REAL PROPERTY, PROBATE AND TRUST LAW SECTION
OF THE FLORIDA BAR
RECOMMENDATIONS TO THE
TITLE INSURANCE STUDY ADVISORY COUNCIL

The Florida Bar's Real Property, Probate and Trust Law Section hereby presents the following recommendations to the Title Insurance Study Advisory Council in an effort to assist the Council in recommending legislation to benefit and protect consumers in the State of Florida:

1. Data Collection. Data collection is necessary to protect the public in establishing title insurance rates. Unlike casualty insurance, title insurance premiums include compensation for a number of activities in addition to funding a reserve to pay claims. Those activities, which are referenced as primary title services, are described in Section 627.7711(1)(b) Fla. Stat. Primary title services are routinely performed by thousands of title insurance agents across Florida. Information regarding the costs of performing primary title services is necessary in connection with any evaluation of the rates to be charged for title insurance.

A systematic collection of providers' defined costs incurred in providing primary title services is critical to permit a regulator to evaluate data provided by title agents and insurers supporting requested rates. The data collection must be effective and efficient to avoid undue increases in the operating costs borne by the thousands of small businesses providing primary title services, especially in areas of the state where smaller agencies or law firms are the only providers of real estate settlement services. Several guidelines may be identified to assure the quality of the information collected from title insurance agents and to assure that such information is collected in a cost efficient manner.

Therefore, we recommend that:

a. Data reporting should be an annual requirement of all insurers and licensed title insurance agencies.

b. There should be an expeditious and workable system developed by the regulator to gather data necessary for setting rates. With regard to data for years prior to the adoption of rules and one year thereafter, the cost of retroactively compiling data can be prohibitive and data should be limited to information readily available from records already maintained by agents for business management and tax reporting purposes.

c. Data for years beginning one or more years after the adoption of rules may be more inclusive and more detailed but should be designed to be reasonably trackable by modified closing software.

d. The statute should include an express prohibition on the use of data call information for enforcement actions.

e. Because of the difficulty of separating the costs and revenues attributable to legal services from those attributable to title services within a law office, the attorney-client privilege, and uncertainty about separation of powers issues as concerns the Florida Supreme Court's exclusive authority to regulate attorneys, the data call statute should expressly exclude attorney-agents.

f. The statute should clarify that rates may properly be based on data submitted only by title agencies and insurers and less than complete response rates.

g. The responsible regulatory agency should be delegated rule making authority with respect to data calls and enforcing compliance.

2. <u>Establishing Rates</u>. The current promulgated rate mechanism continues to be the most suitable for a state like Florida, in which real estate activities in their various forms constitute a significant portion of the economy. The primary purpose of an insurance regulator is to assure consumers that insurance companies will be able to pay claims on the policies of the insureds. Much of the underwriting and risk management functions of title insurers in Florida are provided by a network of thousands of independent agents. It is incumbent upon a regulator of title insurance to assure consumers that, in addition to assuring that title insurers have adequate reserves to pay claims, the network of title agents is appropriately compensated to permit the primary title services to be properly discharged, avoiding the time and lost productivity involved with any insurance claim.

The promulgated rate permits a regulator to independently set rates that will be both adequate and fair to consumers. Promulgated rates permit the regulator to responsibly set rates across all markets and avoid subsidizing one market at the expense of another. The promulgated rate model acknowledges that the thousands of title insurance agents performing primary title services are often agents for more than one underwriter. Competitive concerns will prevent title agents from providing the costs of underwriting and risk management activities to title insurers on a consistent basis, thus denying title insurers the ability to adequately identify the true costs of title insurance necessary to employ other title insurance rating models. The promulgated rate model empowers a regulator with the ability to obtain data in a systematic and consistent manner from title agents so it may independently determine the costs associated with the provision of title insurance and establish a rate which is appropriate for title insurers, title agents and consumers. Florida, with its reliance on the thousands of title agents for critical underwriting and risk management functions, requires the promulgated rate model to protect consumers from the risks associated with rates established without adequate information or direction from the regulator.

A promulgated rate mechanism avoids the destructive rate competition evident in other states and provides a regulatory mechanism for maintaining the balance between the public policy in favor of reasonable rates for consumers and the public policy of protecting the solvency of the insurer and the agencies providing necessary services. In non-promulgated rate states (and recently in New Mexico), we have seen an upward pressure on rates over the last year. A single industry wide promulgated rate requires less regulatory resources than would individual rate filings by each underwriter and each agent. The regulator does not currently have, and is unlikely in the future to add, the additional resources necessary to evaluate individual rate filings by each underwriter and each agent.

Therefore, we recommend that:

a. The concept of establishing rates adequate to assure the maintenance of an efficient title agent network and delivery system, as currently embodied in §627.782 (2)(b), should be continued.

b. The established rates should provide for a reasonable margin for underwriting profit and contingencies, including contingent liabilities under s. 627.7865, sufficient to allow title insurers, agents, and agencies to earn a rate of return on their capital that will attract and retain adequate capital investment in the title insurance business and maintain an efficient title insurance delivery system.

c. The promulgated rates in Florida are in need of review currently and should be reviewed on a regular basis in the future.

3. Rebating of Premiums. Rebates of promulgated premiums tend to frustrate the purpose of regulation in the first place and make the job of the regulator even harder. Especially in economic downturns when the role of the title agent in the closing and the issuance of the policy is even more critical, reducing the premium share of the agent is inimical to protecting the consumer by assuring the solvency of the underwriter. While this argument did not carry the day in the decision by the Florida Supreme Court in Chicago Title vs. Butler (Fla. 2000), recent events that have occurred since the decision was rendered show that the legislature must address the insurer solvency issue by re-examining the role that compensating title agents has in assuring insurer solvency.

Therefore, we recommend that: No rebates of title premium should be permitted. Since the rationale underlying a regulated rate system is to preserve an appropriate balance between the solvency of the industry and consumer pricing, any deviation from a properly established rate is antithetical to that goal.

4. Role of Title Agents. The Council has explored in great detail the various functions performed by title insurance agents in the delivery of a title insurance policy and the closing of a real estate transaction and how those functions differ dramatically from the functions of an agent issuing property and casualty insurance or life insurance. The functions regarding the determination of insurability and the clearing of title objections directly impact the ultimate liability under the issued policies and the underwriter's ultimate claims loss experiences. The agent's compliance with written closing instructions and other matters addressed in a closing protection letter also directly impact an underwriter's claims experience. The simple reality is that all of those functions are covered by the premium paid for the policy and, unless agents are appropriately compensated for the work involved in performing those functions, quality will suffer and claims will increase.

Therefore, we recommend that: The critical role played and services provided by title agents in the process of closing a real estate transaction, incurring liability under an insured closing protection letter and issuing a title insurance commitment and policy should be recognized as substantively different than the role of agents involved with other types of insurance. Agents should continue to be compensated for these critical roles and liability both with a portion of the premium and payment for their closing services.

5. Conclusion of Closing Services. Consumers have a right to expect policies to be delivered on a timely basis and the prompt disbursement of closing funds. Although it is understandable and conceivable that it is not possible to issue a policy within 24 hours of the closing, it is unacceptable to have policies that still haven't been issued and delivered several months after the closing. Failure to promptly disburse funds may result in extra fees being charged and may delay subsequent closings. Lastly, without enforcement of these violations, those practices will not change. Currently, it appears that many agents (especially in light of the many recent defalcations) view the department as "all bark and no bite".

Therefore, we recommend: Legislation that sets statutory time limits for delivery of the final policy, the payment of premiums to the underwriter, and the disbursement of funds (with an exception for longer term escrows subject to a written escrow agreement) and authorize regulatory enforcement of violations.

6. Single Regulator. Title insurance agents play a very substantive role in the underwriting and elimination of risk in the issuance of title insurance. The agent role overlaps significantly with the roles and duties of the title insurance underwriter such that common regulation and uniform positions and interpretations of law and policy are extremely important. It makes little practical and economic sense to maintain two regulatory infrastructures to supervise the same core functions, especially when the

duplication results in inconsistent regulation, confusion among the regulated parties and business inefficiencies.

A deep understanding of the industry and business practices is required. One regulatory body will be more capable of understanding not just the operational intricacies of title insurance but how a failure of those intricacies will impact the solvency and stability of title insurance agents and title insurance companies

Therefore, we recommend that: Florida should have a single regulator with rule-making authority governing both agents and underwriters, supervised by a person who specifically has knowledge of and experience within title insurance.

7. <u>Authorizing of Title Insurance Forms</u>. Title insurance protects the real property ownership interests of Florida consumers and permits Florida consumers to gain access to lenders across the country by providing those lenders with certainty and protection. Access to a wide pool of lenders reduces the cost of borrowing to consumers. Title insurance reduces total transaction costs to the consumer by adding certainty and protection that allows lenders to reduce interest rates by assuming certain risks that title insurers are in a position to manage. The nature and scope of the risks may change as lending markets change. Consumers in Florida will benefit from a timely and effective system to promptly review proposed title insurance coverages for both consumers and lenders.

The American Land Title Association (ALTA) is a national trade organization comprised of title insurers and title insurance agents. ALTA also develops nationally standardized forms and works closely with consumer groups, lenders and title insurance regulators across the country to identify necessary coverages that can be responsibly provided. National standardization of title insurance policy forms not only permits acceptance of residential mortgages in secondary markets, such as the Federal National Mortgage Association (Fannie Mae), but it also lowers the cost to consumers. A procedure to timely consider new or additional title insurance coverages, particularly coverages available in a majority of other states, will benefit Florida consumers.

Therefore, we recommend that:

a. There should be a specified time period for the approval or rejection of proposed title insurance forms, after which such forms are deemed approved for issuance by all licensed Florida title insurers.

b. Recognizing that real estate practices have become national in scope, ALTA approved forms should come with a presumption in favor of approval and a reduced time period for approval or rejection.

c. The availability of prior approved forms after the approval of new versions of the same form is confusing to the public and the industry. When a new version of a form is approved, the old version should be automatically withdrawn six months later.

d. Where a new form is replacing a substantively similar existing form which has a promulgated rate, the promulgated rate for the similar form should be applied to the new form until the next rate review.

8. <u>Florida Statutes</u>. The Florida Insurance Code has grown and evolved incrementally over the years as part of the legislative process. Statutes regarding all types of insurance are intermingled within the Insurance Code and spread across various chapters. In an unsuccessful attempt to eliminate this

confusion, §627.776 purports to list the provisions of the Insurance Code applicable to title insurance, and creates a separate list of those provisions which are not applicable. Unfortunately, significant portions of the Insurance Code are not referenced in either category. Rather than clarifying a confused statutory framework, §627.776 compounds the confusion, leading to uncertainty within the industry and among regulators as to the intent of the Legislature.

Therefore, we recommend that: All statutes related to the provision of title insurance in Florida should be consolidated into a single stand-alone chapter within Florida Statutes. The current legislative structure, in which title insurance is mixed within the overall Insurance Code is confusing, with some provisions expressly applicable, some expressly inapplicable, and a great many where the applicability is uncertain. Care should be exercised in the consolidation process to remove all references to title insurance from other provisions of the Insurance Code.

9. <u>Continuing Education and Licensure</u>.

We recommend that:

a. Recognizing that the interests of sellers, purchasers and lenders can best be served by title agents with knowledge of Florida real estate law and its unique aspects, such as Constitutional homestead, it is a necessary precondition to title insurance functions that:

   i. The holding of a title insurance license in another state, should not be a sufficient condition for acquiring a Florida license. The same Florida specific examination should be required of all applicants.

   ii. Out of state agents should be required to meet their continuing education requirements with Florida specific education.

b. Because of the substantial differences between title insurance and other types of insurance, a title insurance agent should not be permitted to meet continuing education requirements through education designed for life, auto, property and casualty or other unrelated types of insurance.

c. The statutes governing continuing title insurance education should permit the office or department to outsource their education review and approval functions.

d. All courses approved by The Florida Bar for real property certification credit and/or ethics credits should automatically be recognized for title insurance continuing education credit.

10. <u>Illegal Inducements</u>. Illegal inducements in any industry increase the expenses of the service provider, which in turn increase consumers' costs. Illegal inducements cause a "trusted advisor" to push a consumer to a particular service provider, not because of the level of service performed or the consumer's best interests, but because the "trusted advisor" has received an additional form of compensation or incentive for sending the business to a specific provider. Illegal inducements harm competition in the marketplace, which is detrimental to consumers. This law in Florida is particularly important because RESPA enforcement by state officials is authorized only if there is a specific state statute authorizing the state official to enforce RESPA. Florida does not have this type of statute.

Therefore, we recommend that:

The law prohibiting the payment of illegal inducements should be strengthened to:

a. Clarify that the receipt as well as the payment of an illegal inducement is a violation.
b. Allow a regulatory body having jurisdiction over a licensed participant in the real estate industry to assess penalties for the violation of RESPA regulations.

11. <u>Rate Simplification and Clarification</u>. While this can be accomplished solely through rule changes, this is a significant industry problem and thus suitable for consideration by the Council. The current rate structure in Florida makes it difficult for lenders to provide an accurate estimate of title charges for the Good Faith Estimate, which is even more important under the new HUD regulations.

Therefore, we recommend that: Rates be simplified to allow consumers to easily compare rates and charges so that they can get the best deal.

12. <u>Clarify the Results of HB 111</u>. In light of the changes to RESPA, it is very important that the interpretation and application of HB-111 not only is consistent with RESPA, but also clearly sets forth the guidelines for agents. The HUD-1 Settlement Statement is one of the most integral parts of the closing. It is very important that the charges are set forth clearly and can be easily explained to customers. A law that conflicts with not only RESPA, but also with the current rate structure, is counterproductive for several reasons. First, a law which is difficult to apply will not benefit consumers because the various agencies and underwriters may reflect charges differently on the HUD (thus, the initial goal of comparison shopping for customers would be frustrated). Second, creating a law that discourages the needs of servicemen and women undermines the "goal" of promoting consumer-friendly title insurance practices. Third, a law that results in inconsistencies in application and enforcement could penalize agents for essentially "playing by the rules".

Therefore, we recommend that: HB 111 should be clarified to confirm which charges are permitted and prohibited, and those charges should be conformed to the requirements of the new HUD RESPA rules. Note that the HUD required reporting of charges conflicts with the current Florida rate structure and that the term “closing services” mandated in Florida is not a permitted category of charge for a VA loan or refinancing – resulting in a disincentive to handle the needs of servicemen and women.