

**STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION**

Before the Commissioner of Financial and Insurance Regulation

**In the Matter of a Request for
a Declaratory Ruling Related
to the Closing of Residential
Mortgage Loans and Provision
of Title Settlement Services**

Order No. 10-096-M

Issued and entered
this 15th day of November 2010
by Ken Ross
Commissioner

DECLARATORY RULING

**I
BACKGROUND**

By a letter dated May 18, 2010, Independent Bank requested a declaratory ruling as follows:

By this letter, the undersigned applicant, Varnum, on behalf of its client, Independent Bank (the "**Bank**"), a Michigan banking corporation, requests a declaratory ruling pursuant to Section 63 of the Michigan Administrative Procedures Act of 1969 (MCL § 24.263) and Rule 500.1041 of the State Office of Administrative Hearings and Rules, on behalf of the Bank and its wholly-owned subsidiaries, Independent Title Services, Inc. ("**ITS**") and Independent Mortgage Company ("**IMC**"), both of which are Michigan corporations...

Two questions were initially presented. A third question was added by email dated August 17, 2010.

II QUESTIONS PRESENTED

1. Does the Michigan Insurance Code (the "**Code**") permit an employee of the Bank to conduct the closing of a residential mortgage loan in a transaction for which ITS, a wholly-owned subsidiary of the Bank, issues the title insurance policy (as agent of a third party insurer) and acts as settlement and escrow agent?
2. Does the Code permit ITS to pay the Bank or its Employee (as hereinafter defined) a fee, in consideration for the services performed by the Employee to conduct the live portion of the closing of a residential mortgage loan (i.e., to "witness" the closing), to the extent that the Bank has determined that such amount represents the fair value of such services?
3. Do the Bank's Employee's actions and disclosures regarding its wholly-owned subsidiary, ITS, as described in this letter, satisfy the applicable requirements under the Code pertaining to disclosure of affiliated business arrangements?

III ANALYSIS

The Commissioner is authorized to issue declaratory rulings under Section 63 of the Administrative Procedures Act of 1969, as amended, MCL 24.263. It provides:

On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

The Bank's letter conforms to the rules governing requests for declaratory rulings. The facts are set forth in detail in numbered paragraphs 1 to 14 in the letter, which is attached. The letter further identifies the statutes to be considered as Sections 1201 and 1243 of the Insurance Code of 1956, as amended, MCL 500.1201 and specifically MCL 500.1243(1), 500.1243(13), 500.1243(15)-(20), and 500.1243(30). Section 1201 provides:

As used in this chapter:

(a) "Agent" except as provided in section 1243 means an insurance producer.

* * *

(e) "Insurance producer" means a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance.

* * *

(k) "Negotiate" means the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers.

(l) "Sell" means to exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurance company.

(m) "Solicit" means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company.

* * *

Pertinent parts of Section 1243 provide:

(1) As used in this section:

* * *

(c) "Agent" means an individual licensed as an insurance producer, broker, solicitor, or insurance counselor under this act.

(d) "Agency" means an insurance agency licensed under this act.

* * *

(i) "Loan representative" means an employee or representative of a lender that deals directly with loan applicants in accepting loan applications or approving or closing a loan.

* * *

(k) "Required insurance" means any insurance product that a borrower is required to obtain as a condition of closing a loan.

(13) A loan representative may not act as an agent or solicitor for the sale or provision of required insurance related to an application, approval, commitment, or closing of a loan if the loan representative participated in the application, approval, commitment, or closing of that loan.

(15) If asked about the availability of insurance products by a person inquiring about a loan or a loan applicant, the lender may indicate that insurance products are available from the lender or an affiliated agency and may provide instruction about how to obtain further information concerning the agency or agent and available insurance products.

(16) If insurance is required as a condition of obtaining a loan, and if the required insurance is available through the lender or an affiliate of the lender, the lender shall disclose to the applicant all of the following:

(a) That the lender will not require the borrower to purchase any policy or contract of insurance through a particular agent, agency, or with a particular insurer.

(b) Except as otherwise provided by law, that the lender will not require the borrower to purchase any insurance product from the lender or an affiliate as a condition of the loan.

(c) That the purchase of any insurance product from the lender or its affiliated agency is optional and will not in any way affect current or future credit decisions.

(17) The disclosure required by subsection (16) shall be made to a loan applicant at the time the loan applicant inquires about the availability of required insurance or at such time as the lender advises the loan applicant that the required insurance is available through the lender or an affiliate of the lender, whichever is earlier. The disclosure shall be confirmed in writing, dated, and signed by the applicant no later than the closing of the loan.

(30) Except as provided in subsection (31), an insurance agency or agent shall not reward or remunerate an affiliated lender for procuring or inducing insurance product business for the agency or agent or for furnishing leads and prospects or acting in any other manner as an agent. This subsection does not preclude an affiliated agency from

compensating its employees, who may also be employees of the lender, or reimbursing its affiliated lender at fair market value for any goods, services, or facilities that the lender may provide to the agency or for expense incurred by the lender in advising its customers and the general public of the agency's services.

Additionally, Section 1243(31) provides:

An insurance agency may pay dividends and make other distributions of assets to the agency's shareholders, including an affiliated lender, as a return on the capital invested and risks assumed by the shareholders or in conjunction with a merger, liquidation, or other corporate transaction.

The following discussion is premised upon a reading and understanding of the Bank's letter.

The analysis in the letter is clear, persuasive, and fundamentally correct. To avoid repetition and restatement, it is incorporated into this ruling by reference. Thus, the discussion below is brief and only makes observations, clarifications, and additions to the analysis that has been incorporated.

ANALYSIS

Conducting Closings

The essence of this question is whether licensure is required of the Employee for his or her role in closings.

Of paramount importance is that the solicitation and sale of title insurance occurs by someone other than the Employee before the closing. The only activity of the Employee at the closing is identified in the letter as follows:

9. In cases where the applicant selects ITS as the title insurance settlement services provider, ITS prepares for the settlement. The settlement process includes:

e. Conducting the closing (the signing session with the parties involved) (this is the single step in the settlement process that may be conducted by the Bank Employee);

11. In order to avoid having to have an employee of ITS travel to the Bank location (or other nearby closing location), the Employee conducts the closing, *i.e.*, witnesses the borrower signing the various loan documents. Once the Employee completes the closing, the closing package is returned to ITS for disbursement.

Witnessing signatures does not require licensure because the Employee does not “negotiate,” “sell,” or “solicit” insurance as those terms are defined in Section 1201. Nor does the Employee act as a “broker,” which is an insurance sales and placement activity, as seen in MCL 500.1905(1):

A person shall not solicit insurance, bind coverage, or in any other manner act as an agent or broker in the transaction of surplus lines insurance unless licensed under this chapter and section 1206a.

Finally, the Employee is not engaged in any activity listed under MCL 500.1232, which requires licensure as an insurance counselor:

A person shall not audit or abstract policies of insurance or annuities, provide advice, counsel, or opinion with respect to benefits promised, coverage afforded, terms, value, effect, advantages, or disadvantages of a policy of insurance or annuity, nor advertise, solicit business, or hold himself or herself out to the public as an insurance counselor unless he or she is licensed as an insurance counselor....

Thus, there are no licensure requirements for an Employee witnessing signatures at the closing.

Payment of Fees

Section 1243(30) begins by proscribing payment of referral fees and concludes by authorizing the payment of certain fees for services. While the Bank categorizes its conduct in the fee-for-services mode, it should be noted that, if there were any concern that the payments were referral fees in disguise, the Bank could make such payments in any event in light of federal law.

The Commissioner issued two bulletins in 2001 that are available on the OFIR website:

- Bulletin No. 2001-06-OFIS, The Gramm-Leach-Bliley Act and the Sale of Insurance by Lenders
- Bulletin No. 2001-10-OFIS, The Gramm-Leach-Bliley Act and the Sale of Insurance by Depository Institutions

In Bulletin No. 2001-10-OFIS, respecting referral fees, the Commissioner stated as follows:

Code sections 1207(3), 1216(3), and 1243(30) generally prohibit the payment of referral fees to unlicensed persons. However, Sections 104(d)(2)(iv) and (v) of the Act allow the payment of certain referral fees. Therefore, with respect to referral fees, the Act preempts sections 1207(3), 1216(3) and 1243(30) as they apply to depository institutions and their affiliates, except to the extent that those sections prohibit either of the following:

1. Payment of compensation by a licensed agent or agency to an unlicensed individual or entity for a referral of a potential customer, if the unlicensed individual or entity discusses specific insurance policy terms and conditions with the potential customer.
2. Payment of compensation by a licensed agent or agency to an unlicensed individual for referral of a potential customer who seeks to purchase, or seeks an opinion or advice on, insurance, if the payment is based on the purchase of insurance by the customer.

Since neither of the exceptions apply to the payment of the fees by the Bank, it is shielded by preemption from the referral fee prohibition of Section 1243(30). Given this federal preclusion, the Bank may now have the benefit of a 2002 amendment to the Code.

Effective March 1, 2002, MCL 500.1240(4) was added to the Code:

An insurer or insurance producer may pay or assign commissions, service fees, or other valuable consideration to an insurance agency or to persons who do not sell, solicit, or negotiate insurance in this state, unless the payment would violate section 2024.

As discussed above, the Employee does not “sell, solicit, or negotiate insurance” at the closing. Section 2024, which prohibits rebates, could have no application here, since it only deals with life and health insurance.

On the other hand, MCL 500.2066 proscribes rebates in all lines of insurance, including title insurance. Section 2066(1) provides:

No insurer, by itself or any other party, and no insurance agent or solicitor, personally or by any other party, transacting any kind of insurance business shall offer, promise, allow, give, set off or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy or on any policy, or agent's commission thereon, or earnings, profit, dividends or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for insurance, on any risk in this state now or hereafter to be written, which is not specified in the contract of insurance; nor shall any such insurer, agent or solicitor, personally or otherwise, offer, promise, give, sell, or purchase any stocks, bonds, securities or any dividend or profits accruing or to accrue thereon, or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy contract.

However, the ITS payments are going to the Bank or the Employee, and not to the person purchasing insurance. As decided in *Lawyers Title Ins Corp v Chicago Title Ins Co*, 161 Mich App 183 (1987), to constitute a rebate, the payment must be made as an inducement to the person purchasing insurance.

Returning to Section 1243(30), it expressly authorizes an agency to reimburse an affiliate at fair market value for services--in this case closing services--that the lender provides. In its letter, the Bank explains that the \$50 it pays for the closing services is at fair market value, thus conforming to the fee for services standards in Section 1243(30).

In summary, the payment of the \$50 service fee is expressly allowed by Section 1243(30). It is not a referral fee and, even if it were, the prohibition on referral fees in Section 1243(30) would not apply to the Bank due to federal preclusion. Moreover, since March 2002, referral fees have been permitted under Section 1240(4). Finally, the payment of the service fees could not amount to rebating since the payments do not run to the person purchasing insurance.

Disclosure of Affiliated Business Arrangements

According to the letter, the Employee makes disclosures as follows:

7. At the time the loan application is taken and submitted, the Employee advises the borrower of the title insurance requirement and of the availability of the required insurance through ITS. In doing so, the Employee provides certain disclosures regarding the affiliation between the Bank and ITS, as required by federal law (including RESPA) and state law (including Section 1243 of the Michigan Insurance Code). Beginning January 1, 2010, in accordance with new RESPA rules, the Employee provides the borrower a list of available title companies to choose from which will name ITS as a title insurance provider.

The Commissioner accepts the Bank's factual statement that the Employee makes the disclosures required under Section 1243. In providing the RESPA required list, the Employee provides more information than is required by Section 1243.

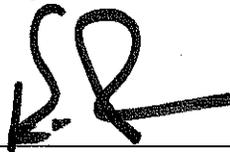
**III
RULING**

For the reasons explained above, the Commissioner concludes and declares that:

1. The Code permits an employee of the Bank to conduct the closing of a residential mortgage loan in a transaction for which ITS, a wholly-owned subsidiary of the Bank, issues the title insurance policy (as agent of a third party insurer) and acts as settlement and escrow agent.

2. The Code permits ITS to pay the Bank or its Employee a fee, in consideration for the services performed by the Employee to conduct the live portion of the closing of a residential mortgage loan (i.e., to "witness" the closing), to the extent that the Bank has determined that such amount represents the fair market value of such services.

3. The Bank's Employee's actions and disclosures regarding its wholly-owned subsidiary, ITS, as described in the letter, satisfy the applicable requirements under the Code pertaining to disclosure of affiliated business arrangements.

A handwritten signature in black ink, appearing to be 'KR', written over a horizontal line.

Ken Ross
Commissioner