



Financial Services  
Commission  
of Ontario

# **Report on FSCO's Review of Residential Title Insurance**

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## About the Financial Services Commission of Ontario

The Financial Services Commission of Ontario (FSCO) is an agency of Ontario's Ministry of Finance that is responsible for regulating insurance companies, agents and adjusters in Ontario. FSCO is also responsible for overseeing mortgage brokerages, administrators, brokers and agents; pension plans; loan and trust companies; co-operative corporations; credit unions and caisses populaires; and service providers who receive direct payment from auto insurers for certain statutory accident benefits in Ontario.

The Commission's legislative mandate is to provide regulatory services that protect the public interest and enhance public confidence in the sectors it regulates. As an organization, FSCO is committed to being a progressive and fair regulator, supporting competitive financial services sectors.

## Background

In order to enhance the public's trust in the regulated sectors, FSCO needs to ensure that consumers have an unbiased source of information. Since title insurance is an important product for consumers who are purchasing a home, FSCO has created a consumer awareness brochure entitled [Understanding Title Insurance](#). This brochure is available on FSCO's website and provides an overview of title insurance in Ontario, so that consumers can make smart purchase decisions.

In addition to being informed about title insurance, consumers also need to be confident that the title insurance industry is competitive and complies with provincial statutes. As Ontario's insurance regulator, FSCO is responsible for ensuring that insurance companies follow the Insurance Act and have fair business practices.

To address these obligations, FSCO periodically conducts reviews and/or surveys of the insurance industry using a risk-based approach to regulation. Under this regulatory approach, FSCO focuses its attention on those risks that have the potential to cause the greatest degree of harm. The benefit of this approach is that regulatory resources are maximized and compliance costs are minimized.

This is the second title insurance review that FSCO has completed to date. In August 2007, FSCO conducted a much broader review of the market conduct practices of title insurance companies in Ontario. For more information on the 2007 review, [visit FSCO's website](#) to read the Title Insurance Report.

## Introduction

FSCO conducted a review of five insurance companies who were licensed to sell title insurance products in Ontario between December 2013 and August 2014.

This report outlines the findings of FSCO's 2015 residential title insurance review, which focuses on the compensation arrangements that exist between title insurers and the lawyers who distribute title insurance products to their clients. In cases where lawyers distribute title insurance products to consumers on behalf of insurance companies, there are potential conflicts of interest in ensuring consumers are provided suitable products. This review considers the controls title insurers have in place

in overseeing the distribution of their products, as well as what disclosures are provided to consumers to enable them to make informed decisions about the products they plan to purchase.

## Purpose of the Review

During the review period, December 2013 to August 2014, there were five licensed insurance companies who were authorized to sell title insurance in Ontario. Three of these companies had compensation arrangements with lawyers who order title insurance policies on behalf of their clients.

The purpose of FSCO's review was to:

- Obtain a better understanding of the services that lawyers are providing to these insurance companies;
- Determine how fee payments align with each insurance company's individual business model;
- Find out what internal controls insurers have in place to monitor and manage potential conflicts of interest that may arise from these compensation arrangements; and
- Determine whether the marketplace for the selling of residential title insurance continues to be competitive.

## Why FSCO Conducted a Review

In Ontario, regulation 69/07 of the Insurance Act requires that title insurance companies obtain an opinion on title to the property from a solicitor who is not employed by the title insurer. In practice, this means that insurers rely on the legal opinions consumers receive from their lawyers to issue residential insurance policies. This also means that consumers typically purchase title insurance through their lawyers, who act in their professional capacity by providing a broad spectrum of real estate transaction services to their clients.

In situations where there are compensation arrangements between insurers and lawyers for the distribution of residential title insurance products, outside observers may reasonably perceive that there are conflicts of interest. The existence of a conflict of interest does not necessarily mean that someone has done something wrong, nor is it a problem if it is appropriately identified and managed. FSCO recognizes that lawyers in Ontario abide by the Rules of Professional Conduct which are subject to oversight by the Law Society of Upper Canada (LSUC). However, it is FSCO's view that insurance companies also have an obligation to oversee their distribution process and ensure consumers are treated fairly.

From a complaint perspective, FSCO continues to receive few complaints about title insurance from consumers. FSCO's statistics show that title insurance complaints represented less than one per cent of all reported property and casualty insurance industry complaints in 2014. Most of these complaints were related to claims for occurrences that were not covered by consumers' title insurance policies, or exclusions that were listed in their policies.

## Review Methodology

One key component of FSCO's review was a survey of the five insurance companies who are licensed to sell title insurance in Ontario. This survey was conducted in order to obtain information about:

- Any compensation insurers pay to lawyers for selling or distributing the company's title insurance product;
- Insurers' requirements for lawyers to disclose to policyholders the compensation that they receive from an insurance company; and
- Whether the compensation paid by an insurer was or is incorporated within the premium that is charged to the policyholder.

After the survey was conducted, FSCO had follow up discussions with the title insurance companies to better understand how the compensation arrangements between the insurers and lawyers align with the insurers' business models. FSCO also sought information about the monitoring and oversight controls these insurers have in place over the distribution of their title insurance products through lawyers.

## Findings

### Marketplace

When FSCO's review was conducted, there were five insurance companies who were licensed to sell title insurance in Ontario:

- Chicago Title Insurance Company
- First Canadian Title (FCT) Insurance Company Ltd.
- Lawyers' Professional Indemnity Company (LawPro)
- Stewart Title Guaranty Company
- Travelers Insurance Company of Canada

Of these five companies, FCT Insurance Company Ltd., Stewart Title Guaranty Company and Chicago Title Insurance Company conducted the majority of all title insurance business in Ontario. Each of these title insurance companies focused its marketing and sales efforts on one particular segment of the market: homeowners, residential lenders, developers or mortgage refinancees.

## Market share

Company Name	DWP for Title Insurance in 2013 (\$ millions)	% of the Canadian Title Insurance Market in 2013	DWP for Title Insurance in 2006 (\$ millions)	% of the Canadian Title Insurance Market in 2006
FCT Insurance	106	46%	104	52.6%
Stewart Title	92	40%	70	36%
Chicago Title	26	11%	16	8%
LawPro	6	3%	6	3%
Travelers	0	0%	0.8	0.4%
<b>Total</b>	<b>\$230</b>	<b>100%</b>	<b>\$196.8</b>	<b>100%</b>

From 2007 to 2013, Ontario's residential title insurance market experienced a 16 per cent total increase in direct written premiums (DWP). (These years are being compared because they are based on the dates FSCO conducted reviews of the residential title insurance market in Ontario.) Although the individual market share of each title insurance company has changed in the last six years, these changes are not significant. Although the market shares have changed over the past few years, the market has also experienced an increase in DWP.

## Premiums and Compensation Arrangements between Insurers and Lawyers

### *The State of the Market*

Since 2007, most title insurers have increased their premiums by an average of \$50. Premium prices for residential title insurance policies vary among insurers, but the majority are within a \$50 to \$60 price difference.

Three of the five title insurance companies have compensation arrangements with lawyers. These insurers charge the same premium rates to consumers, regardless of whether or not the lawyers who ordered the policies have compensation arrangements with the insurance companies. One of the two companies that has no compensation arrangements with lawyers has not increased its premiums since 2007.

Given that the market share distribution has not substantially changed, and since premiums among title insurance companies only vary by \$50 to \$60, it appears that the residential title insurance market is still competitive.

Compensation rates vary among insurers, and one insurer varies its fee per policy based on the type of property that is purchased by the consumer. These title insurance companies do not provide any direction to lawyers about whether or not they should share the compensation fee — either partially or entirely — by reducing their fee or offering a discount to their clients. This is left to the sole discretion of each lawyer.

### *Why FSCO Looked at Compensation Arrangements*

Based on the information that was gathered, it appears that the residential title insurance market is still competitive, since:

- What, if any, services connected to the compensation arrangement are over and above the requirements in Ontario Regulation 69/07;
- How the compensation fee is calculated; and
- How the terms of the arrangement set out the compensation fee that is payable to lawyers.

While these were the primary areas of focus for FSCO's review of compensation arrangements, it should be noted that from LSUC's perspective these fees that are paid to lawyers are not considered referral fees. LSUC considers these fees to be payments for the lawyers' legal services and/or administrative/processing services.

### *Services*

In Ontario, all lawyers provide basic services for the distribution of title insurance products. This includes conducting a title search and providing an opinion on title — both of which fall under the requirements of Ontario Regulation 69/07.

During the review, all three title insurers who said they provide compensation arrangements, indicated that lawyers are compensated if they order title insurance online through the company's customized software or an online ordering platform. These title insurers said that online orders generate operating and administrative savings, which are passed on to lawyers through the compensation payments they receive.

Two of these title insurers also indicated that a portion of the compensation payment is for legal services that are provided to the title insurer, which includes basic services.

If lawyers are required to use the insurer's customized software or online ordering platform to qualify for compensation, these services are over and above the basic services for distributing title insurance products. These extra services include selecting the title qualifications from a checklist in the software, and completing any required information online.

Operating and administrative savings are realized according to insurers, when lawyers use the customized software or electronic ordering platform, because the insurers' staff would otherwise need to complete much of this work that is performed by lawyers online. This includes inputting data into the title insurance policy, analyzing the title information, and entering title qualifications.

### *Compensation*

When FSCO's review was conducted, there were three active compensation programs for lawyers who sold or distributed title insurance products. Only one of these insurers offered a discount that required the lawyer to pass the savings directly back to the consumer. The amount of this discount was minimal, and varied based on whether the transaction was for a new purchase or renewal.

Of the two title insurers who did not require the savings to be passed on to the consumer, one insurer calculated its savings per policy by estimating the average time it would take its staff to process the title insurance policy internally, and the average legal fee that was charged by lawyers in Ontario for a residential purchase transaction. The other title insurer indicated that it is difficult to calculate cost savings related to legal services and any process efficiencies which it experiences due to a reduction in labour costs related to not having to manually process title insurance policies and provide related customer service.

Lawyers who do not participate in these compensation programs cannot use the insurers' customized software or online ordering platforms. In addition, they are not paid any compensation as the title insurance companies' staff would need to complete much of the work that is done by lawyers who use the software or online ordering platforms. In these situations, the final title insurance policy is given to the lawyer by an individual who works for the insurer, provided all underwriting review has been completed, the premium has been paid, and the report on title has been received.

### *Arrangements*

During FSCO's review, two of the three insurers had compensation arrangements that required lawyers to sign an agreement. These lawyers were required to acknowledge that the fees payable by the insurer under the agreement are not referral fees, they are fees for the lawyer's legal services and/or administrative/processing services. Under these agreements, lawyers were not prohibited from ordering title insurance policies from other insurance companies.

The title insurer who required its discount to be offered directly to consumers, did not have a formal agreement with lawyers.

One title insurer had volume requirements specified in its agreement with lawyers. To qualify for a fee, lawyers had to order a high volume of title insurance policies with the insurer. Lawyers who were unable to meet the required volume threshold, were not entitled to receive a fee from the insurer. This volume threshold was negotiated between the insurer and individual lawyers. According to the company, it has a better claims experience with lawyers who sell a high volume of title insurance policies. FSCO's findings show that the majority of lawyers that participated in this company's program were unable to meet the agreed upon volume threshold, and therefore did not receive any fees from the insurer.

While compensation arrangements vary per title insurer, it should be noted that in general, compensation arrangements for the distribution of title insurance policies are not prohibited by Ontario Regulation 69/07.

### *Assessment*

If the basic services that are provided by lawyers who distribute title insurance fall within the requirements of regulation 69/07, then these title insurance compensation programs have specific services that are over and above these basic requirements. These extra services are mainly administrative in nature, since processing efficiencies are realized by having lawyers use the insurers' customized software or online ordering platforms. If these services were not completed by these lawyers, they would need to be performed by the insurers' staff, resulting in additional costs.



If compensation agreements are in place, insurers have set out the terms for receiving compensation fees. In addition, under these agreements lawyers must acknowledge that these fees are not for referrals, but are instead fees for the lawyer's legal services and/or administrative/processing services, which is consistent with LSUC's viewpoint. Since these agreements do not prohibit lawyers from ordering title insurance policies from other insurers, each lawyer may use his/her own discretion in presenting suitable products to his/her clients.

### **Company Oversight and Management of Conflicts of Interest**

From the three insurers that offered compensation programs, only one had a requirement in its agreement that the lawyer disclose to the consumer that he/she is receiving a fee from the insurer. To ensure that lawyers are complying with this requirement, this insurer has an oversight mechanism in place which includes conducting quality assurance audits on a rotational basis.

This quality assurance audit includes the following:

- Reviewing the lawyer's title insurance files;
- Validating a number of matters, including search requirements, title qualification selection and real estate practice standards; and
- Checking that the compensation fee is being disclosed to the lawyer's clients.

In cases where the fee was not disclosed to the lawyer's client, the issue is brought to the lawyer's attention and the lawyer is informed that he/she must do so. This finding is also noted in the lawyer's file, so that the insurer can follow up on this matter at its next quality assurance audit, to confirm that the lawyer has implemented the necessary changes.

This title insurance company appears to have sufficient internal controls in place to manage potential conflicts of interest, as it requires lawyers to disclose compensation fees to their clients and it verifies this through quality assurance audits.

At the time of the review, FSCO noted that the other two compensation programs did not require lawyers to disclose fee payments to their clients. Instead, both indicated that they rely on the lawyers' professional obligation to disclose this information. These insurers did not have an oversight mechanism in place to verify that lawyers have actually disclosed potential conflicts of interest.

### **Assessment**

From FSCO's perspective, insurers are accountable for the distribution of their products, as it is the insurer and the consumer who have a contractual arrangement in place. Accountability for the product includes ensuring conflicts of interest are disclosed where appropriate, and if insurers continue to rely on lawyers to provide disclosures, it is in their best interest to adopt an oversight mechanism to mitigate any potential conflicts of interest.

After completing this review, FSCO reached out to the participating insurers and communicated its overall findings in advance of issuing this report. It is imperative for title insurers to appreciate their role in the distribution of title insurance products, and recognize that they are responsible for mitigating any potential conflicts of interest in cases where they rely on lawyers to disclose compensation fees to their clients.

## Conclusion

Based on the information that was gathered, it appears that the residential title insurance market is still competitive, since:

- There is no insurer that dominates the residential title insurance market in Ontario;
- The market share of each insurer has not substantially changed since 2006; and
- Premiums among title insurance companies only vary by \$50 to \$60

Based on these findings, it is difficult to determine if these compensation programs have generated a direct benefit for those lawyers who participated in them.

Some insurers have chosen to pay fees to lawyers for their legal services, as well as the administrative services that are associated with ordering title insurance policies through the insurance company's customized software program. These services are over and above the basic services that are provided by a lawyer in the distribution of title insurance, which are not required by Ontario Regulation 69/07, and therefore support the compensation programs that are offered by title insurers.

Compensation arrangements between title insurance companies and lawyers may result in potential conflicts of interest which are not a problem if they are appropriately identified and managed. Lawyers have an obligation to their clients based on their own professional code of conduct and oversight by the Law Society of Upper Canada. However, insurers are still accountable for the distribution of their products, and therefore must have appropriate oversight to ensure consumers receive appropriate disclosure of the information they need to make informed decisions.

FSCO expects insurers to have supervisory mechanisms in place to oversee the sale and distribution of title insurance products. In addition, insurers should develop controls to manage potential conflicts of interest, and to maintain the appropriate level of oversight of the distribution of their products.

Based on the findings of this review, FSCO has made recommendations to two title insurers to improve their internal controls for managing potential conflicts of interest that may arise during the sale of their products. FSCO is satisfied with the proposed solutions that were presented by these title insurers, as their compensation arrangements will have adequate controls in place to mitigate these concerns, which will be verified going forward.