



Insurance Department

State of Utah

GARY R. HERBERT
Governor
SPENCER J. COX
Lieutenant Governor
TODD E. KISER
Commissioner

State of Utah Title & Escrow Commission Meeting Meeting Information

Date: March 14, 2016 **Time: 9AM** **Place: East Building, Copper Room**

MEMBERS

COMMISSION MEMBERS

xChair, Bob Rice (*Insurer, Ada County, ID*) xMatthew Jagerson (*Agency, Utah County*)
xCo-Chair, Jeff Wiener (*Insurer, Salt Lake County*) xDavid Moore (*Agency, Salt Lake County*)
xSylvia Andersen (*Public Member, Salt Lake County*)

DEPARTMENT STAFF

xTodd Kiser, *Ins. Commissioner* xPerri Babalis, *AG Counsel* xBrett Barratt, *Deputy Comm.*
xSuzette Green-Wright, *MC Dir.* xReed Stringham, *AG Counsel* xTammy Greening, *Examiner*
Greg Soderberg, *ALJ* Adam Martin, *Examiner* xSteve Gooch, *PIO Recorder*

PUBLIC

Carol Yamamoto James Seaman Larry T. Rasband
Matt Sager Tim A. Krueger Tim Grubb
Blake Heiner James Swan Elliott Stone
Wade Taylor (phone) Joseph McPhie (phone) Pete Stevens (phone)

MINUTES — *Not Approved*

General Session: (Open to the Public)

- **Welcome** / Bob Rice, Chair (9:00 AM)
- **Adopt Minutes of Previous Meeting**
 - **Motion by David to adopt minutes. Seconded by Sylvia. Motion passes 5-0.**
- **Reports**
 - Concur with Licensee Report / Suzette
 - There were no new agency licenses issued in February. The industry is getting better at taking care of lapsed agency licenses faster. Individuals are still struggling on renewing their licenses on time, so we might see some actions on those. Suzette suggests that all agents check their email spam boxes.
 - **Motion by Jeff to concur. Seconded by David. Motion passes 5-0.**
 - Concur with Complaint & Enforcement Report / Suzette
 - When there's a report, Adam sends a follow up letter to ask what business they wrote or searched while their license was down — they are classified as "alleged". There are two spaces at the bottom of the report that will show the audits that are being performed, so the commission can see the time that is being spent on them.
 - In February, there were 9 closed reports (including 1 private letter, 1 training opportunity, 1 E-case). Tammy has been getting a lot of phone calls and has been using them as training opportunities, rather than treating them as complaints.
 - The E-case in February was an informal order for \$6,500. On an informal order, there is no dispute of facts — facts are what they are. So they can go through an informal order rather than the whole stip & order process.

- Jeff asks when the commission sees the informal orders: before they're done or after they're signed. Suzette says we don't normally bring informals to the commission. Brett asks if there's a reason we don't present them. Once the time frame expires for someone who gets an informal order, could we present them to the commission so they know what's going on? Suzette says we can, once that time frame lapses. Jeff says he's OK with whatever, so long as it's public.
 - Bob asks what the difference is between an informal order and a stip & order. Tammy gives some examples of an informal order: if an annual report wasn't filed on time, there's no dispute of fact and an informal order can be done; a stip & order may involve some negotiation and ultimate agreement with facts.
 - Sylvia asks how the fine amounts tabulated? Tammy says they treat similar situations the same according to a guideline they use across all lines of business, not just title.
 - Bob asks if the title agency agrees and signs off on the facts in an informal order. Tammy says no, but they can request a hearing within 15 days after the order becomes final. So, Bob says, in an informal order the department acts as basically the judge and jury. Suzette says yes, and the same applies for all lines of business.
 - Jeff asks about #3730 in closed investigations and #3731 in E-cases, and if they're the same thing or a typo. Suzette says they're different cases, and that #3730 has requested a hearing.
 - **Motion by Jeff to concur. Seconded by Sylvia. Motion passes 5-0.**
- Request for Dual Licensee Expedited Request: None
- Request for Attorney Exemption: None
- **Administrative Proceedings Action** / Greg Soderberg, ALJ
 - Stipulation and Order: None
 - Order to Show Cause: None
 - Informal Adjudicative Proceeding and Order: None
 - Notice of Formal Adjudicative Proceeding: None
- **Board Duties & Responsibilities** / Perri
 - Upcoming AG training
 - Perri and Reed will attend a training on Wednesday regarding a Supreme Court opinion that addressed the immunity of boards like the T&E Commission with respect to antitrust laws. A regulatory board in North Carolina was sued for antitrust violations. This training is sponsored by the National Association of Attorneys General. They will receive training and advice on how to keep the commission on the immunity side of the line.
 - Brett notes that the Supreme Court case prompted the legislative branch to evaluate all the boards and commissions in the state. Based on that evaluation, neither of the UID's boards — the T&E Commission and the Bail Bond Board — will have any recommendations or changes.
- **New Business**
 - E&O and fidelity bond requirements in future legislation
 - 31A-23a-204(2) says a title agency has to maintain E&O *or* a fidelity bond of at least \$250,000 — is that appropriate or should agencies have both? David says he did a sample of 10 states and discovered that most states regulated escrow, and the requirement was either for fidelity bond or a surety bond in addition to E&O. Do we need to change Utah's market?
 - E&O covers errors and mistakes. Fidelity bonds cover employee honesty and theft. There are a lot of exclusions in E&O for the holding of monies and documents, which is escrow. Fidelity bonds often just cover employees and do not include owners. There was a company that created one that included owners, but the fidelity bonds were for specific underwriters, so if you had multiple underwriters you had to have multiple fidelity bonds. States use surety bonds along with E&O in many different ways. We need to discuss if surety bonds are appropriate in regulating escrow. In addition to E&O, should we require a fidelity or surety bond?
 - Elliott Stone asks if there's a process where an agency has to submit a declarations page to the UID. David says he believes so. Elliott thinks there should be someone at the UID checking to see what coverages licensees have.

- Elliott asks if you could require certain insurance for admitted carriers. David says underwriters have major responsibilities, but it's still either/or. Commissioner Kiser says he believes that a business owner should have the insurance that is prudent for their business. The legislature is hesitant to put barriers in place that would be too high for people to enter. David says most states require a surety bond for the average monthly balance in the trust account, so there's no barrier to entry. They could get a minimal surety bond and still be able to play the game. David notes that in a split transaction, he's relying on another agency to complete the transaction — there's potential there for theft, embezzlement or loss of trust funds, etc.
- Commissioner Kiser says he's never seen Utah force insurance on business owners because Utah is a free market state. Perri says the department doesn't currently even have the authority to do it.
- Sylvia notes that in the real world there are specific amounts of insurance that are required by the state for events that she puts on. This is so the liability doesn't fall on the state. She doesn't think it's appropriate for the state to require more than the entry level of insurance. She would rather educate people and let agencies decide for themselves.
- Bob asks where David sees the gap or lack of protection. David says most states have more than one area protected, and he thinks the industry and commission need to discuss whether surety bonds should be required to fill the gaps between E&O and fidelity bonds over the next few months.
- Blake Heiner says the point is to protect the consumer. Consumers believe they have a certain level of protection concerning the protection of the funds they have with the title company. He doesn't see how the legislature would hesitate to increase liability amounts to protect consumers. Especially since they recently put a lot of liability on underwriters. He would like to have the commission discuss what should be covered by E&O, and he thinks it is appropriate to extend the requirements in the interest of protecting consumers. There are a lot of agents in the industry who will do no more than the minimum, unless they're forced to.
- Brett says the \$250,000 floor was \$50,000 two years ago — it was changed in 2015. Part of the discussion as to why it wasn't increased was because of the barrier to entry and because underwriter requirements were significantly higher than \$250,000. This issue needs to be discussed with regard to what underwriters are doing, how consumers are protected today, and what the balance is between regulation and private business.
- Blake says the real question is who's responsible for making sure consumers are protected: the regulator or the underwriters?
- Jeff notes that the regulations are in statute, so any changes would have to go through the legislative process. Is there any action the committee can take on it?
- Sylvia suggests that if the commission and industry determine there's a need, they should approach a legislator and ask them to carry the bill.
- David notes that one of the commission's duties is to advise the department on matters affecting the industry, which is why he brought it up.
- Commissioner Kiser thanks him, and says he thinks there should be education in the industry, rather than requiring a higher level of insurance. There comes a point where you have to make financial decisions about what you think is right and appropriate for your own business, and the government doesn't need to be involved in that.
- Bob asks Perri and Brett if the T&E Commission can promote legislation on its own and independent of the department. Perri suggests that it be discussed with the department first, then we can see what happens. Any action taken by the T&E Commission has to be taken as a body, not as individuals. Sylvia notes that individuals can talk to their legislators on their own about any issue, as an individual. But she says it would behoove the T&E Commission to be in harmony with the commissioner.
- Elliott thinks consumers should be protected for acts of negligence *and* acts of fraud, not one or the other. Consumers are often uninformed, and should be protected against both.

- Sylvia gives an example of buying insurance for her car and relying on her agent to advise her. She's much more comfortable with it being her informed choice, rather than it being a required choice by an outside body. However, the commission's job is to protect the consumer, who may be uninformed or have an agent who doesn't alert them to potential hazards. She understands both sides, but we need to find a happy medium.
- Jeff says the discussion has been very enlightening, but it should be hashed out over time. He would like to tell the commissioner that the "and" is a healthy change that should be looked at. The ULTA would want to weigh in on that as well. He would suggest including it in the department's bill in 2017. He thinks it could be as simple as changing "or" to "and" rather than mandating any additional set amounts.
- Commissioner Kiser notes that it might be good to include specific types of fidelity bond that would be appropriate.
- Discuss recently passed legislation
 - Brett notes that HB 163 was a title bill. Also, 31A-23a-407 was updated by the legislature. His understanding of the intent of the change was to maintain liability on the underwriter. There is some consumer protection built in if a producer takes money that has been deposited when a policy is ordered. HB 163's effective date is on or about May 10, 2016.
 - Bob asks what the department's position is regarding the consumer protection offered under 407, and how would we characterize the source of that liability. Brett says he would characterize it under *respondeat superior*, which is a consumer protection mandated by statute. Essentially, the underwriter is responsible for the agents it appoints because the underwriter is better able to oversee its agents than the consumer or the department are. This is Brett's interpretation, in lieu of having time to develop a department policy.
 - Jeff notes that they looked at other states to see how 407 would impact the industry. There aren't a lot of others in the same position. The department has been against the practice that exists in other states, but there are rating bureaus that allow underwriters to collectively look at those charges and make sure they're adequate for a particular state. He doesn't think it's an unhealthy practice in Utah as we enter uncharted waters. It might in fact be well warranted and should be discussed with the department. As we protect consumers, the industry needs to make sure they have the right protections that keeps the industry alive and healthy. He thinks a rating bureau meets a lot of those needs.
 - Sylvia asks if there's a mandate for underwriters that will have to carry added coverage, is there any guideline that will keep underwriters from being hyper-charged for insurance? Bob says he thinks that title underwriters aren't going to buy insurance for possible liability under 407 — they would self-insure.
 - Commissioner Kiser says underwriters will take care of the risk by picking agents they know and trust, and who won't create an environment that is litigious. Sylvia asks what the other shoe that drops will be. Commissioner Kiser says small agents may fall off because underwriters won't use them because they are a liability.
 - Jeff says it's risk assessment — what is the adequate protection that should be required for an agent? There isn't a lot of history, but ultimately the risk will be absorbed by increased costs. Sylvia notes that any increased costs for the underwriter are ultimately going to be absorbed by the consumer. That legislation just increased the cost to the consumer circuitously.
 - Commissioner Kiser says this happened years ago to the property and casualty industry, and several agencies merged or sold out to larger groups. The industry continued to be healthy, costs stayed low and margins stayed high. It ended up being good for the industry. He doesn't think it was the intent of the legislature to do away with small business. The industry found that it was difficult to be profitable as small industries. Sylvia asks if the unintended consequence of this legislation just closed the doors of several small businesses. Bob says it's very likely. Commissioner Kiser says we don't really know yet. The marketplace is strong in Utah and it will continue to be strong. He doesn't think it will hurt consumers or agents. Some agencies that have

- been borderline with an underwriter may need to improve their liability portfolio, or may be asked to do business differently now. His opinion is that *Orlando* proved that underwriters always had the risk, and 407 codified it.
- Jeff says the thing that makes title insurance different from other lines, is that there's a lot of risk during the funds transfer process. He thinks a rating bureau discussion would be healthy, especially with this new unknown.
 - Bob says the enforcement arm of the department should redouble its efforts to enforce 406, which is where title agencies are allowed to do escrow in certain situations. Brett adds that the department needs to continue being vigilant in appointing and failing to appoint agents. Bob asks if the department is seeing an issue with that. Suzette and Tammy say yes.
 - Agency notice of inactive agents
 - Randy is absent, but he sent Suzette a text, which says the department is now sending notices to agencies when individual licenses lapse or go inactive. However, agencies need to make sure they check their spam filters and have an active email address on file with the department so they get the email. Sircon is also known as Vertafore, so spam should be checked for emails under either name. Jeff notes that many underwriters have spam filtered at the corporate level, so they may not make it through. He would like to see if there's a way to test the system. **"Agency notice of inactive agents" is added to Old Business for the April meeting.**
 - 5-year review of R592-15
 - Steve explains that a 5-year review is just a way for the state to know if rules are still necessary. All the commission needs to do is say whether the rule needs to be kept, and why.
 - David says it's still needed. Agencies still get calls regularly on people beating them up on rates. He gets asked to match rates that he can't justify. He says ALTA did a study finding that 80% of title premiums are spent up front. So, if the deal is cancelled the agency has just spent a lot of money. The rule helps create a minimum floor. Bob agrees that the rule is still needed.
 - Jeff notes that 31A-19a-209(2)(a)(i) requires the rule.
 - David asks if the matrix needs to be updated on the rates that need to be filed. Tammy says she doesn't think so. The department made a concession for bundled fees and that if audited, companies would be OK if they could explain what they were.
 - James Seaman asks if other filings will be moved to the upload system like annual reports were. Tammy says she could look into it with rates & forms and IT.
 - David says his question was about an enforcement action on the report about charging unfiled fees. Tammy in that case the fees were already included in the premium and weren't something a title agency should be charging.
 - **Motion by David to approve R592-15 for continuation. Seconded by Matthew. Motion passes 5-0.**
 - Vote to enact R592-17
 - This was the rule that was moved from the R590 series and into the R592 series. It is a cut-and-paste of what was R590-212 into R592-17 — it's just a renumbering.
 - **Motion by David to enact R592-17. Seconded by Matthew. Motion passes 5-0.**
 - **Old Business**
 - R592-11 confirmation message
 - The department is in line to get this done. DTS is currently busy with updating another project. There will be a window that pops up to say that the annual report upload was successful. In the meantime, Tammy has been sending email notifications to people as the reports are uploaded. She hopes the confirmation message can be completed before April 30.
 - CFPB subcommittee update
 - Elliott has prepared a draft scope statement that will be reviewed in the subcommittee meeting.
 - **Other Business**
 - **Hot Topics**
 - Impact of 31A-23a-407, its interpretation, and HB 163 on the monoline statute

- Bob discovered that Utah doesn't have a monoline statute that would prohibit title insurers from having any other lines of insurance. His question was whether Utah's monoline statute conflicted with 407, but the state has no monoline statute so there is no conflict within the state. However, other nearby states do have monoline statutes — would discovering that 407 is a line of insurance, like a quasi-E&O insurance, create a situation where title insurers would be violating the monoline statutes of other states? His question to the department is: does the liability imposed on insurers pursuant to 31A-23a-407 rise to a line of insurance, or is it more of a statutory *respondeat superior*?
- Brett thinks there's a related question, which is are closing protection letters a liability policy written by an insurer who is not authorized to write liability? To Bob's question, the department will get back to him. However, he says it appears to be a statutorily imposed *respondeat superior*. He notes that health insurers aren't authorized to write liability, but they are also liable for the acts of their agents. If it's true in health and true in life, he thinks it should be true in title.
- Bob notes that the ALTA's regulatory survey has determined that there's no monoline statute in Utah, but there could be an unofficial practice. Brett says he wouldn't characterize it as a monoline, but you can't write a type of insurance without the requisite line of authority for that type of insurance.
 - Bob would like to have 31A-23a-503, Controlled Business in Title Insurance, added to Hot Topics for April's meeting.

Executive Session (None)

- **Adjourn** (10:34 AM)
 - Motion by Jeff to adjourn. Seconded by Matthew. Motion passes 5-0.
- **Next Meeting: April 11**, 2016 — Copper Room

2016 Meeting Schedule in Copper Room

Jan 11	Feb 8 (Centennial)	Mar 14	Apr 11	May 9	Jun 13
Jul 11	Aug 8	Sept 12	Oct 17	Nov 14	Dec 12 (<i>Aspen</i>)