

TITLE INSURANCE CONSUMER PROTECTION FUND GUIDELINE

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Section 1. Title

This Act may be cited as the “[State] Title Insurance Guaranty Association – Title Insurance Consumer Protection Fund.”

Section 2. Purpose

The purpose of this Act is to provide a mechanism for continuation of coverage; to provide payment of covered claims under certain insurance policies; to avoid excessive delay in payment; to avoid financial loss to policyholders because of the insolvency of a title insurer; and to provide an Association to assess the costs of such protection.

Section 3. Scope

This Act applies to all title insurers authorized to transact insurance in this state.

Section 4. Definitions

- A. “Association” means the title insurance guaranty association.
- B. “Authorized to transact insurance” means a title insurer as defined in [insert appropriate citation to the state insurance code].
- C. “Commissioner” means the chief regulatory insurance official of this state, whether referred to as Director, Superintendent, Commissioner, or other similar title.
- D. “Covered claim” means an unpaid claim of an insured covered under, and not in excess of, the applicable limits of a title insurance policy insuring land located in this state issued by an insolvent insurer. Subject to applicable policy limits, the Association’s liability for covered claims shall not exceed \$300,000 per claim. The total amount that may be recovered from the Association by a claimant for all covered claims shall not exceed \$600,000. “Covered claim” does not include supplementary payment obligations, including, but not limited to, adjustment fees and expenses, escrow or other closing protection claims; nor does it include punitive, exemplary, extra-contractual or bad-faith damages awarded by a court judgment against an insurer. “Covered claim” does not include any first-party or third-party claim by or against an insured whose net worth on December 31 of the year preceding the date the insurer becomes insolvent exceeds \$25,000,000 (\$25 million), provided the insured’s net worth on such date shall be deemed to include the aggregate net worth of the insured and all of its affiliates as calculated on a consolidated basis, and the insured has not applied for or consented to appointment of a receiver, trustee, or liquidator for all or substantially all of its assets; filed a voluntary bankruptcy petition; or filed a proceeding under state law to

reorganize or receive protection under any insolvency law. The amount of a covered claim shall be reduced by the amount or other benefit that an insured recovers from any person, including an agent, regardless of whether an assignment is taken.

Drafting Note: States that desire to include additional claims in the fund may omit one or more of the exclusions from this definition.

- E. “Insolvent insurer” means:
 - (1) An insurer authorized to transact business in this state at the time the policy was issued or an insurer that subsequently assumes such policy under an assumption agreement;
 - (2) An insurer against which an Order of Liquidation with a finding of insolvency has been entered after the effective date of this Act by a court or administrative agency of competent jurisdiction in the insurer’s state of domicile, or of this state under [insert state liquidation law citation]; and
 - (3) An insurer against which an Order of Liquidation has not been stayed or been the subject of a writ that supersedes or other comparable Order.
- F. “Insured” means a person entitled to payment for insured loss under a policy issued by the insolvent title insurance company on title to real property located in this state.
- G. “Member insurer” means any person who is authorized to transact title insurance in this state.

Drafting Note: Some states may authorize property and casualty insurers to transact title insurance. Other states may limit the transaction of title insurance to monoline title insurers.

- H. “Net direct title premium” means direct gross premiums written in this state on insurance policies to which this Act applies.
- I. “Person” means any individual, corporation, partnership, association, trust, or voluntary organization.
- J. “Policy” means a title insurance policy, or assumption certificate whose subject of coverage or protection is title to real property located in this state; and “Title Policy” means any written instrument or contract by means of which title insurance liability is assumed by a title insurer.
- K. “Receiver” means receiver, liquidator, rehabilitator, or conservator as the context may require.
- L. “Servicing facility” means a person or persons delegated by the Board of Directors to settle or compromise claims and to expend Association assets to pay claims.

Section 5. Organization of Association

There is hereby created a nonprofit legal entity to be known as the [State] Title Insurance Guaranty Association. All member insurers shall maintain membership in the Association as a condition of their authority to transact title insurance in this state. The Association may take any appropriate form of legal entity available under the laws of this state, including, but not limited to, a corporation or receivership association as approved by the Commissioner.

Section 6. Board of Directors

- A. The Board of Directors of the Association shall consist of not less than five (5), and not more than eleven (11), persons serving terms as established in the Plan of Operation. In addition to the voting members of the board, the Commissioner or his/her designated representative shall be an ex-officio non-voting member of the board. The members of the board shall be selected by member insurers subject to the approval of the Commissioner and shall have as a majority of its members, persons who are employed by member insurers. Vacancies on the board shall be filled for the remaining period of the term by a majority vote of the remaining board members, subject to the approval of the Commissioner.
- B. In approving selections to the board, the Commissioner shall consider, among other things, whether all member insurers are fairly represented.

- C. Members of the Board of Directors shall not receive compensation for serving as members of the Board of Directors, or any committees thereof, but may be reimbursed from the administrative account for actual expenses incurred by them as members of the Board of Directors.

Section 7. Powers and Duties of the Association

- A. The Association shall:

- (1) Be obligated to the extent of the amount of covered claims not resolved, whether reported or not, prior to the determination of insolvency, except that the Association shall not be obligated as to policies that have been replaced by another title insurance policy issued by a solvent authorized title insurer. In no event shall the Association be obligated for an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises;

Drafting Note: The phrase “not resolved” includes claims that are unpaid or otherwise unresolved by the member insurer as of the insolvency determination date, including claims that may not have been asserted but exist due to a defect in title or other event covered under the terms of the title policy issued by the insolvent member insurer. If another title insurance company assumes or otherwise issues a replacement policy, there should be no covered claims under the original, now insolvent, title insurance company policy. States may want to cut off claims by requiring the Association, or the Commissioner as liquidator, to cancel title insurance policies after five years. Alternatively, as reflected in this Act, states may not want to have a guaranty fund claim cut-off.

- (2) Have no liability for the alleged bad faith of the insolvent insurer in the handling of any claim prior to the determination of insolvency or for any exemplary or punitive damages;
- (3) Investigate claims made against the policies of an insolvent insurer and adjust, negotiate, resolve, settle, and pay covered claims to the extent of the Association’s obligation and deny all other claims. Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. The designation of a servicing facility is subject to the approval of the Board of Directors, but the designation of such insurer may be declined by the member insurer; and
- (4) Refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the covered claims and expenses, including loss adjustment expenses, and receivership expenses for the coming year if, at the end of any calendar year, the Board of Directors finds that the assets of the Association in the fund exceed the liabilities of that account.

- B. The Association may, subject to approval by the Board of Directors:

- (1) Employ or retain persons or companies as servicing facilities necessary to handle claims and perform other duties of the Association;
- (2) Review settlements, releases, and judgments to which the insolvent insurer or its insureds were parties to in order to determine the extent to which such settlements, releases, and judgments may be properly contested;
- (3) Borrow funds necessary to affect the purposes of this Act in accordance with the Plan of Operation;
- (4) Sue or be sued and intervene in any court or arbitration forum having jurisdiction over an insolvent member insurer;
- (5) Negotiate and become a party to contracts necessary to carry out the purposes of this Act, including assumption or reinsurance agreements relating to the title policies of an insolvent insurer;
- (6) Take actions as provided in Subsection A and Subsection B of this section prior to an insurer being declared insolvent by a court, where an insurer is potentially unable to fulfill its contractual obligations or is determined to be impaired; and
- (7) Perform other acts necessary or proper to effectuate the purposes of this Act.

- C. If the Association fails to act within a reasonable time, the Commissioner shall assume the powers and duties of the Board of Directors of the Association and cause it to act as appropriate.

Section 8. Plan of Operation

- A. The Association shall submit to the Commissioner a Plan of Operation and any amendments thereto necessary or suitable to ensure the fair, reasonable, and equitable administration of the Association. The Plan of Operation and any amendments thereto shall become effective upon the approval in writing by the Commissioner. If, at any time, the Association fails to submit suitable amendments to the Plan of Operation, the Commissioner shall, after notice and hearing, adopt rules necessary or advisable to effectuate the provisions of this Act. The rules shall continue in force until modified by the Commissioner or superseded by a plan or amendments submitted by the Association and approved by the Commissioner.
- B. All member insurers shall comply with the Plan of Operation, subject to the provisions of this Act.
- C. The Plan of Operation, among other things, shall establish procedures for conducting the business of the Association, for handling its assets, for keeping records, and for the conduct of other activities necessary for execution of the powers and duties of the Association.
- D. The Plan of Operation may provide that any and all powers and duties of the Association, except those under Section 6 and Section 7 of this Act that are to be performed by the Board of Directors, or be delegated to a corporation, association or other organization that performs, or will perform, functions similar to those of the Association, or its equivalent, in two (2) or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid by the Association for its costs incurred in performance of such functions.

Section 9. Duties and Powers of Commissioner

- A. The Commissioner shall:
 - (1) Serve on the Association a copy of any complaint seeking an Order of Liquidation with a finding of insolvency against a member insurer domiciled in this state at the same time that such complaint is filed with a court of competent jurisdiction; and
 - (2) Notify the Association of the existence of an insolvent insurer not later than three (3) days after receipt of notice of the determination of the insolvency; and, upon request of the Board of Directors, provide the Association with a statement of the reported direct premiums written for the [insert time period] of each member insurer.
- B. The Commissioner may:
 - (1) Suspend or revoke, after notice and hearing, the Certificate of Authority to transact insurance in this state of any member insurer that fails to pay an assessment when due or fails to comply with the Plan of Operation. As an alternative, the Commissioner may levy a civil penalty on any member insurer that fails to pay an assessment when due. The civil penalty shall not exceed five percent (5%) of the unpaid assessment per month, except that no civil penalty shall be less than one hundred dollars (\$100) a month; and
 - (2) Revoke the designation of any servicing facility if the Commissioner finds claims are being handled unsatisfactorily.

Section 10. Coordination Among Guaranty Associations

- A. The Association may join one or more organizations of other state title guaranty associations of similar purposes, to further the purposes and administer the powers and duties of the Association. The Association may designate one or more of these organizations to act as a liaison for the Association and to the extent which the Association authorizes, to bind the Association in agreements or settlements with the receiver of the insolvent insurer or his or her designated representative.

- B. The Association, in cooperation with other obligated or potentially obligated guaranty associations, or their designated representatives, shall make all reasonable efforts to coordinate and cooperate with the receiver, or his or her designated representative, in the most efficient and uniform manner.

Section 11. Effect of Paid Claims

- A. Any person recovering under this Act shall be deemed to have assigned his or her rights under the policy to the Association to the extent of his recovery from the Association. Every insured seeking the protection of this Act shall cooperate with the Association to the same extent as he or she would have been required to cooperate with the insolvent insurer. The Association shall have no cause of action against an insured for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the Association do not operate to reduce the liability of the insured to the receiver, liquidator, or statutory successor for unpaid assessments.
- B. The court having jurisdiction shall grant such claims assigned pursuant to Subsection A of this section and the expenses of the Association or similar organization in another state the same priority as the claims and expenses of policyholders. The Association may make application to the receivership court for reimbursement of such reasonable claims and expenses and upon proper showing to the court for reimbursement of such amounts the court shall order appropriate reimbursement of reasonable claims and expenses to be made.
- C. The receiver for the insolvent insurer shall, each time a request for funds is submitted to the Association, but not less than once every six (6) months within the time set by the receivership court, file with the Commissioner or liquidator court of the insolvent insurer, a statement of the covered claims paid, reserves for unpaid claims, claims expense incurred, and the balance of funds then in the possession of the receiver.

Section 12. Non-Duplication of Recovery

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer that is also a covered claim, shall be required to first exhaust his or her rights under such policy. Any amount payable on a covered claim under this Act shall be reduced by the amount of any recovery or value thereof received under such insurance policy.

Section 13. Examination of Association; Financial Reports

The Association is subject to examination and shall complete audited financial statements. The Board of directors shall submit to the Commissioner and its member insurers, not later than June 30 of each year, a financial report for the preceding year in a form approved by the Commissioner.

Section 14. Assessment Authority of Commissioner and Association

- A. Making of Assessment
 - (1) If the Commissioner determines that a title insurance company has become insolvent, the Association shall promptly estimate the amount of additional money needed to supplement the assets of the impaired title insurance company to pay all covered claims and administrative expenses.
 - (2) The Association shall assess title insurance companies in writing an amount as determined under Subsection B of this section. A member insurer does not incur real or contingent liability under this Act until the Association provides the member insurer with a written assessment.
- B. Amount of Assessment: Proration of Payment
 - (1) The Association shall assess member insurers the amount necessary to pay: (a) the Association's obligations under this Act and the expenses of handling covered claims subsequent to an insolvency; and (b) other expenses authorized by this Act.

- (2) The assessment of each member insurer must be in the proportion that the net direct written title premiums of that company for the calendar year preceding the assessment bear to the net direct written title premiums of all member insurers for that year.
- (2) The total assessment of a member insurer in a year may not exceed an amount equal to two percent (2%) of the member's net direct title premium earned for the calendar year preceding the assessment. If the maximum assessment and the Association's other assets are insufficient in any one year to make all necessary payments, the money available shall be prorated and the unpaid portion shall be paid in subsequent years.

C. Notice and Payment

- (1) Not later than the forty-fifth (45th) day before the date an assessment is due, the Association shall notify member insurers of the amount of the assessment.
- (2) Not later than the forty-fifth (45th) day after the date an assessment is made, the member insurer shall pay the Association the amount of the assessment.

D. Exemption for Impaired Title Insurance Company

A member insurer is exempt from assessment during the period beginning on the date the Commissioner designates the company as an impaired member insurer and ending on the date the Commissioner determines that the company is no longer an impaired member insurer.

Drafting Note: The term "hazardous financial condition" or "inability to meet obligations" may be substituted for the term "impaired."

E. Deferment

- (1) At the discretion of the Commissioner, the Association may defer, in whole or in part, an assessment of a member insurer that would cause the member's financial statement to show amounts of capital or surplus less than the minimum amount required for a Certificate of Authority in any jurisdiction in which the company is authorized to engage in the business of insurance.
- (2) The member insurer shall pay the deferred assessment when payment will not reduce capital or surplus below required minimums. The payment shall be refunded to or credited against future assessments of any member insurer receiving a larger assessment because of the deferment, as elected by that member.
- (3) During a period of deferment, the member insurer may not pay a dividend to shareholders or policyholders.

F. Accounting; Reports

- (1) The Association shall adopt accounting procedures to show how money received from assessments or partial assessments is used.
- (2) The Association shall make interim accounting reports as the Commissioner requires.
- (3) The Association shall make a final report to the Commissioner showing how money received from assessments or partial assessments has been used, including a statement of any final balance of that money.

G. Use of Assessments

The Association may use money from assessments to negotiate and consummate contracts of reinsurance, assumption of liabilities, or replacement policies from authorized title insurers to provide for outstanding liabilities of covered claims. Assessments shall be used to pay the Association's general expenses and statutory obligations.

- H. Failure to Pay
- (1) The Association shall promptly report to the Commissioner a failure of a member insurer to pay an assessment when due.
 - (2) On failure of a member insurer to pay an assessment when due, the Commissioner may take any action as provided in Section 9B of this Act.
 - (3) A member insurer whose certificate of authority is canceled or surrendered is liable for any unpaid assessments made before the date of the cancellation or surrender.
- I. Recovery of Assessment in Rates; Tax Credit
- (1) The surcharge on title insurance policies shall be based on historical need and include amounts sufficient to recoup a sum equal to the amounts paid to the Association by the member insurers, less any amounts returned to the member insurers by the Association, and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurers.
 - (2) Unless the Commissioner determines that all amounts paid as assessments by each member insurer have been recovered under Subsection A of this section, for any amount not recovered the member insurer is entitled to a credit against its premium tax [include reference to state law providing for premium taxes]. The credit may be taken at a rate of twenty percent (20%) each year for five (5) successive years following the date of assessment and, if the member insurer elects, may be taken over an additional number of years.

Drafting Note: State law may not permit this tax offset, as premium taxes are for general fund purposes and assessments as provided in this Act are for a specific purpose.

- (3) An amount of a tax credit allowed by this section that is unclaimed may be shown in the member insurer's books and records as an admitted asset for all purposes, including an annual financial statement under [include reference to state law].

Drafting Note: State law may not permit this tax offset; therefore Subsection (2) and Subsection (3) may be omitted.

Section 15. Immunity and Confidentiality

- A. There shall be no liability on the part of, and cause of action of any nature shall arise against, any member insurer, the Association or its officers, agents or employees, the Board of Directors, any individual director, or the Commissioner or his or her representative for any action taken by them in the performance of their powers and duties under this Act or for failure to prevent any insolvency.
- B. The meetings, activities, recommendations, and decisions of the Board of Directors of the Association as required or permitted in this Act shall not be open to public inspection, nor considered public documents pursuant to [insert relevant state law]. No representative of a member insurer shall be excluded from any meeting of the Board of Directors, with the exception of a representative of an insolvent insurer.

Section 16. Stay of Proceedings

All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this state shall, subject to waiver of the Association for specific cases involving covered claims, be stayed for six (6) months and such additional time as may be determined by the court from the date the insolvency is determined or an ancillary proceeding is instituted in this state, whichever is later, to permit proper defense by the Association of all pending causes of action.

The liquidator, receiver, or statutory successor of an insolvent insurer covered by this Act shall permit access by the Board of Directors, or its authorized representative, to such of the insolvent insurer's records that are necessary for the Board of Directors in carrying out its functions under this Act with regard to covered claims. In addition, the liquidator, receiver, or statutory successor shall provide the Board of Directors, or its authorized representative, with copies of those records upon the request by the Board of Directors and at the expense of the Board of Directors.

Section 17. Termination; Distribution of Funds

- A. The Commissioner shall by Order terminate the operation of the Association if he or she finds, after hearing, that there is in effect a statutory or voluntary plan which:
- (1) Is a permanent plan that is adequately funded or for which an adequate means of funding is provided; and
 - (2) Extends, or will extend, to the policyholders of this state protection and benefits with respect to insolvent member insurers not substantially less favorable and effective to the policyholders than the protection provided under this Act.
- B. If operation of the Association is terminated or if the Association has no further known obligations, the Association, as soon as possible thereafter, shall distribute the balance of money and assets remaining, after discharge of the functions of the Association, with respect to prior insurer insolvencies not covered by another plan, together with expenses, to the member insurers or former member insurers, pro rata upon the basis of the aggregate of such payments made by the respective insurers during the period of five (5) years next preceding the date of the Order.

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

2015 Proc. 2nd Quarter, Vol. 1 126, 145, 151, 160, 230-239 (adopted).