

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: SB 444

INTRODUCER: Senator Bennett

SUBJECT: Title Insurance

DATE: April 5, 2009 REVISED: 04/12/09 04/14/09 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Emrich</u>	<u>Burgess</u>	<u>BI</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input checked="" type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Senate Bill 444 changes the method used to determine the premiums for title insurance in Florida. Currently, the Financial Services Commission (FSC) adopts rates relating to title insurance forms, policies, commitments and contracts by rule.¹ This legislation would instead require title insurance companies to submit rate filings to the Office of Insurance Regulation (OIR) for approval in the same manner as is currently required for property and casualty insurers. Title insurers would be required to provide actuarial justification for the entire premium charged to the consumer for the services provided. Specifically, the bill provides the following:

- Requires title insurers to annually file their rates for approval with the OIR and provide supporting documentation which indicates that the rate is “actuarially sound” and not “excessive, inadequate or unfairly discriminatory.”
- Title insurance filed rates may not include any charge for primary title services, closing services, or title searches or any commission or compensation made to title agents or agencies.

¹ The Financial Services Commission consists of the Governor and Cabinet. The FSC rule is 690-186.003, F.A.C.

- The OIR must approve the rate filing or issue a Notice of Intent to disapprove the filing within 90 days of the filing.
- Provides treble damages to the insured if a title insurer or agent is negligent in determining insurability.
- Authorizes a title insurance agent or agency to charge consumers a “reasonable fee” for primary title services, title searches, and closing services and such charges do not constitute a part of the insurers’ rate.
- Requires that agent or agency charges are filed with the OIR and are to be published on the Internet so that the public is informed as to title insurance costs.
- Clarifies that the term “premium” includes charges made by title insurers for a title endorsement, commitment or other contract.

This bill amends the following sections of the Florida Statutes: 626.9541, 627.7711, 627.780, 627.782 and 627.7845, F.S.

This bill creates the following section of the Florida Statutes: 626.8422 and 627.7712.

This bill repeals the following section of the Florida Statutes: 627.783.

II. Present Situation:

Title Insurance

Title insurance insures owners of real property against loss by encumbrance, defective titles, invalidity, or adverse claim to title.² 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.³ It is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage.

In Florida, purchasers of real property and lenders utilize title insurance to protect themselves against claims by others that they are the rightful owner of the property. Most lenders require title insurance when they underwrite loans for real property. Title insurance provides a duty to defend an adverse claim against title, and also promises to indemnify the policyholder for damages to the lender’s security interest created by a cloud on the title, unmarketable title, or adverse title that was not discovered by the title insurer.

² 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. The effect of this provision allows a title insurer to sell UCC personal property title insurance in conjunction with a transaction involving a UCC security interest.

³ BLACK’S LAW DICTIONARY (8th ed. 2004).

Title Insurance Premiums

Part XIII of ch. 627, F.S., governs title insurance contracts. Under current law, a title insurer charges a premium⁴ for title insurance that includes the charge for performance of “primary title services”⁵ by a title insurer or title insurance agent⁶ or agency, and incurs the risks incident to such policy. The percentage of such title insurance premium required to be retained by the title insurer cannot be less than 30 percent.⁷ 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 “closing services” and must charge at least the actual cost of these services to the customer pursuant to a rule promulgated by the Financial Services Commission (FSC).⁸

The FSC has adopted a rule which establishes the premium rates that can be charged in Florida by title insurers for title insurance contracts and, for policies issued through agents and agencies, the minimum insurer premium retention for the risk associated with the title insurance.⁹ 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.

Current law requires the FSC to review the premium not less than once every three years. Also, the FSC may by rule require insurers to submit statistical information, including loss and expense data as the DFS determines to be necessary to analyze premium rates.

Title insurance rates were specified in statute for a three year period in 1999 and remained in effect until June 30, 2002.¹⁰ In 2002, the FSC adopted title insurance rates by rule¹¹ which were the same as the prior statutory rates and are the rates which remain in effect today.

⁴ Section 627.7711(2), 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 incurring the risks incident to such policy, and upon which charge a premium tax is paid under s. 624.509, F.S.

⁵ “Primary title services” means determining insurability in accordance with sound underwriting practices based upon evaluation of a reasonable title search or a search of 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. Such services do not include closing services or title searches, for which a separate charge or separate charges may be made (s. 627.771(1)(b), F.S.) A “title search” is defined to mean the compiling of title information from official or public records (s. 627.7711(4), F.S.).

⁶ Under current law, title insurance agents are licensed, disciplined and regulated by the Department of Financial Services (DFS) under Part V of ch. 626, F.S., while title insurers are regulated by the Office of Insurance Regulation (OIR). Title insurance forms must be filed and approved by the OIR prior to usage, and rates and premiums charged by title insurers are specified by rule by the Financial Services Commission (FSC) as discussed further under this section.

⁷ Section 627.782(1), F.S.; Rule 690-186.003(9), F.A.C. This premium covers the risks and insures insurer solvency.

⁸ Section 627.782, F.S. (Rule 690-186.003(11)(a), F.A.C.) “Closing services” means services performed by a licensed title insurer or title insurance agent or agency, or attorney agent in the agent's or agency's capacity as such, including, but not limited to, 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 (s. 627.7711(1)(a), F.S.).

⁹ Rule 690-186.003, F.A.C. As noted above, the percentage required to be retained by the title insurer cannot be less than 30 percent.

¹⁰ Chapter 99-286, Laws of Florida. The rate provisions in this law went into effect on July 1, 1999 and remained in effect until June 30, 2002.

Florida is one of three states where the rates for title insurers are promulgated by the state.¹² Thirty five states require title insurers to file their rates and obtain approval from the regulatory agency while nine states are exempt from filing provisions.¹³ Four states allow title insurers to use the “use and file” rate filing option whereby insurers may implement a rate change prior to filing for agency approval.

Representatives with some title insurers complain that the OIR has not reviewed title insurance rates in over ten years, even though the agency (via the FSC through rule promulgation) is required to do so every three years. Further, the OIR has not acquired any financial data from title agents or companies during that same time period. However, the OIR asserts that it has attempted over the past several years to promulgate rules (via the FSC) pertaining to the rate setting process (and obtain data from the title insurers through a data call process), but the proposals have been successfully challenged by the insurers.¹⁴

In 2006, the OIR completed a review of the title insurance industry in Florida that focused on three areas: a financial analysis of the Florida title insurance industry, a review of the regulatory treatment of title insurance premiums and title insurance, and a comparison of what Florida consumers pay for title insurance compared to consumers in other states.¹⁵ The study found that the Florida title insurance industry is overwhelmingly dominated by five large groups and that Floridians are paying more for comparable title insurance than consumers in other states. For example, the study found that some premiums in Florida were 136 percent higher than premiums in other states. The study also found that the loss ratios for title insurance coverage are low relative to other states.¹⁶ The relatively low loss ratio and relatively high profitability of the title industry suggest a high pricing structure for Florida title insurers, according to the OIR. The study recommended tying premium rates to loss ratios thereby making rates a reflection of the actual risks borne by the insurer. Title insurance premiums totaled \$15.5 billion in 2004.

Industry representatives dispute the OIR study’s findings and assert that it misstated facts, misread and misunderstood data and that there was little value in the OIR study, other than the recommendation for a more comprehensive study. Also, comparing title insurance rates among states is not useful, according to these representatives, because there are different coverages, different levels of operating costs and differing loss experiences.

The OIR held an evidentiary hearing on title insurance in the fall of 2007 and subpoenaed the major title companies to discuss a range of topics which included the following: 1) cost of producing title insurance policies and how these costs relate to insurance premiums; 2) procedures used by companies to audit agents; 3) methods of conducting title searches; 4) use of affiliated business arrangements; 5) use of reinsurance contracts; and 6) efforts to educate and better protect consumers.

¹¹ Rule 690-186.003, F.A.C.

¹² New Mexico and Tennessee are the other two states.

¹³ Includes the District of Columbia.

¹⁴ Attorneys’ Title Insurance Fund vs. FSC, DOAH 05-2630RP; Chicago Title Insurance Co. vs. FSC, DOAH 06-5105RP; Stewart Title Guaranty Co. vs. FSC, DOAH 07-000077.

¹⁵ *An Analysis of Florida’s Title Insurance Market: Three Studies that Provide a Comprehensive, Multi-Faceted Review of the Florida Title Insurance Industry*, July 2006.

¹⁶ The “loss ratio” is basically the ratio of loss costs to premium revenue.

Premium Tax

Under current law, all title insurance premium gross receipts of a title insurance company, no matter whether the premium was written directly, or through its affiliated agencies or nonaffiliated agencies, are subject to the 1.75 percent insurance premium tax.¹⁷ Even though a substantial portion of the premiums collected by the title insurer are paid or retained by the title insurance agent (70 percent), the full title insurance premium received by the title insurer is subject to the insurance premium tax. According to representatives with the Department of Revenue (DOR), as a general proposition, the DOR relies on the title insurance premium reported in an insurer's Annual Statement, which is filed with the OIR and the National Association of Insurance Commissioners, as the premium subject to the insurance premium tax in Florida.

Title Insurance Study Advisory Council

In 2008, the Legislature created the Title Insurance Study Advisory Council (Council) which was tasked to undertake a comprehensive examination of the title insurance system in Florida and make findings and recommendations in its final report to the Governor, Speaker of the House of Representatives and President of the Senate on or before December 31, 2009.¹⁸ The Council is composed of 21 members and is administratively supported by the staff of the Executive Office of the Governor (EOG). The Council has met on two occasions as of this date.

III. Effect of Proposed Changes:

Section 1. Creates s. 626.8422, F.S., pertaining to charges for services under the Title Insurance Agent law. The bill provides that a title insurance agent or agency may charge a reasonable fee for primary title services, title searches, and closing services that are actually performed by the agent or agency. The charges for services authorized under this provision do not constitute a part of the rate charged by the title insurer for the issuance of the title insurance policy, form, commitment, or contract. The agent or agency is required to file with the OIR the amount of each charge, including what comprises the charge, together with related information the OIR may require on a form adopted by the agency. The OIR must then publish the information collected from the title agent or agency on the Internet so that the public is informed as to the costs of the services provided.

The bill provides that the agent or agency service charges outlined above may not be set below the actual cost of providing such services.

Section 2. Amends s. 626.9541(h), F.S., pertaining to unlawful rebates under the unfair methods of competition and unfair or deceptive practices law. The bill deletes language which allowed payment of earned premium to title insurance agents who performed services for title insurers because agents will be paid directly by consumers for these services (title services, searches, closing services, etc.) under the bill (see Section 1).

¹⁷ Section 624.509, F.S.

¹⁸ Chapter 2008-198, L.O.F.

Section 3. Amends 627.7711, F.S., relating to the definition of “premium” under the Title Insurance Contract law. The bill expands the definition of premium to include any charge made by a title insurer for a title “endorsement, commitment or other contract.” The bill specifies that premium does not include any reimbursement for primary title services, title searches, closing services, or any component thereof, performed by a title insurer, agent or agency. The premium must be calculated by multiplying the approved rate by each \$1,000 of title insurance limits provided.

Section 4. Creates s. 627.7712, F.S., pertaining to charges for services under the Title Insurance Contract law. This section is identical to s. 626.8422, F.S., which created the title agent statutory provision under Section 1 of the bill.

Section 5. Amends s. 627.780, F.S., relating to illegal dealings in premium. The bill clarifies that the OIR approves the premium as opposed to the Financial Services Commission.

Section 6. Amends s. 627.782, F.S., relating to approval of rates. The bill changes the method used to determine title insurance premiums. The legislation repeals the current method of determining premiums in which all title insurers use rates adopted by rule by the Financial Services Commission. Instead, each title insurer will be required to file its rates with the OIR for approval in the same manner as property and casualty insurers. Specifically, the bill requires each title insurer to make an annual rate filing with the OIR which indicates that the rate is “actuarially sound” and not “excessive, inadequate or unfairly discriminatory.” The filed rates may not include any charge for primary title services, closing services, or title searches or any commission or compensation made to title agents or agencies. The OIR must approve the rate filing or issue a Notice of Intent to disapprove the filing within 90 days of the filing.

The bill provides 12 rate factors the OIR must consider in its review of the filing:

- An insurer’s loss experience;
- The margin for profit sufficient to allow the title insurer to earn a rate of return on capital which will attract capital investment;
- Past and prospective expenses;
- Liability for defalcation;
- Degree of competition among insurers for the risk insured;
- Investment income;
- Reasonableness of the judgment reflected in the filing;
- Dividends, savings or unabsorbed premium deposits;
- Adequacy of loss reserves;
- Cost of reinsurance;
- Trend factors; and
- Other relevant factors affecting the frequency or severity of claims.

The bill further provides standards for a rate being excessive, inadequate or unfairly discriminatory and if the OIR makes a determination that the rate meets one or more of these provisions, it shall initiate proceedings to disapprove the rate and notify the title insurer. In any administrative proceeding relating to the legality of the rate, the insurer has the burden of proof to show by a preponderance of the evidence that the rate is not excessive, inadequate, or unfairly

discriminatory. The bill provides deadlines for the insurer to respond to the OIR rate determination.

When submitting the rate filing, the bill requires officials with the title insurer to certify certain information under oath and to be subject to the penalty of perjury. If the certifying official knowingly makes a false certification, he or she commits a violation of the unfair or deceptive practices provision under s. 626.9541(1)(e), F.S.,¹⁹ and is subject to penalties provided under s. 626.9521, F.S.²⁰

If a title insurer fails to make a rate filing, the OIR may require the insurer to discontinue policies for which rates have not been approved. Insurers with an “insignificant” number of policies or premium volume may be exempted from the filing requirement.

Section 7. Amends s. 627.7845, F.S., relating to the determination of insurability. Under current law, a title insurer cannot issue a title commitment, endorsement or policy until the insurer has made a determination of insurability based upon the evaluation of a reasonable title search or search of the records of a Uniform Commercial Code filing office, as applicable. The bill provides that if a title insurer or agent is negligent in performing the determination of insurability, the insurer is liable to the insured for damages up to three times the amount of coverage.

Section 8. Provides that s. 627.783, F.S., is repealed. This provision pertains to rate deviation and states that a title insurer may petition the OIR for a specific deviation from the adopted premium.

Section 9. Provides that the act will take effect July 1, 2009, and applies to title insurance forms, contracts, commitments, or policies issued on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹⁹ This provision pertains to “false statements and entries.”

²⁰ This provision pertains to administrative fines which are willful and nonwillful.

B. Private Sector Impact:

Representatives with the OIR state that the bill would likely create and promote competition within the title insurance industry by requiring insurers to make a rate filing with the OIR which is actuarially justified, as opposed to the current practice whereby the Financial Services Commission sets a rate by rule which, as noted above, has not been done for years. Homebuyers could likely realize savings on their title insurance premiums as a result of competition among title insurers. Likewise, title agents would have to compete for title business by charging homebuyers a “reasonable” fee for providing primary title services, title searches, and closing services.

Title insurers and agents who oppose the bill assert that the legislation represents a fiscal impact to the industry because it provides for sweeping changes to the way title business has operated since the existing statutory structure was enacted in 1991. For example, they state that the bill removes the 70 percent of the title insurance premium that currently is earned by the agent. The legislation would also have a cost impact on insurers and agents by subjecting them to treble damages for negligence by failing to determine the insurability of title. Finally, they argue that the Title Insurance Study Advisory Council, created by the legislature last year, should be allowed to complete its work and issue its recommendations to the Legislature and Governor by the end of the year.

C. Government Sector Impact:

The OIR will be tasked with reviewing and approving rates filed by title insurers under the provisions of the bill. According to representatives with the OIR, these responsibilities will be subsumed within their existing resources. The OIR will be required to compile title agent or agency charges for services and publish the charges on the Internet (OIR website) or otherwise distribute the information to the public.

According to representatives with the Department of Revenue, to the extent the rates charged by title insurers for title insurance increase or decrease as a result of the bill’s provisions, there will be a corresponding change in premium tax collections on title insurance.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

Barcode 919152 by Banking and Insurance on April 14, 2009:

Currently, the Financial Services Commission (FSC) is authorized to adopt rules in conformity with the 1998 National Association of Insurance Commissioners' (NAIC) model rule for audited financial statements. The amendment clarifies that the FSC, in adopting its rules, must utilize the most recent version of the NAIC model rule. (WITH TITLE AMENDMENT)

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
