

**RPPTL WHITE PAPER**  
**PROPOSED UNLAWFUL INDUCEMENT RULE**  
**RULE 69B-210.010, FLORIDA ADMINISTRATIVE CODE**

**I. SUMMARY**

On August 20, 2010, the Department of Financial Regulation, Division of Insurance Agents and Agency Services released a draft of proposed rule 69B-210.010 (the “Draft Rule”) which was designed to implement those portions of the Florida Insurance Code dealing with unfair methods of competition and unfair or deceptive acts and practices under §626.9521 and § 626.9541, Fla. Stat.

The Draft Rule is to be applauded for its efforts to clarify and provide specific examples of some prohibited “payments” and other inducements made to those in a position to refer title insurance business. However, the Draft Rule can be read to affect the employer-employee relationship and the relationship between a law firm and its title insurance underwriters and to create numerous ambiguities and problems, including the regulation of attorneys and the attorney-client relationship. Thus, instead of the laudatory intent to reduce uncertainty as to permitted marketing techniques, the Draft Rule increases uncertainty as to the propriety of other business relationships.

Note: The “attorney-exemption” in F.S. §626.8417(4) applies only to the license and appointment of title agents. As such, Florida Administrative Regulations applicable to title insurance are generally considered applicable to attorney-agents; the regulators have traditionally deferred to the Florida Bar to deal with any violations.

The Section endorses the concepts behind the Draft Rule, but finds the current draft overly broad and ambiguous and in need of amendments for clarity and to avoid over-reaching application. The Section proposes to offer technical assistance to the Department to draft a more appropriate rule.

**II. CURRENT SITUATION**

Both federal and state law include express prohibitions on paying certain types of “inducements” for the referral of title insurance business. These statutory prohibitions are applicable to title agents, agencies, title insurers and attorney-agents.

**A. Federal RESPA**

The pertinent portion of the Real Estate Settlement Procedures Act (codified at 12 U.S.C. sec. 2607) (“RESPA”) provides:

“No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.”

And that

“No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.”

RESPA includes express exceptions for payments of fees to attorneys for services actually rendered and for payments to any person of a “bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.”

#### B. Florida Statute

The Florida statutory prohibitions on providing inducements for the referral of title insurance business are similar, but less clear. The pertinent portions of §626.9541(h)3 provide:

“No title insurer, or any member, employee, attorney, agent, or agency thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducement to title insurance, or after such insurance has been effected, any rebate or abatement of the premium or any other charge or fee, or provide any special favor or advantage, or any monetary consideration or inducement whatever.”

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“No insured named in a policy, or any other person directly or indirectly connected with the transaction involving the issuance of such policy, including, but not limited to, any mortgage broker, real estate broker, builder, or attorney, any employee, agent, agency, or representative thereof, or any other person whatsoever, shall knowingly receive or accept, directly or indirectly, any rebate or abatement of any portion of the title insurance premium or of any other charge or fee or any monetary consideration or inducement whatsoever...”

and

“in no event shall any portion of the attorney’s fee, any portion of the premium . . . , any agent charge or fee, or any other monetary

consideration or inducement be paid directly or indirectly for the referral of title insurance business.”

Other portions of the Florida statute include express authority for an attorney to abate their professional fees and for “Butler” rebates.

### C. Regulatory Need.

In part due to less than adequate enforcement resources, various subterfuges have become commonplace for circumventing the spirit of the statute. Years ago, the regulator circulated a memorandum outlining certain practices it considered violations. While that memorandum was very informative, not being embodied in a formal rule, the Department had concerns as to whether those interpretations could be effectively enforced against a licensee. That led to an attempt to codify specific activities which are considered to be violations of the Florida statute into the Draft Rule.

## **III. EFFECT OF DRAFT RULE**

The Draft Rule attempts to provide greater clarity to the state statutes and to provide specific examples of permitted and prohibited activities. This is to be desired and encouraged. However, the Draft Rule goes well beyond addressing kick-backs for the referral of title business, and is so broadly phrased that it potentially impacts three separate relationships of concern to attorney-agents:

**1. The Relationship between an Attorney-Agent’s Firm and its “True” Employees.** The operative definition of “Interested Party” is so broad as to include all of a law firm’s staff. If applied literally, the Draft Rule would place restrictions on providing cell phones, copiers, and other equipment for the use of staff or even paying of salaries. It certainly would prohibit most types of incentive compensation to staff persons involved in title and closing functions.

**2. The Relationship between Title Insurers and Their Agents.** Traditionally title insurers have provided many types of support to their attorney-agents and their staff. This has included reference materials (Fund Title Notes, bulletins), marketing materials, training and education programs, business support, software and equipment, discounts on various goods and services and any number of other things intended both to generate brand loyalty and to enable the agent to do a better, more professional job. The Draft Rule would prohibit many of these functions.

**3. Affiliated Businesses.** More than 15 years ago, HUD released “safe harbor” regulations on creating a legally compliant affiliated business. In the wake of those rules, hundreds of title agencies (and even some title insurers) have been created as affiliates of builders, developers and Realtors®. While there may be good public policy reasons for regulating or even proscribing affiliated business relationships, the issues are sufficiently complex as to merit a more comprehensive review and specific regulation as opposed to the very poorly phrased blanket prohibition in the Draft Rule.

Private discussions with senior staff at the Department suggest that the first two categories of impact, on relationships, may be unintended drafting errors, and the Section proposes to provide technical assistance in that regard. In addition to the over-broad application of the Draft Rule to the above three categories, there are a host of technical drafting issues to be addressed.

#### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

No fiscal impact on State or Local Governments is anticipated.

#### **V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The Section's proposed stance, if accepted, will have a positive economic impact. By providing more certainty, businesses reduce the expense of regulatory compliance, especially when the Draft Rule creates or extends uncertainty.

#### **VI. CONSTITUTIONAL ISSUES**

It is anticipated that regulation of attorney's in the proposed manner will infringe upon the Judicial Branch's exclusive jurisdiction, in violation of Florida Constitution Article V, Section 15

#### **VII. OTHER INTERESTED PARTIES**

Department of Financial Regulation, Division of Insurance Agents and Agency Services  
Florida Land Title Association  
Florida Association of Realtors  
Title Insurance Companies