

Memorandum

To: Title and Escrow Commission
Fr: Reed Stringham, Deputy Commissioner
Re: Fixing the confusing relationship between R592-6-4 and -5
Dt: January 27, 2021

This memorandum describes the confusing relationship between Utah Admin. Code R592-6-4 and -5 and suggests ways to fix it.

1. The confusing relationship.

The provisions at issue are cast as counterparts to each other. According to its preamble, R592-6-4 describes unfair methods of competition that are prohibited except as provided in R592-6-5:

‘the Commission finds that providing or offering to provide any of the following benefits, . . . **except as allowed in Section R592-6-5 below**, is a material and unfair inducement to obtaining title insurance business[.]’

However, R592-6-5 describes a different relationship between the two provisions. According to its preamble, -5 describes permissible conduct except as prohibited in -4:

“Except as specifically prohibited in Section R592-6-4 above, the following are permitted[.]” R592-6-5 (emphasis added).

Thus, -4 says exceptions to its prohibitions are set out in -5, and -5 says that exceptions to its permissions are set out in -4. This creates confusion for several reasons.

First, there can logically be only one set of prohibitions with exceptions or one set of permissions with exceptions. The two provisions cannot serve as exceptions to each other and still make sense.

Second, this illogical relationship between the two provisions is compounded by the fact -4 and -5 do not line up as a unified set of prohibitions/permissions with matching exceptions. Some prohibitions in -4 have no associated exception in -5, and visa-versa.

Third, if -5 truly identifies only exceptions to -4, then a licensee who does not meet the requirements of an exception under -5 has not necessarily violated an insurance law. For example, we know that under -5 an advertisement in an official trade association publication is supposed to be at the rate charged to other advertisers in the publication. R592-6-5(1)(b). If a title licensee places an advertisement at a lower rate, has there been a violation of a law? Probably not, because -5(1)(b) is an exception to a prohibition, not a prohibition itself. Paying a lower rate simply means that the licensee doesn’t qualify for the exception; it doesn’t mean

that the licensee violated the law. And because the licensee's conduct doesn't otherwise fall within a prohibition described in -4, there has been no violation. My best guess is that this result does not reflect the drafters' intent.

2. Ways to fix the confusion.

It seems to me that the following three-step approach is the best way to fix the confusion described above.

First, the exception language in the preambles of -4 and -5 should be eliminated.

Second, to the extent possible, descriptions of permissible conduct in -5 should be recast as prohibited conduct and added to -4. For example, the provision in -5(5) that states

(5) A donation to a charitable organization must:

(a) not be paid in cash;

(b) if paid by a negotiable instrument, be made payable only to the charitable organization;

(c) be distributed directly to the charitable organization; and

(d) not provide any benefit to a client.

could be re-drafted to say

(5) A title licensee may not make a charitable donation in cash.

(6) A title licensee may not make a charitable donation with a negotiable instrument unless it is payable to the charitable organization only.

(7) A title licensee may not distribute a charitable donation in a manner other than directly to a charitable organization.

(8) A title licensee may not make a charitable donation that benefits a client.

Under the third step, for those provisions in -5 that cannot easily be recast as prohibitions, e.g. "(11) A title producer may provide clients access to water, beverages, and edible treats at the title producer's premises", -5 could be re-drafted to state:

Notwithstanding the prohibitions in R590-6-4, a title licensee may engage in the following conduct ...

Following this statement there would be a list of conduct that is permissible without exception.

The Department proposes to take these steps to fix the confusing relationship between -4 and -5. If the Commission approves, the Department will submit a draft of amendments to -4 and -5 for consideration.