

T 06 06

To: **All Washington Title Insurers and Title Insurance Agents**

Subject: **Rebates and illegal inducements**

Date: **Nov 21, 2006**

Rebates and illegal inducements

The Office of the Insurance Commissioner has issued this Technical Assistance Advisory to clarify requirements for title insurers and their agents under the state's Rebating and Illegal Inducements statutes and regulations. This guidance is the direct result of a 10-month investigation by the agency that revealed widespread use of illegal incentives and inducements to obtain title insurance business in clear violation of state law. (A report of that investigation is available from the Insurance Commissioner's office and is posted on the agency's Web site at: http://www.insurance.wa.gov/publications/news/Investigation_Title_Insurance.pdf.)

The Insurance Commissioner contends that the law clearly specifies the spending limit: It's \$25, per person, per year.

However, in response to a commonly voiced complaint by the companies that the rule is ambiguous and unclear, the Commissioner offers the following information to ensure compliance with the law.

The "Rebating" statute¹, the "Illegal Inducement" statute² and the Commissioner's "Unfair Practices" rule³ establish that a company may not give anything of value exceeding \$25 in any twelve-month period to a person as an inducement for placing title insurance business with a particular title insurance company. Again, \$25, per person, per year.

Any gift, incentive or inducement exceeding \$25 per person per year is a violation of the insurance laws of Washington. The Commissioner is authorized to assess penalties for violations of insurance laws up to \$10,000 per violation.

Definition of "person," "year" and "value"

The definition of a person is consistent throughout the state's insurance code. A **person** means any individual, company, association, organization, partnership, corporation, or any other legal entity. Our investigation disclosed that some companies do not understand this definition and apply it correctly.

A **year** is defined as any 12-month period.

Value means the market value of the item or service if the item or service were purchased on the open market. At a minimum, this is the entire cost of the item/service that the title company is providing. It includes the cost of the item or service as well as the resources used to provide or produce the item/service and all other associated costs.

Record keeping

There is no requirement for a title company to give anything away as an inducement or incentive to obtain business, but if the company voluntarily chooses to do so, it must maintain complete and accurate records to document its spending under the \$25 rule. This includes names of individuals who attended the event. It is not sufficient to document an event with a statement that “X” number of people attended. Necessary records include sign-in sheets, including the name and signature for each attendee.

Examples of the \$25 limit

The \$25 limit applies:

- When a title company has given something of value to a person or paid something on behalf of that person.
- When a title company hosts an event. It must allocate the value to each of the individuals attending, with the value counting toward the \$25 limit.
- When the company hosts an educational seminar on a topic other than title insurance. The value of the seminar, based on what it would cost on the open market, must be allocated to the attendees.
- When the company supplies one of its employees to provide services (technical consultations, transaction coordination, computer training) to a real estate agent, agency or any other third party. The value is determined by what it would cost to obtain the service on the open market.
- To “customer service” (for example, “home books,” demographic information and other compilations) information that title companies provide at no cost. The value of the services must be allocated to the individual’s \$25 limit. The Insurance Commissioner has made an exception that allows title companies to provide a copy of the last deed, deed or trust, a map and tax information at no charge. Anything else is subject to the \$25 limit.

The \$25 limit does not apply:

- If the title company has been reimbursed for what it has given to the person. However, if the reimbursement is less than the full value, the \$25 limit applies to the non-reimbursed amount.
- When a title company hosts an educational seminar on title insurance topics. However, if the company provides food or refreshments, the value of the food and refreshments must be allocated to the \$25 limit for each attendee.
- When the company hosts an event or seminar and is reimbursed the full value by attendees. If full reimbursement is not made, the excess value must be allocated to attendees in accordance with the \$25 limit.

How state law compares to federal requirements

Another commonly expressed complaint from companies was inconsistency between state and federal requirements. The Federal Real Estate Settlement Procedures Act⁴ (RESPA) establishes lower limits for incentives and inducements than Washington’s \$25 limit. As a result, a title company may be in compliance with Washington’s

laws and regulations, but in violation of federal law at the same time. By allowing title companies to provide things of value up to \$25, the state is not condoning violation of federal law and does not excuse a company from complying with federal requirements.

Accordingly, there may be instances under federal law where a title company may provide something of value which exceeds the state limit. In those instances, the title company must comply with state law. (The contention that federal law allows the incentive will not be accepted as an excuse.)

Broker opens

In practice, broker opens are conducted for the benefit of the listing real estate broker or agent, even though others may be attending. Accordingly, the value of any food or refreshments provided by the title company for a broker open must be applied toward the \$25 limit of the broker or agent hosting the event. It may not be allocated by the number of attendees. If, however, individual items such as door prizes are given to individual attendees, then the value of the specific item must be allocated to the \$25 limit of the recipient. This rule applies regardless of whether or not a title insurance company employee attends the broker open.

When pro-rating is permitted

If a title company hosts an open house or event and has a general buffet and refreshments available to all attendees, then the value may be pro-rated by the number of attendees and allocated to each individual's \$25 limit. But if prizes or gifts are provided to attendees that are of unequal value, then, in addition to the general pro-rata allocation, the value of each individual prize or gift received by the attendee must be allocated to the attendee.

On the other hand, if the event is a meal at a restaurant, then the cost of each individual's meal must be allocated to that individual, along with their proportionate share of any tax and gratuity.

When pro-rating is not permitted

A title company that sponsors or provides food or refreshments at an event for a real estate agent or other third-party is not permitted to pro-rate the expense – the \$25 limit applies to the total event since the value benefits a single person. This means that the company cannot pay in excess of \$25 to sponsor an event or provide food and refreshments for an event and pro-rate the costs among the number of attendees.

Similarly, the test of whether or not the value of a sponsored event can be pro-rated among the total number of attendees or must be allocated to a single company or person, rests on a simple determination: Who owns the event?

- If the title company owns the event, and the benefit goes to individual real estate agents and other third parties who have a direct relationship with the title company, the value can be pro-rated among the total number of attendees.
- But when a real estate agent, entity or other third-party owns the event, food, beverages and other incentives provided by the title company cannot be pro-rated among the total number of attendees.

Co-advertising

The practice of co-advertising is permitted under state law when the title insurer's advertising benefit is proportional to the amount paid. However, when the title company's share of the advertising is disproportionate and the so-called "co-advertising" actually amounts to a subsidy, the \$25 limit applies.

The \$25 limit does not apply if the title company advertises independently and does not participate in the advertising of a real estate agent or other third party.

Some specific questions

What happens if the title company already has provided something of value to a person in the last 12 months and that person attends another function that is being sponsored by the title company and the person's allocated share of the new event puts that person over the \$25 limit?

That is a violation, and the title company may be subject to disciplinary action.

What if the title company makes a good-faith effort to collect payment (reimbursement) for what was given, but was unsuccessful in obtaining payment?

It is the actual receipt of the reimbursement that counts. If the title company does not receive reimbursement, then any non-reimbursed amount will be applied to the person's \$25 limit.

May a title company advance the excise tax payment in order to record a transaction prior to receiving the funds for the tax?

No. The advancement constitutes a loan to the parties, and as such, is a thing of value and subject to the \$25 limit.

May a title company discount its escrow fees as an inducement to obtain business?

Yes, under certain circumstances. First and most important, the escrow fee must not be less than the title company's full and complete cost for conducting the escrow. Secondly, the discount must not be discriminatory, and it must be provided to all customers meeting the same criteria. Thirdly, the criteria must be based on the actual savings to the title company in conducting the escrow and may not be based merely upon a label such as "builder."

Authority

- 1 Rebating (**RCW 48.30.140**)
- 2 Illegal Inducements (**RCW 48.30.150**)
- 3 Unfair Practices Rule (**WAC 284.30.800**)
- 4 Federal Real Estate Settlement Procedures Statute, or RESPA (**12 U.S.C. 2607**)