The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Finance and Tax Committee

BILL:	CS/SB 636
INTRODUCER:	Banking and Insurance Committee and Senator Lawson
SUBJECT:	Title Insurance
DATE:	April 20, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	**Fav/CS**
2.	Fournier	Johansen	FT	**Favorable**
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 636 provides for the following changes to the title insurance law:

- Requires nonresident title insurance agents to qualify for licensure by passing an examination and completing continuing education requirements in the same manner as Florida resident title insurance agents;
- Allows for the rebating of an attorney's fee charged for professional services, the title agent's portion of the insurance premium, or any other agent charge or fee, to the person responsible for paying the premium, charge, or fee;
- Clarifies that no portion of the attorney's fee, the title agent's portion of premium, any agent charge or fee, or any other monetary consideration or inducement, may be paid directly or indirectly for the referral of title insurance business;
- Repeals the authority for the Financial Services Commission to establish limitations on related title services by rule;
- Repeals the provision that the title insurer or agency must maintain a record of the related title service charges made for the issuance of a policy;
- Clarifies the definition of an "estoppel letter" relating to mortgage certificates of release;
- Clarifies the provisions to clear liens that have been paid off from the public records; and,
- Removes the requirement that the Financial Services Commission adopt rules to establish a premium charged by a title agent for preparing and recording of an affidavit of release of a mortgage.

This bill substantially amends the following sections of the Florida Statutes: 626.84201, 626.9541, 627.7711, 627.780, 627.782, 627.783 and 627.7845.

II. Present Situation:

Title Insurance

Title insurance insures owners of real property against loss by encumbrance, defective titles, invalidity, or adverse claim to title.[1] Title insurance is a policy issued by a title insurer that, after performing a search of the title, represents the state of that title and insures the accuracy of its search against claims of title defects.[2] It is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage.

A purchaser of real property or lender utilizes title insurance to protect against a claim by another who claims to be the rightful owner of the property.[3] Most lenders require title insurance when they underwrite loans for real property.[4] Title insurance provides a duty to defend related to an adverse claim against title, and also promises to indemnify the policyholder for damage to the lender's security interest created by a cloud on title, unmarketable title, or adverse title that was not discovered by the title insurer.[5]

Like most insurance, title insurance is typically issued through an agent of the title insurer. The title insurance agent[6] performs a number of services including determining the insurability of title based upon evaluation of a title search and determining and clearing underwriting objections to eliminate risk. The primary goal of a title search is to establish that all previous liens have been satisfied, that property boundaries are clear and unobstructed, and that any easements are well defined and included in the description of the property, thereby reducing the likelihood of loss by determining potential defects in the title prior to issuance of the policy.

According to representatives with the Office of Insurance Regulation (OIR), 22 title insurance companies sold title insurance in Florida in 2005 with total direct premiums written of $2.4 billion. The method of delivering title insurance in Florida has not changed appreciably over the past decade and non-affiliated agencies write an estimated 85 percent of title insurance. Title insurance in this state is highly concentrated in that four companies wrote 57 percent of premiums and eleven companies wrote 98 percent of premiums in 2005.

Interstate Reciprocity for Nonresident Title Insurance Agents

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[1] Section 624.608, F.S., Title insurance is also insurance of owners and secured parties as to the existence, attachment, perfection and priority of security interest in personal property under the Uniform Commercial Code.
[2] BLACK'S LAW DICTIONARY (8th ed. 2004).
[3] See e.g. American Land Title Association; http://www.alta.org/consumer/questions.cfm (last visited 3/5/07)
[4] Id.
[5] Id.
[6] Part V of ch. 626, F.S., provides for the regulation of title insurance agents under the Department of Financial Services. A "title insurance agent" is a person appointed in writing by a title insurer to issue and countersign commitments or policies of title insurance in its behalf (s. 626.841(1), F.S.). A "title insurance agency" is an insurance agency under which title agents determine insurability in accordance with underwriting rules and standards prescribed by the title insurer represented by the agency, and issue policies of title insurance, on behalf of the appointing title insurer. The term does not include a title insurer (s. 626.841(2), F.S.). A "title insurer" is a company authorized to issue title insurance (s. 627.7711(3), F.S.).

In 2005, Florida began licensing nonresident title insurance agents.[7] To qualify for a license, an applicant must pay applicable fees, meet the fingerprinting requirement, and may be required to take a Florida title examination depending on their home state title insurance agent licensing requirements.[8] If the applicant is from a state that Florida has full reciprocity with, the applicant is not required to pass the Florida title examination. In order for Florida to have full reciprocity with a state for nonresident title agent licensure, that state must offer resident and nonresident title agent licenses, have an examination for its resident title agent license, and not require Florida resident title agents to pass an examination in order to obtain licensure.

Currently, a Florida nonresident title agent can meet Florida's continuing education requirements if he or she has completed the continuing education requirement in his or her home state. If the individual's home state does not require continuing education, but the agent holds a title license in another nonresident state and meet that state's continuing education requirements, then the agent also meets Florida's continuing education requirements.

According to DFS, Florida has full reciprocity with 17 states for licensing title agents, partial reciprocity with 23 states and no reciprocity arrangement with 10 states. As of January 18, 2007, Florida has licensed 410 nonresident title agents. Of these agents, 285 are from states that fully reciprocate with Florida and therefore do not have to pass Florida's title examination. In an effort to promote uniformity among the states, the National Association of Insurance Commissioners supports reciprocity licensing agreements among states and has produced a model act for states to adopt ("Producer Licensing Model Act").

Title Insurance Premiums

Part XIII of ch. 627, F.S., governs title insurance contracts. Under current law, a title insurer charges a premium[9] for title insurance that includes the charge for performance of "primary title services"[10] by a title insurer or title insurance agent or agency, and incurs the risks incident to such policy. The percentage of such title insurance premium required to be retained by the title

[7] Section 626.84201, F.S. That section provides that notwithstanding the residency requirement, the Department of Financial Services (DFS), upon application and payment of the fees, may issue a license as a nonresident title insurance agent to an individual not a resident of Florida in the same manner applicable to licensure of nonresident general lines agents.

[8] Part V of Chapter 626, F.S. sets forth the requirements to be a Florida title insurance agent. Under s. 626.8417, F.S., the applicant must:

- be a Florida resident;
- pass the required examination for licensure;
- not be found to be untrustworthy or incompetent;
- have completed a 40-hour classroom course in title insurance within the 4 years immediately preceding the date of the application for license, the applicant must, 3 hours of which shall be on the subject matter of ethics, as approved by the Department of Financial Services, or must have had at least 12 months of experience in responsible title insurance duties, while working in the title insurance business as a substantially full-time, bona fide employee of a title agency, title agent, title insurer, or attorney who conducts real estate closing transactions and issues title insurance policies.

[9] Section 627.7711, F.S., defines the word "premium" to mean the charge made by a title insurer for a title insurance policy, including the charge for the performance of primary title services by a title insurer or agent, and the assumption of the risks associated with such a policy, and upon which charge a premium tax is paid under s. 624.509, F.S.

[10] "Primary title services" means determining insurability in accordance with sound underwriting practices based upon evaluation of a reasonable search and examination of the title or the records of a Uniform Commercial Code filing office and such other information as may be necessary, determination and clearance of underwriting objections and requirements to eliminate risk, preparation and issuance of a title insurance commitment setting forth the requirements to insure, and preparation and issuance of the policy. s. 627.771(1)(b), F.S.

insurer cannot be less than 30 percent.[11] Because of this limitation, a title insurer is allowed to pay the remaining 70 percent of premium to a title insurance agent for performing primary title services. A title agent also performs "related title services"[12] and must charge at least the actual cost of these services to the customer pursuant to a rule promulgated by the Financial Services Commission.

The Financial Services Commission has adopted a rule which establishes the premium rates that can be charged in Florida for title insurance contracts and the minimum insurer premium retention for the risk associated with the title insurance.[13] According to the OIR, the minimum amount of premium required to be retained by the insurer, as a percentage of total premium written, varies from 30 to 40 percent contingent upon the total dollar value of the title insurance written. For example, a title insurer is generally required to retain 30 percent of the premium if the amount of the written premium is $1 million or less.

Rebating of the Agent's Premium

A title insurance agent is prohibited from rebating or lowering the agent's share of the premium or any other charge for related title services below the cost for providing such services under the Unfair Methods of Competition and Unfair or Deceptive Act.[14] In the insurance context, "rebating" refers to the return of money by an insurance agent to an insured. Historically, this practice has been prohibited entirely for all lines of insurance. However, in 1986, the Florida Supreme Court in *Department of Insurance v. Dade County Consumer Advocate's Office* [15] found Florida's laws prohibiting rebating by life insurance agents to be unconstitutional "to the extent they prohibit insurance agents from rebating any portion of their commissions to their customers." The Court held that the prohibitions on rebating unnecessarily limited consumers' bargaining power and did not advance a legitimate state purpose in safeguarding the public health, safety, or general welfare.[16]

In 2000, the Florida Supreme Court in *Chicago Title Insurance Co. v. Butler*,[17] issued an opinion finding that the prohibition against an agent rebating or lowering the agent's share of the title insurance premium was unconstitutional. Specifically, the court found that the anti-rebate statutes infringe upon a citizen's property rights and unconstitutionally restrict a citizen's rights to freely bargain for services.[18] Since the Legislature has guaranteed 30 percent of the premium

[11] Section 627.782(1), F.S.; Rule 690-186.003(9), F.A.C. This premium covers the risks and insures insurer solvency.
[12] Rule 69O-186.003(11)(a), F.A.C. "Related title services" means services performed by a title insurer or title insurance agent or agency, in the agent's or agency's capacity as such, including, but not limited to, preparing or obtaining a title search, examining title, examining searches of the records of a Uniform Commercial Code filing office and such other information as may be necessary, preparing documents necessary to close the transaction, conducting the closing, or handling the disbursing of funds related to the closing in a real estate closing transaction in which a title insurance commitment or policy is to be issued. The premium, together with the charge for related title services, constitutes the regular title insurance premium. Section 627.7711(1)(a), F.S.
[13] Id. As noted above, the percentage required to be retained by the title insurer cannot be less than 30 percent.
[14] s. 626.9541(1)(h)3., F.S.
[15] 492 So.2d 1032, 1035 (1986)
[16] Id.
[17] 770 So. 2d 1210 (Fla. 2000)
[18] Id. at 1220.

to the title insurer for the sole purpose of ensuring industry solvency, the court found that the rebate of the agent's share of the premium would not adversely impact the insurer's solvency.[19]

Real Estate Settlement Procedures Act of 1974[20]

The Real Estate Settlement Procedures Act, know as RESPA, is a federal law protecting consumers from abuses and usury that requires lenders to give homebuyers advance notice of closing costs, settlement costs, relationships and lending practices. RESPA applies to real estate transactions involving a federally related mortgage loan and is enforced by the United States Department of Housing and Urban Development (HUD). Congress specifically found that RESPA should provide:

- more effective advance disclosure to home buyers and sellers of settlement costs; the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
- a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
- significant reform and modernization of local recordkeeping of land title information.[21]

The RESPA and the federal regulations[22] promulgated to implement RESPA use the term "determine the insurability of the title" rather than "examination of the title."

Cancellation of Mortgages

For a purchase of real estate, a title insurer must determine whether any mortgages on the property have been paid. Section 701.04, F.S., requires the holder of a mortgage (the mortgagee) to send, within 14 days of a written request, an estoppel letter setting forth the unpaid principal balance on the mortgage, any interest due, and the per diem rate. If the mortgage, lien, or judgment is fully paid, then a satisfaction letter must be issued to the party making the request. Within 60 days after a mortgage is fully paid, the mortgagee must cancel the mortgage. If a civil action arises out of the provisions of s. 701.04, F.S., the prevailing party is entitled to attorney's fees and costs.

Section 701.041, F.S., provides procedures for title insurers to execute and record a release of a mortgage. Under this provision, title insurers are permitted to execute and record a certificate of release of a mortgage in the event that a satisfaction or release of a mortgage with a principal amount of $500,000 or less has not been executed and recorded after the mortgage has been paid in full. A certificate of release operates as a release of the mortgage described in the certificate. The certificate is to be recorded in the real property records of each county in which the mortgage is recorded. The title insurer is liable to the holder of an obligation under the mortgage (mortgagee) for actual damages sustained due to the recording of the certificate of release, unless the title insurer relied upon a payoff statement provided by the mortgagee and can provide that the mortgage was paid in full in accordance with the payoff statement. The Financial Services Commission (FSC) is mandated to adopt rules establishing an actuarially sound premium charge to be made for each certificate of release recorded under this section.

[19] Id. at 1218.
[20] 12 U.S.C. 2601 et seq.
[21] 12 U.S. C. 2601
[22] 24 CFR Part 3500

According to representatives with the Real Property, Probate and Trust Law Section of the Florida Bar, certain ambiguities have arisen since the passage of s. 701.041, F.S., in 2005.[23] These ambiguities include inconsistent definitions of "estoppel letters" and "payoff statements" in ss. 701.04 and 701.041, F.S., respectively; ambiguity as to how the $500,000 principal amount limit should be applied, the extent of liability of a title insurance agent for his or her acts under the statutes, and the concerns regarding the adoption by the FSC of a premium rate.

III. Effect of Proposed Changes:

Section 1. Amends s. 626.84201, F.S., pertaining to nonresident title insurance agents. The bill requires that in order to obtain and maintain a Florida title insurance license, nonresident applicants must pass the Florida license examination (required for Florida agents under s. 626.221, F.S.) and take the Florida continuing education (CE) courses (required for Florida agents under s. 626.2815, F.S.) in the same manner as Florida resident title insurance agents. This provision changes current law (and the NAIC Model Act) and contravenes Florida's interstate reciprocity provisions with other states as to licensing requirements for nonresident title insurance agents and Florida resident title insurance agents. The effect of this bill requires nonresident title insurance agents in Florida to pass the Florida exam and complete Florida approved CE courses to obtain a license and requires Florida title agents, wishing to obtain a license in another state, to pass that state's licensure exam and complete CE courses.

Section 2. Amends s. 626.9541(1)(h), F.S., pertaining to unfair methods of competition and unfair acts or practices relating to unlawful rebates. Current law prohibits the rebating or lowering of a title agent, agency or insurer's share of the premium or any charge for related title services below the cost of providing such services. The bill removes the prohibition and allows a rebate or abatement of an attorney's fee charged for professional services, the title agent's portion of the insurance premium, or any other agent charge or fee, to the person responsible for paying the premium, charge, or fee. The bill clarifies that no portion of such fees or the title agent's portion of the premium may be paid directly or indirectly for the referral of title insurance business.

The changes relating to "agent premiums" conform the law to the decision in *Chicago Title Insurance Co. v. Butler*. Butler had challenged the constitutionality of the anti-rebate law and the Florida Supreme Court held this statute to be unconstitutional to the extent that it prohibited a title insurance agent's ability to negotiate a portion of his or her share of the "risk premium."

Section 3. Amends s. 627.7711, F.S., pertaining to definitions under title insurance contracts. The bill amends the definition of "related title services" by deleting that term and renaming it "closing services" and removing references within that definition which apply to "preparing or obtaining a title search, title examination, examining searches of the records of a Uniform Commercial Code (UCC) filing office and such other information as may be necessary." The bill creates a new definition of "title search" which means the compiling of title information from official and public records.

[23] Ch. 2005-531, L.O.F.

The definition of "Primary title services" is amended to clarify that determining insurability is based on evaluation of a reasonable title search or a search of records of the UCC. The bill clarifies that primary title services do not include closing services or title searches, for which a separate charge is or separate charges are made.

A representative of the Attorney's Title Fund in Florida indicated that these are technical changes that clarify the role of the closing agent versus the role of the title agent/attorney. Officials with the DFS assert that since there are no additional fees charged to the consumer for "primary title services" but there are for "related title services" (renamed as "closing services" in the bill), the changes to the definitions could result in a change in the way fees are charged under current law.

Section 4. Amends s. 627.780, F.S., relating to illegal dealings in risk premium. The bill deletes the word "risk" from the section title and provides a cross-reference to the changes made above in Section 2 allowing rebates for the agent's share of premium.

Section 5. Amends s. 627.782, F.S., relating to rule adoption, to remove the provision that authorizes the Financial Services Commission to establish limitations on charges for related title services by rule. Under rule 69O-186.003(11), F.A.C., adopted by the FSC, at least "actual cost" must be charged for related title services. Other than this rule, the Financial Services Commission (or Department of Insurance, previously) has never adopted rules to establish limits for related title services.

Officials with the OIR state that the repeal of the prohibition against related title services (termed "closing services" under Section 3 of the bill) being below cost may lead to predatory pricing by direct writers, insurer's affiliated agencies, and larger independent agencies and may result in less competition and higher prices to consumers for purchasing title insurance.

Section 6. Amends s. 627.783, F.S., pertaining to rate deviation. The bill deletes a provision that currently allows a title insurer or title insurance agent to petition the OIR to deviate above the charge for related title services specified in s. 627.782(1), F.S.

Section 7. Amends s. 627.7845, F.S., relating to determination of insurability, to conform language to the provisions contained in Section 3, above. The bill prohibits a title insurer from issuing a title insurance commitment, endorsement, or policy until the title insurer makes a determination of insurability based upon the evaluation of a reasonable title search or a search of the records of a Uniform Commercial Code filing, as applicable. The references to the requirement for an examination of title have been deleted.

The bill removes the requirement that a title insurer or its agent or agency maintain a record of the actual related title service charges made for issuance of the policy and endorsements for a period of not less than 7 years. Officials with the OIR recommend that title insurers and agents still be required to maintain records of the agent's "closing" title service charges for the OIR and the DFS to review. Also, the OIR recommends that title insurers be required to publish those charges so that the public is able to shop for the best title service product.

Section 8. Amends s. 701.04, F.S., relating to cancellation of mortgages. This section addresses the concerns raised by the Real Property, Probate and Trust Law Section of the Florida Bar. The bill describes the elements of an estoppel letter to conform with the definition of that term in Section 9 of the bill. An estoppel letter is the unpaid balance of a loan secured by a mortgage, including principal, interest, and any other charges and interest.

Section 9. Amends. 701.041, F.S., pertaining to mortgage release certificates. This section addresses the concerns raised by the Real Property, Probate and Trust Law Section of the Florida Bar. The bill defines an estoppel letter to conform to the term used in Section 8, above, and clarifies that the mortgage secured by a loan in the principal amount of $500,000 or less is determined from the recorded mortgage which contains no disclosure of record that the mortgage secures an open-end or revolving line of credit agreement. The bill clarifies that the statement which is contained in the certificate of release is a statement that the mortgage being released has been determined eligible for release under this section. The bill also clarifies that the title insurance agent recording a certificate of release is liable to the holder of the obligation secured by the mortgage for actual damages sustained due to the recording of the certificate. Finally, the bill repeals the requirement that the Financial Services Commission adopt rules to establish a premium charged by a title agent for preparing and recording of an affidavit of release of a mortgage.

Section 10. The act shall take effect on October 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The charges for “related title services,” termed “closing services” in the bill, are effectively deregulated. Persons purchasing title insurance may be able to negotiate with title insurance agents for lower rates on the agent’s share of the title insurance premium and obtain lower rates on closing services since rebating is no longer prohibited.

Nonresident title agents are no longer subject to Florida's reciprocity provisions and must pass licensure exams and complete continuing education requirements to be licensed in the state. Florida's resident title agents will incur additional costs associated with examination and continuing education course fees should they wish to become licensed in other states.

C. Government Sector Impact:

Revenues:
Since additional nonresident applicants will be required to pay an exam fee of $56 for the title insurance agent examination, the Department of Financial Services estimates an *increase in revenue* to the Insurance Regulatory Trust Fund annually of $10,864 (194 additional title examinations at a cost of $56).

Expenditures:
The DFS estimates that it will incur $1,100 in expenses to make technical programming changes to the Agent Education Database (DICE) to accommodate nonresident title agents having to meet Florida's continuing education requirements in the same manner as Florida resident title agents.

If title insurance agents discount their portion of the title insurance premium, there may be a reduction in insurance premium tax revenues.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.