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Richard Brinkley
Government Analyst II
Bureau of Investigation
Division of Insurance Agent and Agency Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0319

Re: Proposed Rule Development §69B-215.235, F.A.C.
Use of Designations

Dear Mr. Brinkley:

I am writing on behalf of the Florida Land Title Association, which represents the interests of title insurers and title agents (including attorney-agents) in Florida and its affiliate, the Certified Land Title Institute, which grants the highly regarded Certified Land Searcher (CLS) and Certified Land Closer (CLC) designations. We appreciate the Department's concern about abuses and misleading practices which, judging by newspaper articles, have become all too common in other fields of insurance.

Fortunately, the use of unearned or misleading designations has not become a problem in title insurance – and as applied to title insurance is a solution in search of a problem.

We fully agree that no-one should use a designation which they have not earned, or to do so in a false or misleading manner, and are supportive of some of the goals of the rule. However, in reviewing the draft of §69B-215.235 F.A.C. (the "Proposed Rule"), we think that it over-reaches the statutory authority cited, adds ambiguities and uncertainties about legitimate information currently provided to consumers, and fails in its fundamental goal of eliminating the use of misleading designations.

With that in mind, we would offer the following specific comments and concerns:

1. There is No Statutory Authority for the Breadth of the Proposed Rule

The Proposed Rule purports to implement Fla. Stat. §626.9541(1)(ff), which in pertinent part reads:

(ff) Unlawful use of designations; misrepresentation of agent qualifications.—

1. A licensee may not, in any sales presentation or solicitation for insurance, use a designation or title in such a way as to falsely imply that the licensee:

a. Possesses special financial knowledge or has obtained specialized financial training; or

b. Is certified or qualified to provide specialized financial advice to senior citizens.

(emphasis added).

a. The Application of the Proposed Rule to any Designation Not Implying "Financial" knowledge is not Authorized by the Statute.

The statutory prohibition applies only to designations which falsely imply special "financial knowledge" or "financial advice." It is inapplicable to any designation which would imply specialized real estate, title insurance, legal or other knowledge or expertise. The Proposed Rule however would impermissibly intrude into each of those areas.

b. There is No Authority for Setting Criteria as to Designation Granting Entities.

There is no provision in the statute which even remotely touches on the standards and criteria which must be met by the entity which grants the designation. In fact, I would suggest that many highly regarded institutions of higher learning do not meet the standard of the Proposed Rule in that they have never specified the "exact terminology, combination of words and/or acronym to be used" by a person earning a degree.

c. The Proposed Rule Reaches Beyond the Statute in Restricting Where and When a Designation May be Used.

Section 626.9541(1)(ff) applies only to the use of designations in a "sales presentation or solicitation for insurance."

The Proposed Rule recites in subsection (1) that its purpose to set standards "with respect to the use of certifications and professional designations in the marketing, solicitation, negotiation, sale or advice made in connection with an insurance transaction by any licensee." So the recited purpose is to prohibit use of certain designations far more broadly than the statute to basically all aspects of the insurance transaction. It should be noted that subsection (1) is not the operative portion of the rule, but merely a recitation of purpose or goals.

Subsection (4) states that a "designation may not be lawfully used under the Insurance Code unless...." How one uses a designation "under the Insurance Code" is a bit unclear – but seems pretty broad.

The actual operative provision of the Proposed Rule, contained in subsection (6), goes further still. It includes no limitations as to the context when the designation might be used. It seems to prohibit use of any non-conforming designation anytime, anywhere.

For each of these reasons, the Proposed Rule is beyond the scope of the statutory authority. There are other problems and concerns with the Proposed Rule from both a public policy and drafting standpoint.

2. Definition of "Designation" is Too Broad and the Standards for a Permissible Designation are Unnecessarily Vague.

The draft rule defines designation as "any combination of words (or an acronym…) that indicates or implies" that a licensee has "special knowledge or training." This can be almost anything, including many commonly used descriptions and recognitions which routinely appear in biographies, resumes, news-releases, on websites and occasionally even on coffee cups. Consider:

* Certified Land Title Searcher (CLS) or Certified Land Title Closer (CLC)
* Served on the Florida Title Insurance Study Advisory Council
* Board Certified in Real Estate Law
* State Legislator, (District 1, 119, 68, 38 and potentially any of the lawyer-legislators)
* drafted the XYZ bill
* Worked with OIR and DFS in redrafting the Title Insurance Rule
* Chair of the Title Insurance Committee for the Real Property, Probate and Trust Law Section of the Florida Bar
* President of the Florida Land Title Association
* Selected to Insure the [describe big project]
* Former [Position name] with [XYZ] Title Insurance Company
* Former Florida Commissioner of Insurance
* Florida Legal Elite (the Florida Trend recognition)
* Legitimately earned educational degrees

Subsections (4) and (5) then limit the agent to using only those designations obtained from an organization that has "published" standards (where they must be published is unanswered) which are "continually utilized" (whatever that means) and that specify the exact terminology to be used (where do you find this for most universities?). Some of these examples – the CLS/CLC and Board Certifications -- will satisfy the standards. Legitimately earned degrees may or may not. The others almost certainly would not be acceptable – and yet may be highly relevant information to the consumer.

3. The Operative Provisions are Unclear as to the Scope of Application

As pointed out above, the Proposed Rule extends far beyond the statutory authority in basically prohibiting any use of certain designations by anyone, anytime in connection with insurance. A

great deal of the concern could be ameliorated simply by expressly excluding general biographical and professional information that is commonly provided on a website, in a resume, newspaper articles and general background information from the prohibitions of the Proposed Rule where true.

4. Uncertainty of Required Ongoing Monitoring.

The Certified Land Title Institute grants the Certified Land Searcher (CLS) and Certified Land Closer (CLC) designations. These designations are only granted after meeting certain experience requirements and passing a very difficult test. A substantial number of applicants do not pass the test. While our initial belief is that the CLS/CLC designations would be permitted under the Proposed Rule as it has been expressly recognized in §626.2815, we find the vagueness of subsections (4) and (5) troubling.

Where must the standards be "published"? What level of detail is required to be published? Most legitimate certification organizations are reluctant to publish the details of their tests. How must a person demonstrate that the standards were published many years ago when they earned their designation?

We have no idea what the qualifier "continually utilized" means in this context. One reading would suggest a need for periodic future testing to assure continued meeting of the standards. That interpretation would prohibit showing Bar membership, CPA credentials and other legitimate credentials, as those (like most insurance licenses) do not require retesting in Florida. We would strongly discourage such an interpretation as a huge and unnecessary burden on credential granting organizations. It is illogical to set a higher standard for credentials than for maintaining state issued insurance licenses.

Another interpretation of "continually utilized" suggests that the designation is still being conferred. What happens if a degree program or designation is phased out by the sponsor? Any number of universities have dropped certain degree programs due to budget pressures or changed the name of the degree. Since these are no longer "continually utilized" can those graduates still claim to have the degree they worked so hard to earn?

Regardless of the Department's intent on these issues, the language need to be clarified greatly.

4. Application of the Proposed Rule to Attorneys and Other Licenses

A significant amount of title insurance is Florida is written by attorney-agents. Attorneys (in good standing with the Florida Bar) are exempt from licensure and appointment requirements under Fla. Stat. §627.8417(4)(a). The rest of the title insurance rules (such as promulgated rates and forms approval) are generally applicable to attorney-agents.

Attorneys (and their law firms) and many title agencies routinely provide biographical materials showing educational degrees earned (J.D., M.B.A, Ph.D, etc), other licenses held (such as a CPA) and a great deal of other information. The Florida Bar and Florida Supreme Court strictly regulate attorney advertising and marketing materials and other practices by the Florida Bar.

The Florida Bar also authorizes a series of "Board Certified Specialist" designations in various fields of law.

Even though a law firm website may show title insurance among a list of professional services offered, there is no benefit to introducing an additional level of inconsistent regulation of attorney marketing. Thus, we would recommend a specific "carve-out" of attorneys and their firms from the Proposed Rule.

Because of the synergies between title insurance and other real estate professionals, a number of title agents also hold licenses as real estate agents or brokers, mortgage brokers and the like. Some will also be licensed as title insurance agents in other states. Others will be attorneys (operating in a corporate agency, so not exempt from licensure requirements) or CPAs. This information is potentially quite relevant to customers and should be something which (assuming it is true) should be permissible to share.

5. Membership in Trade or Professional Associations.

Membership in a trade or professional association is almost certainly not the type of designation contemplated by the Proposed Rule as it does not imply special knowledge or training. However, certain associations are known for their ethics standards (for example FLTA & Realtors®). Showing one's membership in an association and adherence to their code of ethics could be argued to be prohibited under the Proposed Rule. To avoid any erroneous assumption that this rule might prohibit advertising one's membership, we would recommend an express exception for membership in trade and professional associations.

Conclusion:

The Proposed Rule is well outside of the statutory authority, is ambiguous, and frankly is so loosely drafted that it utterly fails to achieve what we understood to be the initial goal – of prohibiting the use of misleading or even mail-order designations.

We appreciate the difficulty in drawing a bright line between prohibiting the use of misleading or "mail-order" designations, while permitting providing a consumer with relevant, true information about an insurance agent.

This draft of the Proposed Rule unfortunately strikes entirely the wrong balance. This rule will have a chilling effect on the information legitimate agents will provide; will adversely impact the long-standing certifications who may not be able to demonstrate "publication" years ago; but still leaves ample room for the vendors of mail order designations to publish minimal, even illusory standards and procedures and continue to sell misleading certifications.

FLTA greatly appreciates the opportunity to participate in this process, and while we are very negative as to this particular draft rule, we are supportive of the underlying goals.

Sincerely,

Alan B. Fields
Executive Director