***(10/6/14)***