

41 N.J.R. 12(1)
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INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

DIVISION OF INSURANCE

Insurance Producer Standards of Conduct; Marketing Unfair Trade Practices, Rebates and Inducements; Prohibited Practices

Proposed Amendment: N.J.A.C. 11:17A-2.3

Authorized By: Neil N. Jasey, Acting Commissioner, Department of Banking and Insurance

Authority: N.J.S.A. 17:1-8.1 and 17:1-15e

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2009 – 358.

Submit comments by February 5, 2010 to:

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The agency proposal follows:

Summary

On July 21, 2008, N.J.A.C. 11:17A-2.3 was amended to provide that the making of charitable contributions by insurers and insurance producers upon a consumer agreeing to

purchase an insurance product would not be considered a prohibited inducement or rebate, provided that no pecuniary benefit is obtained by the insurer or producer other than an income tax benefit and that no income tax benefit is passed through to the consumer.

Title insurance companies and title insurance producers in the State are regulated by the producer licensing rules, N.J.A.C.11:17, and by the Title Insurance Act of 1974, N.J.S.A. 17:46B-1 et seq., which includes specific provisions that prohibit their offering rebates or reduced fees. The title insurance industry is different from other lines of insurance in that the members of that industry solicit business mostly through attorneys and real estate agents rather than from the consumer. N.J.S.A.17:46B-35 prohibits title insurance companies and agents from providing rebates, discounts, abatements, credits or reductions in premium or special favor, advantage or other benefit or inducement.

The Real Estate Settlement Procedures Act (RESPA) is applicable to New Jersey's licensed title insurers and title insurance producers. The RESPA Act (12 U.S.C. §§2601 et seq.) and regulations promulgated thereunder (24 CFR 3500.1 et seq.) are applicable to all one-to-four family residential real estate transactions where the property is sold or refinanced or where a mortgage is secured by a subordinate lien, and the financing is provided by an institutional lender by way of a Federally-related mortgage loan. In an August 6, 2009 opinion letter, HUD's General Counsel stated that a gift to charity such as that contemplated by the recent amendment to N.J.A.C. 11:17A-2.3(f) is prohibited under RESPA. Previously, there had been no explicit articulation of HUD's position on that issue.

Due to the now apparent conflict between N.J.A.C. 11:17A-2.3(f) and the RESPA as recently clarified by the HUD General Counsel's opinion letter, the Department has determined that the charitable contribution exemption provided in N.J.A.C. 11:17A-2.3(f) should not extend

to title insurers and title insurance producers. Therefore, the Department is proposing to amend N.J.A.C. 11:17A-2.3 to exclude insurers and title insurance producers transacting title insurance business from the provisions of subsection (f).

A 60-day comment period is provided for the notice of proposal, and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the proposal is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

The proposed amendment will have a positive social impact by reconciling N.J.A.C.17:11-2.3(f) with Federal law applicable to the activities of title insurance producers and title insurers, thereby eliminating uncertainty and confusion that has arisen in the title insurance field since the adoption of subsection (f) in 2008.

Economic Impact

The proposed amendment restores the blanket prohibition upon title insurance producers and title insurance companies from making charitable contributions and offering inducements, rebates or reduced fees of any kind in the sale of title insurance. As a result of the amendment, producers, insurers and consumers should experience no increase in the costs of the sale and placement of title insurance.

Federal Standards Statement

Executive Order No. 27 (1994) and P.L. 1995, c. 65 require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include

in the rulemaking document a comparison with Federal law. A Federal standards analysis is not required in this instance because this amendment will synchronize State and Federal regulations with respect to the charitable contributions by title insurers and title insurance producers made as an inducement for the purchase of title insurance, with the result that no Federal standards or requirements are exceeded. The State's regulation as amended will be consistent with Federal standards and RESPA regulations.

Jobs Impact

The Department does not believe that this amendment will cause any jobs to be generated or lost. The Department invites interested parties to submit any data or studies concerning the jobs impact of the amendments together with their written comments on other aspects of the proposal.

Agriculture Industry Impact

The Department does not expect any impact upon the State agriculture industry by this proposed amendment.

Regulatory Flexibility Analysis

There are no provisions in the proposed amendment that are excessively onerous to "small businesses" as that term is defined in N.J.S.A. 52:14B-17. This amendment will impose no new recordkeeping or other compliance requirements. Future annual costs of compliance with this rule are expected to remain the same. This amendment has no differing standards for small businesses because RESPA, the controlling Federal law, applies to all title insurance

producers and the companies that they represent regardless of the size of the producer's business of the company and the objective of the proposed amendment is conform the rule to that Federal law.

Smart Growth Impact

The proposed amendment will not have an impact upon the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed amendment will not have an impact on housing affordability because the proposed amendment addresses only the making of charitable contributions by licensed title insurance producers and title insurers.

Smart Growth Development Impact

The Department believes that there is an extreme unlikelihood that this proposed amendment would evoke a change in the housing production in Planning Areas 1 and 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the proposed amendment addresses the exclusion of title insurers and licensed title insurance producers from the charitable contributions inducements exemption under N.J.A.C.11:17A-2.3(f) and that exclusion should not have an impact upon housing production.

Full text of the proposal follows (additions indicated boldface **thus**; deletion indicated in brackets [thus]):

11:17A-2.3 Rebates and inducements; prohibited practices

(a) – (e) (No change.)

(f) An offer by an insurer or insurance producer to make a contribution to a charity that is a qualified organization under the guidelines of the Internal Revenue Service, a non-profit corporation, or to the State of New Jersey or any political subdivision thereof, or to any state government or political subdivision thereof, upon a consumer, other than the charity, non-profit corporation, or governmental entity itself, agreeing to purchase an insurance product shall not be deemed to be an inducement or a rebate prohibited by this section, provided that:

1. – 2. (No change.)

3. The amount of premium or commission to be charged is not altered as a result of the contribution; [and]

4. Records of all such offers and contributions made are maintained for at least five years in a manner set forth in N.J.A.C. 11:17C-2.6, and are available to the Department for review and inspection upon request[.]; **and**

5. The provisions of this subsection shall not apply to insurers authorized to transact title insurance and to insurance producers transacting title insurance business.