



Insurance Department

State of Utah Title & Escrow Commission Meeting Meeting Information

State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

TODD E. KISER
Commissioner

Date: July 15, 2019

Time: 9AM

Place: East Building, Copper Room

ATTENDEES

TITLE & ESCROW COMMISSION

xChair, James Swan (*Insurer, Salt Lake County*) xNancy Frandsen (*Insurer, Salt Lake County*)
xVice Chair, Alison McCoy (*Agency, Tooele County*) xChase Phillips (*Agency, Weber County*)
xRandy Smart (*Public Member, Salt Lake County*) xPerri Babalis, *AG Counsel - TEC*

DEPARTMENT STAFF

xTodd Kiser, *Ins. Commissioner* xReed Stringham, *Deputy Comm.* Tracy Klausmeier, *P&C Dir.*
xRandy Overstreet, *Licensing Dir.* xMichael Covington, *CE Specialist* xAdam Martin, *MC Examiner*
xSteve Gooch, *PIO Recorder*

PUBLIC

David Moore Tim A. Krueger Carol Yamamoto
Bob Rice Helen Hayden Matt Olsen
Blake Heiner Adam Back Canyon Anderson
Matt Ryden [PHONE]

MINUTES — *Not Approved*

General Session: (Open to the Public)

- **Welcome** / James Swan, Chair (9:00 AM)
- **Telephone Roll Call**
- **Administer oath of office to new commission member** / Adam
 - Chase Phillips
- **Recognize David Moore's service to the Title & Escrow Commission** / Commissioner Kiser
 - Commissioner Kiser thanks David for his service from October 21, 2015 to June 30, 2019.
 - James offers his thanks to David as well, and says it's been a pleasure serving with him.
- **Adopt Minutes of Previous Meeting**
 - **Motion by Alison to adopt minutes. Seconded by Nancy. Motion passes 4-0; Chase abstains due to not being a commission member at the time.**
- **Concurrence Reports**
 - Licenses
 - **Motion by Randy to concur. Seconded by Alison. Motion passes 5-0.**
 - CE Quarterly Report : ~~January~~ / ~~April~~ / July / August / November
 - James notes that the CE rules require specific topics and wonders if all the classes have a connection to title insurance. Michael says yes. If she has worries about any potential classes, she asks Adam about them. She says rejecting a class is rare, but she did reject one in July, which will show up on the next report.
 - **Motion by Randy to concur. Seconded by Alison. Motion passes 5-0.**
- **Board Duties & Responsibilities** / Perri

- Perri will do her annual board member training at the August meeting.
- **Update on 2019 Goals / James**
 - ULTA report / James
 - The ULTA is preparing for its convention on August 1-2. Anyone in the title insurance business is welcome to attend. There's a good agenda and a lot of pertinent content, including affiliated business, fraud, and other things.
 - ULTA was involved with the Administrative Rules Review Committee hearing by holding a meeting before the hearing and preparing a statement.
 - REC report / Nancy
 - As of the June 19 meeting, the REC is seeking outlines for mandatory real estate CE courses. As of next year, Realtors will have to take mandatory annual courses.
 - As of June 19, the DRE has 595 open investigations. Commissioner Kiser asks what the number was the last time the TEC met. Nancy says a couple of months ago they had 300+ investigations on forms. The chief investigator at the time said the number of open investigations they had reported was tremendously low. The next month it came in at the high 500s and has stayed there. They know they're close to 600, and they close around 4-6 investigations a month.
- **New Business**
 - ABA disclosure / James
 - James says Scott Cope suggested at the last meeting that the TEC and UID should consider a required disclosure of affiliated business on the state's website where title licensing info is shown. This would be similar to the title agent warning that's on there now when a title agent is no longer affiliated with an underwriter.
 - James notes that RESPA requires disclosure in writing at the time of referral. Scott's suggestion would be above and beyond what RESPA requires. James says he's all for disclosure, but doesn't think going above and beyond RESPA is pertinent and necessary. He doesn't have strong feelings and wouldn't be opposed to it, but doesn't think it's necessary. He doubts that consumers visit the UID website very often to look at licensee information.
 - Alison says realistically the consumer would see the affiliated business disclosure at the closing table. James says they're supposed to see it at the time of referral, so early in the process. By the time you get to the closing table, it's too late. The timing gives people the opportunity to shop around if they're not OK with the affiliated business relationship.
 - Reed says that Alison made an excellent point that the important time to disclose the information is when you're getting ready to move forward. He says after the initial discussion, he looked into how difficult it would be to implement and it would be very difficult. The UID agrees with James' thoughts.
 - Chase asks if part of affiliated business is supposed to be regulated under the DRE, would it be more appropriate to have a disclosure on the DRE's website rather than the UID's. The concern would be whether the agents are disclosing appropriately. James says he's not sure the DRE would have jurisdiction over what appears on the UID's licensing information. There's already a question over who has jurisdiction over what issues.
 - Request for position statement from Commission on effect of 31A-23a-402(2)(a) on an affiliated title insurance agency / Reed
 - Reed says there's a statute that says a producer can't give indirect consideration to a Realtor as an inducement to get title business. On its face, the statute prohibits any kind of sharing of income with an affiliated arrangement; but on the other hand, a sharing of profits is not the same as the indirect consideration prohibited by the statute. He's looked at the issue and talked to others and can't come up with a satisfactory answer. The UID would like some input from the TEC on this issue.
 - James can't speak to the legislative intent of 31A-23a-402, but will speak to the intent behind SB121. His opinion is that 121 wasn't intended to be in conflict with 31A-23a-402(2)(a). He thinks they saw the distinction between sharing commissions and distributing profits to the

owners, who may also be brokers or real estate agents or lenders. He says RESPA 26-07(c)(4)(c) allows a return on the ownership interest or franchise relationship. One of the concerns is that most realtors/lenders won't get any money even after SB121 because most won't also be owners. There's a very small percent of licensed realtors who will get profits, because it will be a small percentage of realtors who will be owners.

- James agrees that 402 needs clarification or a line that allows the payments under SB121, but he thinks the title insurance industry would be opposed to opening the legislation anywhere near affiliated business. He thinks the consensus is waiting to see what happens over the next several years before making changes. The title insurance industry is willing to endure a bit of ambiguity over the next few years to see how it works and what other statutes need to be addressed.
- Randy O asks if clarification can be done in a rule. James says he'd have to look and see what authority the TEC has.
- Randy S asks if it's possible for the UID to put out a bulletin with its interpretation. If it's left open-ended, we'll have more issues. Reed says that was his intent in coming before the TEC, to get it figured out and on the same page.
- Alison thinks sharing profits and commissions is muddy waters, but she understands that the RESPA standard already allows for it. Maybe that's where we take the direction from, for now.
- Canyon Anderson says we want to avoid having anyone enforcing RESPA deciding for us, and make sure the state has clarity on the issue.
- Alison asks about state-county rules and whether the state can be more restrictive than RESPA. James says since the controlled business statute has been in existence we've already been more restrictive than RESPA. He says, to Canyon's point, that the UID is likely not so worried about federal regulation as it is finding a law that's in conflict with SB121 and whether to allow distributions to affiliated businesses as a result of this law. He thinks if the drafters knew about the conflict, they would have addressed it at the time. Canyon says the definition fits the window of "profit".
- Blake Heiner says if the statute is amenable to two different interpretations, one of which would be coincident or non-conflicting, then if the UID is enforcing the statute, all they need to do is take the tack that it won't conflict with SB121. Reed says that's the point: Can you overlook the plain term "indirect consideration" and does that somehow not encompass a distribution of profit. Blake says he thinks looking not only at the term, but is the distribution of profit an inducement. He thinks it could be argued that it isn't. Reed thinks that's the only reason these affiliated companies would exist. Blake says not necessarily: As owners get into the business, they will find that brokers don't control their agents, but can incentivize them to go with a particular company. There's an argument to be made that it's not an inducement, but he hasn't fully thought it through.
- Alison asks at what level it would become an inducement. Blake says he doesn't know because it's just a hypothesis. It would be simple enough for the UID to say that it's not going to conflict with SB121 in terms of its interpretation of the statute.
- James thinks there's enough room to thread the needle concerning direct transaction-specific inducements because there's a disconnect when the money has to flow all the way through the business. It becomes so disconnected from an individual transaction that the level of inducement is reduced. Distribution of profits isn't a transaction-specific inducement — it's a different animal.
- Rule review following passage of SB 121 / James
 - The UID was invited to testify before the Administrative Rules Review Committee in June. The ARRC requested that the TEC look at the rules and regulations governing title insurance business and see if there's anything that can be done to additionally restrict inducements. We have not received the promised letter from the ARRC, but we'll start the conversation today.
 - James says the \$50 rule was discussed most during the hearing. There was talk at the hearing of either raising or getting rid of the rule altogether. However, after conversation during the hearing, the ARRC came out in favor of reducing or eliminating it. James says in zero-tolerance states, it hasn't reduced the number of complaints because a true zero-tolerance policy means zero. He can

only imagine the small, ticky-tack violations that would be reported and that we avoid here because of the small amount that's allowed. The ARRC was concerned that the UID was too involved with small violations, but James thinks decreasing to zero would increase the number. He thinks it should stay at some amount and thinks \$50 seems reasonable, but would consider a small increase. It allows people to build relationships over lunch in a way that doesn't rise to the level of inducement. He doesn't think the TEC should be afraid to go back to the ARRC and say the rules are working and have worked for a long time. Newer entrants to the industry may need to get used to the rule, but the focus should be on complying with existing rules rather than restricting them in ways that don't make sense.

- Alison testified during the ARRC hearing that the amount should stay the same or be less. She supports James' ideas and says she doesn't have the appetite to go all the way to zero, but she'd be fine staying where we're at.
- Randy thinks the amount needs to be low enough so it's not an inducement for business. This is seen in all areas of insurance.
- James asks if Adam is seeing any abuse of the rule or increasing violations. Adam says he got a complaint about it 2.5 years ago. Otherwise, there have been no complaints since then.
- Commissioner Kiser says inducement was a huge issue when he took the commissioner job. He remembers when the level was at \$2, then was increased to \$10 because companies wanted to give larger items, like a road atlas or a blanket, when people got a quote. On the other end was the agent who lost a contract because agents of larger organizations could take clients to Jazz games in a suite. The UID looked at it for 2 years to find the right limit. They decided that taking someone to a round of golf was a good limit, and \$100 is a fair amount for golf at a country club. That's where the \$100 limit for P&C and health came from. Does title want to follow that same limit? He's not sure it matters whether the amount is consistent across the industry because other areas aren't consistent, like with fines.
- Nancy didn't attend the ARRC meeting, but she did listen to the full recording. She's trying to figure out the correlation between passing SB121 and the immediate need to fix R592-6. She thinks it could be due to people coming into the state. Her preference is to leave it as-is or lower it slightly, so instead of an inducement a title company can use it to thank clients for their business. Leaving it as-is will keep it based on relationships and good customer service, and will tell people coming into the industry that they're coming into our arena and need to abide by our rules. If anytime this group wants to tweak a rule and it gets tweaked, the door gets opened and the process breaks down. She agrees that if it goes to zero, title companies will turn into policemen and will stop focusing on their own transactions in favor of watching everyone else.
- Randy notes that the code says, other than title insurance, there's an amount of \$100 if it's not conditioned on a quote; if there is a quote, it's \$10. He thinks the distinction might be a good idea.
- Chase agrees with most of what everyone has said, and points out that brokers would want the rule to go to zero to limit competitors from creating relationships with someone in their brokerage. He doesn't think lunch is an inducement, but rather it's about building a relationship that makes the transactions smoother. He thinks the dollar amount makes it better for the client because everything happens more smoothly. He can see this as being a tool to further restrict the open market. He thinks the affiliated business companies would see a benefit to the amount going to zero, and that some amount of money is necessary.
- Carol Yamamoto can understand both points of view, but it makes it confusing if you split up the conditions like Randy and the statute suggest — someone will do the higher because they've interpreted it that way. She says building a relationship can take place anywhere, not just at lunch. She feels that her agents really care about the level of business and professionalism that they're getting and could care less about a lunch. It's sad because it's an inducement no matter the dollar amount. She says it's great whether it stays at \$50 or goes lower, but if it goes away, so be it. It's hard for small title agencies to compete with the big guys. We need to find something that's conducive to all agencies, not just the big dogs. It needs to be fair.

- Nancy asks what the TEC is required to do with respect to the ARRC's request. James says he doesn't think they have any oversight or the ability to tell the TEC what to do, but they can make recommendations to the legislature and have asked the TEC to report back, which they will do. He thinks they're looking for the honest opinion of the industry. Commissioner Kiser says the ARRC is one of the more powerful committees and they want to make sure agencies are writing rules to comply with state law. If the UID and TEC weren't complying with the law, the ARRC would tell us to change it and we would have to. He thinks they're trying to figure out the right thing to do with inducements, and thinks they're doing it with an eye toward the next general session. They'll put something in the statute rather than rule if they need to. He thinks they want to know where "right" is, and they're asking for an opinion. He thinks it's an area where they don't know where the right place is.
- James thinks the title industry isn't well known to the public or legislators. The TEC would be doing a disservice to the industry if it didn't provide candid feedback.
- Adam Back asks if James knows where the conversation came from. He said it sounded like Sen. Anderegg brought the conversation to the table, and he was impressed that the senator seemed to change his views. Adam thinks the topic wasn't coming from Sen. Anderegg, and wonders who brought it to him and why. Chase heard that it had to do with him. He said some of it came up during his committee appointment interview. If that's where it came from, it was unintentional because he realizes this is a hot topic. James says Sen. Anderegg brought Chase up because Sen. Anderegg may have interpreted Chase's comments as being that there may be room to remove burdensome regulations after SB121.
- Adam notes that 5-6 years ago, there were people in favor of going to zero. He disagrees with zero, but after listening to Commissioner Kiser's comments, it makes him think that \$50 is a made up number that generalizes activities. If that's the intent, why not just list the activities. He thinks if there's going to be a move, it shouldn't be over \$100; he's not opposed to it going down, but it should be something.
- Alison says what she's hearing today is that everyone is OK with, or at least not opposed to, where it's at right now.
- Helen Hayden says if there's no issue prompting a rule change, why not leave it as it is. James says the only reason we're talking about it is because the ARRC has asked the TEC to take a look at it. Taking Commissioner Kiser's comments into account, the TEC will provide feedback and hopefully they'll feel like it complies.
- Commissioner Kiser believes that, based on personal conversations he's had, they're considering both zero and unlimited. In the retail market, there are a lot of "unlimiteds" in Utah, and the marketplace says unlimited is where we need to be to some legislators. We don't regulate other industries to prohibit "thank you" offers for buying a product. He doesn't know where it will land between zero and unlimited, but he thinks that's what's on the table right now. He would disagree with unlimited because he thinks rebates are unhealthy in the industry.
- Alison asks if unlimited came up, would the UID take a position. Commissioner Kiser says he would look at rebate law with Reed and Perri to see what the law says. It's possible that he'd take a position, but he'd review it with the Governor's staff to see what their position is. His personal sense is that unlimited in title would be unhealthy. He describes how a company called Zenefits came to the state and offered free services as part of their health management offerings. The law was changed to allow an insurance agency to provide certain administrative services for free. The little agencies couldn't offer free services, but the legislature said they were going to allow it. Commissioner Kiser sat in a meeting with the Governor and a large agency that was complaining that small-business-friendly legislators controlled the legislature that catered law to small businesses. The Governor's response was that if the agency didn't like it, they should get their people elected to change the law. Commissioner Kiser thinks that's what's happening here. Some of the big businesses may have the ears of some of the legislators. He says when he was in the legislature on the Business and Labor Committee, a lot of them were small business owners and

tended to look at small business concerns because 85% of Utah is small business. In this position, he doesn't know where right is. In a lot of other industries, unlimited is fine. Where is right? It's an interesting question the legislature is trying to work out.

- James says it's a widely held belief in the industry that unlimited would be universally opposed and would likely be a RESPA violation.
- Canyon says there have been numerous inducement discussions going back decades. One of the difficulties is trying to implement a minimum escrow fee. In the past there was no charge, but when they tried to increase it they were accused of being self-serving. However, escrow is fiduciary. The last time there were no checks and balances, if a company couldn't pay their bills, they used their escrow accounts. That's how people get hurt. The legislature has a difficult time grasping that idea.
- Adam says the money in question (the \$50) isn't going to the people getting the service — it's going to the agent. In retail or other lines of insurance, it goes to the insured. He notes that there was a senator in the hearing who said their real estate agent had their own deal, but the senator was the one who was hurt by it. It's not the insured person who gets the inducement for the terrible experience, it goes to someone else.
- James thanks everyone for their input and says he'll look for the letter and the date by which the TEC needs to respond.

- **Old Business**

- **Other Business**

- Elect new chair and vice chair
 - *Alison nominates Nancy as chair. Randy seconds.*
 - *Chase nominates Alison as vice chair. Nancy seconds.*
 - *Both motions pass 5-0.*

- **Hot Topics**

Executive Session (None)

- **Adjourn** (10:32 AM)
 - *Motion by Alison to adjourn. Seconded by Chase. Motion passes 5-0.*
- **Next Meeting: August 12**, 2019 — Copper Room

2019 Meeting Schedule in Copper Room

Jan 14	Feb 11	Mar 11	Apr 15	May 28	Jun 10 —Canceled
Jul 15	Aug 12	Sept 9	Oct 21	Nov 18	Dec 16

* bold dates denote quarterly required in-person meetings.