

## TITLE INSURANCE AGENT MODEL ACT

**Drafting Note:** This model Act should be adopted concurrently with the Title Insurers Model Act because the Acts contain many complementary provisions and both Acts are required to provide sufficient regulation of title insurance.

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### Section 1. Title and Purpose

- A. This Act shall be known and may be cited as the [insert state] Title Insurance Agent Act.
- B. The purpose of this Act is to provide the state of [insert state] with a comprehensive body of law for the effective regulation and supervision of title insurance agents.

### Section 2. Definitions

As used in this Act, unless the context otherwise requires:

- A. “Abstract of title” or “abstract” means a written history, synopsis or summary of the recorded instruments affecting the title to real property.
- B. “Associate” means any:
  - (1) Business organized for profit in which a producer of title business is a director, officer, partner, employee or an owner of a financial interest;
  - (2) Employee of a producer of title business;
  - (3) Franchiser or franchisee of a producer of title business;
  - (4) Spouse, parent or child of a producer of title insurance business who is a natural person;
  - (5) Person, other than a natural person, that controls, is controlled by, or is under common control with, a producer of title business;
  - (6) Person with whom a producer of title insurance business or any associate of the producer has an agreement, arrangement or understanding, or pursues a course of conduct, the purpose or effect of which is to provide financial benefits to that producer or associate for the referral of business.

- C. “Bona fide employee” of the title insurer or title insurance agent means an individual who devotes substantially all of his or her time to performing services on behalf of a title insurer or title insurance agent and whose compensation for these services is in the form of salary or its equivalent paid by the title insurer or title insurance agent.
- D. “Commissioner” means the insurance commissioner of [insert name of state], or the commissioner’s representatives or the commissioner, director or superintendent of insurance in any other state.
- E. “Controlled business” means any portion of a title insurance agent’s business written in this state that was referred to it by a producer of title insurance business or by an associate of the producer, where the producer or associate, or both, have a financial interest in the title insurance agent.
- F. “Escrow” means written instruments, money or other items deposited by one party with a depository, escrow agent or escrow for delivery to another party upon the performance of a specified condition or the happening of a certain event.
- G. “Financial interest” means a direct or indirect interest, legal or beneficial, where the holder is or will be entitled to five percent (5%) or more of the net profits or net worth of the entity in which the interest is held.
- H. “Foreign title insurer” means a title insurer incorporated or organized under the laws of any other state of the United States, the District of Columbia, or any other jurisdiction of the United States.
- I. “Non-U.S. title insurer” means a title insurer incorporated or organized under the laws of any foreign nation or any foreign province or territory.
- J. “Person” means a natural person, partnership, association, cooperative, corporation, trust or other legal entity.
- K. “Producer” means a person, including an officer, director or owner of five percent (5%) or more of the equity or capital of any person, engaged in this state in the trade, business, occupation or profession of:
  - (1) Buying or selling interests in real property;
  - (2) Making loans secured by interests in real property; or
  - (3) Acting as broker, agent, representative or attorney of a person who buys or sells an interest in real property or who lends or borrows money with the interest as security.
- L. “Qualified financial institution” means an institution that is:
  - (1) Organized or (in the case of a U.S. branch or agency office of a foreign banking organization) licensed under the laws of the United States or any state and has been granted authority to operate with fiduciary powers;
  - (2) Regulated, supervised and examined by federal or state authorities having regulatory authority over banks and trust companies;
  - (3) Insured by the appropriate federal entity; and
  - (4) Qualified under any additional rules established by the commissioner.
- M. “Referral” means the directing or the exercising of any power or influence over the direction of title insurance business, whether or not the consent or approval of any other person is sought or obtained with respect to the referral.
- N. “Security” or “security deposit” means funds or other property received by the title insurance agent as collateral to secure an indemnitor’s obligation under an indemnity agreement pursuant to which a title insurer is granted a perfected security interest in the collateral in exchange for agreeing to provide coverage in a title insurance policy for a specific title exception to coverage.

- O. “Title insurance agent” or “agent” means an authorized person, other than a bona fide employee of the title insurer who, on behalf of the title insurer, performs the following acts, in conjunction with the issuance of a title insurance report or policy:
- (1) Determines insurability and issues title insurance reports or policies, or both, based upon the performance or review of a search, or an abstract of title; and
  - (2) Performs one or more of the following functions:
    - (a) Collects or disburses premiums, escrow or security deposits or other funds;
    - (b) Handles escrow, settlements or closings;
    - (c) Solicits or negotiates title insurance business; or
    - (d) Records closing documents.
- P. “Title insurance business” or “business of title insurance” means:
- (1) Issuing as insurer or offering to issue as insurer a title insurance policy;
  - (2) Transacting or proposing to transact by a title insurance agent any of the following activities when conducted or performed in contemplation of or in conjunction with the issuance of a title insurance policy:
    - (a) Soliciting or negotiating the issuance of a title insurance policy;
    - (b) Guaranteeing, warranting or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units and proprietary leases and for all liens or charges affecting the same;
    - (c) Handling of escrow, settlements or closings;
    - (d) Executing title insurance policies;
    - (e) Effecting contracts of reinsurance; or
    - (f) Abstracting, searching or examining titles;
  - (3) Guaranteeing, warranting or insuring searches or examinations of title to real property or any interest in real property;
  - (4) Guaranteeing or warranting the status of title as to ownership of or liens on real property and personal property by any person other than the principals to the transaction; or
  - (5) Doing or proposing to do any business substantially equivalent to any of the activities listed in this subsection in a manner designed to evade the provisions of this Act.
- Q. “Title insurance policy” or “policy” means a contract insuring or indemnifying owners of, or other persons lawfully interested in, real or personal property or any interest in real property, against loss or damage arising from any or all of the following conditions existing on or before the policy date and not excepted or excluded:
- (1) Defects in or liens or encumbrances on the insured title;
  - (2) Unmarketability of the insured title;
  - (3) Invalidity, lack of priority, or unenforceability of liens or encumbrances on the stated property;

- (4) Lack of legal right of access to the land; or
  - (5) Unenforceability of rights in title to the land.
- R. “Title insurance report” or “report” means a preliminary report, commitment or binder issued prior to the issuance of a title insurance policy containing the terms, conditions, exceptions and any other matters incorporated by reference under which the title insurer is willing to issue its title insurance policy.
- S. “Title insurance sub-agent” or “sub-agent” means a person, other than a bona fide employee of a title insurance agent who, on behalf of the title insurance agent, determines insurability and issues title insurance reports or policies, or both, based upon the performance or review of a search or abstract of title, provided that the performance of actual legal services such as title examination or closing services by a licensed attorney does not render the attorney a sub-agent.
- T. “Title insurer” or “insurer” means a company organized under laws of this state for the purpose of transacting the business of title insurance and any foreign or non-U.S. title insurer licensed in this state to transact the business of title insurance.
- U. “Underwrite” means the authority to accept or reject risk on behalf of the title insurer.

### Section 3. Licensing Requirements

- A. A person shall not act in the capacity of a title insurance agent and a title insurer may not contract with any person to act in the capacity of a title insurance agent with respect to risks located in this state unless the person is a licensed title insurance agent in this state or possesses a license acceptable to the commissioner and issued by this state.

**Drafting Note:** Although a state agency other than the department of insurance might issue a limited license for one or more recognized agent functions, this does not imply a right of a licensed person to perform other agent functions unless lawfully licensed as a title insurance agent under the terms of this Act. For example, a state may wish to require licensing or registration of persons handling escrow accounts.

**Drafting Note:** States may want to expand this section to include competence, character, and integrity requirements; application procedures; fee requirements; procedures for withdrawal from the state and continuing education requirements. General state insurance licensing laws should also be considered and perhaps cross-referenced or incorporated into this subsection.

- B. An individual employed by a licensed insurance agent to whom the agent delegates authority to act on that agent’s behalf shall be either individually licensed or be named on the employing agent’s license. Each person named on the license shall possess all qualifications determined by the commissioner to be appropriate. The commissioner may adopt rules, regulations, and requirements relating to licensing and practices of persons acting in the capacity of title insurance agents. These persons may include title insurance agents, employees of title insurance agents, and persons acting on behalf of title insurance agents. This subsection is not intended to include persons performing clerical functions.
- C. (1) Every title insurance agent licensed in this state shall:
- (a) Disclose on all correspondence that the agent is acting in a capacity as agent for a particular named underwriter; and
  - (b) Exclude or eliminate the word “insurer” or “underwriter” or similar term from its agency’s name; and
  - (c) Provide, in a timely fashion, each title insurer with which it places business any information the title insurer requests in order to comply with reporting requirements of the commissioner.
- (2) A title insurance agent licensed in this state prior to the effective date of this Act shall have ninety (90) days after the effective date of this Act to comply with the requirements of this subsection.

- D. (1) The commissioner shall require the title insurance agent and any delegate performing the title search to maintain the following for the benefit of the title insurer in amounts commensurate with the agent's average exposure, under terms and conditions, and from insurers acceptable to the commissioner:
  - (a) An errors and omission policy which includes coverage for an agent's delegation of any agent functions; and
  - (b) Fidelity coverage if the agent handles escrow or security deposits.
- (2) The commissioner may promulgate rules specifying acceptable alternatives to the preceding insurance requirements. The availability of closing or settlement protection shall not be construed to be an acceptable alternative to the requirements of this subsection.
- E. (1) If the title insurance agent delegates the title search to a third party, such as an abstract company, the agent must first obtain proof that the third party:
  - (a) Is covered by or maintains the errors and omissions coverage required by Subsection D; and
  - (b) Is operating in compliance with rules and regulations established by the commissioner; and
- (2) The third party shall provide the agent and the insurer with access to and the right to copy all accounts and records maintained by the third party with respect to business placed with the title insurer.

**Section 4. Examination of Title Insurance Agents**

The commissioner may, during normal business hours, examine, audit and inspect any and all books and records maintained by a title insurance agent under the provisions of this Act. However, if the title insurance agent is a depository institution, the commissioner shall have the power to examine and investigate the insurance activities of the depository in order to determine whether the depository institution has complied with the provisions of this Act. The commissioner shall notify the appropriate federal banking agency of the commissioner's intent to examine or investigate a depository institution and advise the appropriate federal banking agency of the suspected violations of state law, if any, prior to commencing the examination or investigation.

**Drafting Note:** This provision is intended to confer the authority to conduct examinations on an exception basis in the event of regulatory interest in a particular agency. States may wish to add a section requiring the regular periodic examination of agents and specifying the party conducting the examination and the party responsible for the cost of the examination. Such a section should include a hardship provision conferring authority on the commissioner to adopt rules reducing the frequency of periodic audits in the case of small agents. Further, in cases where the commissioner believes that access to the non-insurance related books and records of a depository institution is necessary, the commissioner must request this information from the functional regulator of the depository institution through the information-sharing agreements that currently exist.

**Section 5. Prohibition of Rebate and Fee Splitting**

- A. A title insurance agent or other person shall not provide or receive, directly or indirectly, any consideration for the referral of title insurance business or escrow or other service provided by a title insurance agent. However, if the title insurance agent or other person is a depository institution, or an affiliate of a depository institution, the title insurance agent or other person may make a payment to its unlicensed employees for referrals so long as the unlicensed employee does not discuss specific insurance policy terms and conditions. Further, in the case of a referral of a customer of the depository institution, the unlicensed person may be compensated only if the compensation is a fixed dollar amount for each referral that does not depend on whether the customer purchases title insurance from the licensed title insurance agent. Furthermore, any person who accepts deposits from the public in an area where such transactions are routinely conducted in the depository institution may receive for each customer referral no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

**Drafting Note:** The last sentence of this paragraph further limits the referral for customers of personal, family and household insurance products, such as title insurance sold to individuals or families, as a result of Section 305 of the Gramm-Leach-Bliley Act and the subsequent adoption of regulations by the federal banking regulators at 12 CFR 14.50, 208.85, 343.50 and 536.50. The language in the paragraph was drafted to be consistent with the Gramm-Leach-Bliley Act and the federal regulations while maintaining the integrity of Section 104(d)(2)(B)(iv) and (v) of the Gramm-Leach-Bliley Act. Further, the NAIC crafted this language to be consistent with the provisions of Section 8 of the Real Estate Settlement Procedures Act (RESPA) in that it allows some exceptions specified in 12 USC 2607(c)(2).

**[Optional Subsection B]**

- [B. A title insurance agent doing business in the same county as a title insurer or title insurance agent who may be in violation of the prohibitions or limitations of this section shall have a cause of action against the violating title insurer or title insurance agent or recipient and, upon establishing the existence of a violation, shall be entitled to injunctive relief as the court may deem necessary or desirable to prevent violations of this section in the future. In any action under this subsection, the court may award to the successful party the court costs of the action together with reasonable attorney fees.]

**Drafting Note:** “County” in the preceding subsection refers to counties, boroughs or parishes defined by the state.

**Section 6. Controlled Business Provisions**

- A. Whenever the business to be written constitutes controlled business, prior to commencing the transaction, the title insurance agent shall ensure that its customer has been provided with disclosure of the existence of the controlled business arrangement and a written estimate of the charge or range of charges generally made for the title services provided by the agent.
- B. The commissioner may establish rules for use by all title insurance agents in the recording and reporting of the agent’s owners and of the agent’s ownership interests in other persons or businesses and of material transactions between the parties.
- C. The commissioner may require each title insurance agent to file on forms prescribed by the commissioner, reports setting forth the names and addresses of those persons, if any, that have a financial interest in the agent and who the agent knows or has reason to believe are producers of title insurance business or associates of producers.

**[First Optional Subsection D]**

- D. Nothing in this act shall be construed as prohibiting controlled business arrangements in the provision of title insurance business so long as:
  - (1) The title insurance agent or party making a referral constituting controlled business, at or prior to the time of the referral, discloses the arrangement and, in connection with the referral, provides the person being referred with a written estimate of the charge or range of charges likely to be assessed and otherwise complies with the disclosure obligations of this section;
  - (2) The person being referred is not required to use a specified title insurance agent or insurer; and
  - (3) The only thing of value that is received by the title insurance agent or party making the referral, other than payments otherwise permitted, is a return on an ownership interest. For purposes of this subsection, the terms “required use” and “return on an ownership interest” shall have the meaning accorded to them under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607, as amended and Regulation X, 24 C.F.R. § 3500 et seq.

**Drafting Note:** See drafting note following Third Optional Subsection D.

**[Second Optional Subsection D]**

- [D. (1) A title insurance agent shall not accept an order for or issue a title insurance policy or guarantee or provide services to an applicant for title insurance or receive or retain any money in connection with a title insurance transaction, if:
- (a) The title insurance agent knows or has reason to believe that the transaction will constitute controlled business; and
  - (b) When added to other controlled business written by the title insurance agent during the same calendar year, the aggregate controlled premiums written will exceed twenty percent (20%) of the title insurance agent's gross premiums written during the preceding calendar year. However, the twenty percent (20%) limitation shall be eighty percent (80%) in the first year after the effective date of this Act, sixty percent (60%) in the second calendar year after the effective date of this Act and forty percent (40%) in the third calendar year after the effective date of this Act.
- (2) This provision does not apply if the title insurance agent is also a depository institution, or if the title insurance agent is affiliated with a depository institution.]

**Drafting Note:** See drafting note following third optional Subsection D.

**[Third Optional Subsection D]**

- [D. (1) In addition to the requirements of Section 3D, the commissioner shall require the title insurance agent to maintain for the benefit of the title insurer, insured or the depositor, pursuant to terms and conditions to be prescribed by the commissioner, in amounts commensurate with the agent's average exposure and the volume and nature of its business, a sufficient net worth to ensure the agent's solvency and commitment to the purpose of being a bona-fide title insurance agent.
- (2) In determining the precise amounts and terms and conditions of the above-described requirement, the commissioner may promulgate rules that:
- (a) Specify acceptable alternatives to the preceding net worth requirements; and
  - (b) Exempt certain persons from complying with all or a portion of these requirements by virtue of their actual or expected volume of business (e.g., less than fifty (50) annual transactions or less than \$5,000,000 in title insurance policies face value, or other amounts the commissioner may deem appropriate) or by virtue of individual circumstances that show that the requirements would pose an undue hardship on the title insurance agent and that the title insurance agent's conduct will be bona-fide and its services needed and desirable.
- (3) The commissioner shall also require each title insurance agent to perform through its bona-fide employees the core title services listed below in order to receive compensation for the services it renders:
- (a) The evaluation of a title search or abstract to determine the insurability of title;
  - (b) The clearance of underwriting objections; and
  - (c) Issuing and assuming responsibility for the issuance of the title insurance policy, and where customary, issuance of a title commitment.]

**Drafting Note:** Controlled title insurance business may or may not raise concerns and issues in a particular state and therefore, each state should decide whether and how to address this issue. The First, Second and Third Optional Subsections present three approaches. Their language should not be read to preclude other approaches or to suggest that any particular provision is necessarily desirable. Because in the Third Optional Subsection, the particular requirements that are appropriate are likely to vary from state to state, and possibly within areas of a single state, this provision is intended to permit the commissioner to set appropriate levels for net worth requirements with due regard for the prevailing circumstances and factors in each state or area.

**Section 7. Favored Agent of Title Insurer**

A title insurance agent shall not participate in any transaction in which it knows that a producer or other person requires, directly or indirectly, or through a trustee, director, officer, agent, employee or affiliate, as a condition, agreement or understanding to selling or furnishing any other person a loan, or loan extension, credit, sale, property, contract, lease or service, that the other person shall place a title insurance policy of any kind with particular title insurer or through particular title insurance agent.

**Section 8. Required Provisions of Underwriting Contract with Title Insurer**

A person, firm, association or corporation acting in the capacity of a title insurance agent shall not place business with a title insurer unless there is in force a written contract between the parties which sets forth the responsibilities of each party; and where both parties share responsibility for a particular function, specifies the division of such responsibilities; and which contains the following minimum provisions:

- A. (1) The title insurer may terminate the contract upon written notice under the following circumstances:
  - (a) Fraud, insolvency, appointment of a receiver or conservator, bankruptcy, cancellation of the agent's license or permit to do business or the commencement of legal proceedings by the state of domicile of the agent, which if successful, would lead to cancellation of the agent's permit or license to do business;
  - (b) Material breach of any provision of the contract; or
  - (c) Notice of cancellation has been provided in accordance with contract termination requirements.
- (2) Upon notice of termination, the agent shall immediately discontinue all underwriting. Nothing in this subsection is intended to relieve the title insurance agent or title insurer of any other contractual obligation.
- B. The title insurance agent will render accounts to the title insurer detailing all transactions and remit all funds due under the contract to the title insurer by the earlier of the following:
  - (1) Forty-five (45) days after the end of the month of the effective date of the policy; or
  - (2) Within the time specified by the underwriting contract.
- C. All funds collected for the account of a title insurer by a title insurance agent shall be held in a fiduciary capacity in a bank that is a qualified financial institution. A separate and exclusive account shall be established and maintained for each underwriter represented by the title insurance agent.
- D. At the title insurer's request, the title insurance agent, its successor in interest, transferee, or receiver shall provide access to and the right to copy all escrow files and underwriting files involving a transaction in which a title insurance report or policy is or is to be issued.

**Drafting Note:** A possible conflict may exist in certain jurisdictions between the title insurance agent's fiduciary duty as the escrow holder to maintain the confidentiality of the information contained in the escrow files and the Section 8D requirement that the title insurance agent provide the title insurer access to and a right to copy the escrow files. If so, states may wish to adopt rules or regulations or establish requirements addressing the title insurance agent's need to recognize and address possible conflict.

- E. Separate records of business written by the title insurance agent will be maintained for each title insurer. The title insurer shall have access to and a right to copy all accounts and records related to its business in a form acceptable to the title insurer. The commissioner shall have access to all books, bank accounts and records of the title insurance agent in a form usable to the commissioner. The records shall be retained according to Section [cite appropriate record retention statute] and Section 10 of this Act. However, if the title insurance agent is a depository institution, the commissioner shall only have access to the insurance-related books and records of that financial institution. In cases where the commissioner believes that access to the non-insurance related books and records of a depository institution is necessary, the commissioner must request this information from the functional regulator of the depository institution through the information-sharing



agreements that currently exist.

- F. The contract may not be assigned in whole or in part by the title insurance agent without the expressed written consent of the title insurer.
- G. Appropriate guidelines, relating to:
  - (1) The basis of the rates to be charged;
  - (2) The types of risks which may be written;
  - (3) Maximum limits of liability;
  - (4) Territorial limitations;
  - (5) Title searches, and examinations; and
  - (6) Underwriting.
- H. It shall be the duty of the title insurance agent to immediately report and forward to the insurer all title-related escrow claims and title claims reported to the agent by policyholders or another person. However, if the contract permits the title insurance agent to settle claims on behalf of the title insurer:
  - (1) A copy of the claim file shall be sent to the title insurer at its request or as soon as it becomes known that the claim:
    - (a) Has the potential to exceed an amount established by the title insurer;
    - (b) Involves a coverage dispute;
    - (c) May exceed the title insurance agent's claims settlement authority;
    - (d) Is open for more than six (6) months; or
    - (e) Is closed by payment exceeding an amount established by the title insurer;
  - (2) All title and title-related escrow claims files settled by the agent will be the property of the title insurer;
  - (3) Any settlement authority granted to the title insurance agent may be terminated immediately upon the title insurer's written notice to the title insurance agent or upon the termination of the contract. The title insurer may suspend the settlement authority during the pendency of a dispute regarding the cause for termination. Nothing in this paragraph is intended to relieve the title insurance agent or title insurer of any other contractual obligation.
- I. Where electronic claims files are in existence, the contract must address the immediate transmission of the data.
- J. The title insurance agent shall not:
  - (1) Bind reinsurance or retrocessions on behalf of the title insurer;
  - (2) Permit a director, officer, controlling shareholder or employee to serve on the title insurer's board of directors if the agent wrote one percent (1%) or more of the title insurer's direct premiums written during the previous calendar year, as shown on the title insurer's most recent annual statement on file with the commissioner. This subsection shall not apply to relationships governed by the Insurance Holding Company Act.

- (3) Jointly employ an individual who is employed with the title insurer unless the title insurer and the title insurance agent are affiliated or otherwise under common control as defined by Section [insert reference to insurance holding company act]; or
- (4) Appoint a title insurance sub-agent.
- K. The contract shall include specific terms of an agent's compensation.
- L. The title insurance agent shall maintain an inventory of all policy forms or policy numbers assigned to the agent by the title insurer.

**Drafting Note:** See parallel provision in Section 11.

- M. For each title insurance agent under contract with the insurer, the title insurer shall have on file a statement of financial condition, of each title insurance agent as of the end of the previous calendar year setting forth an income statement of business done during the preceding year and a balance sheet showing the condition of its affairs as of the prior December 31st certified by the agent as being a true and accurate representation of the agent's financial condition. Attorneys actively engaged in the practice of law, other than that related to title insurance business, are exempt from the requirements of this paragraph.
- N. The title insurance agent shall annually, concurrent with the renewal date of its contract, furnish the title insurer with proof that the agent is in compliance with Section 3 of this Act.
- O. If the title insurance agent delegates the title search to a third party, such as an abstract company, the agent must first obtain proof that the third party is operating in compliance with rules and regulations established by the commissioner.
- P. The title insurance agent shall provide the insurer with access and the right to copy all accounts and records maintained by the title insurance agent with respect to business placed with the title insurer.

## **Section 9. Policyholder Treatment**

- A. When constituting an offer to issue an owner's title insurance policy covering the resale of owner-occupied residential property, a title insurance report shall be furnished to the purchaser-mortgagor or its representative as soon as reasonably possible prior to closing. If the report cannot be delivered prior to the day of closing, the title insurer shall document the reasons for the delay. The report furnished to the purchaser-mortgagor shall incorporate the following statement on the first page in bold type:

Please read the exceptions and the terms shown or referred to herein carefully. The exceptions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered.

It is important to note that this form is not a written representation as to the condition of title and may not list all liens, defects, and encumbrances affecting title to the land.

- B. A title insurance agent issuing a lender's title insurance policy in conjunction with a mortgage loan made simultaneously with the purchase of all or part of the real estate securing the loan, where no owner's title insurance policy has been requested, shall give written notice, on a form prescribed or approved by the commissioner, to the purchaser-mortgagor at the time the commitment is prepared. The notice shall explain that a lender's title insurance policy is to be issued protecting the mortgage-lender, and that the policy does not provide title insurance protection to the purchaser-mortgagor as the owner of the property being purchased. The notice shall explain what a title policy insures against and what possible exposures exist for the purchaser-mortgagor that could be insured against through the purchase of an owner's policy. The notice shall also explain that the purchaser-mortgagor may obtain an owner's title insurance policy protecting the property owner at a specified cost or approximate cost, if the proposed coverages or amount of insurance is not then known. A copy of the notice, signed by the purchaser-mortgagor, shall be retained in the relevant underwriting file at least five (5) years after the effective date of the policy.

**Section 10. Conditions for Providing Escrow, Closing, or Settlement Services, and Maintaining Escrow and Security Deposit Accounts**

A title insurance agent may operate as an escrow, security, settlement or closing agent, provided that:

- A. All funds deposited with the title insurance agent in connection with an escrow, settlement, closing or security deposit shall be submitted for collection to or deposited in a separate fiduciary trust account or accounts in a qualified financial institution no later than the close of the next business day, in accordance with the following requirements:
  - (1) The funds shall be the property of the person or persons entitled to them under the provisions of the escrow, settlement, security deposit or closing agreement and shall be segregated for each depository by escrow, settlement, security deposit or closing in the records of the title insurance agent in a manner that permits the funds to be identified on an individual basis; and
  - (2) The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.
- B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed.
- C. Funds held in a security deposit account shall be disbursed only pursuant to a written agreement specifying:
  - (1) What actions the indemnitor shall take to satisfy his or her obligation under the agreement;
  - (2) The duties of the title insurance agent with respect to disposition of the funds held, including a requirement to maintain evidence of the disposition of the title exception before any balance may be paid over to the depositing party or his or her designee; and
  - (3) Any other provisions the commissioner may require.
- D. Any interest received on funds deposited in connection with any escrow, settlement, security deposit or closing shall be paid, net of administrative costs, to the depositing party, unless the instructions for the funds or a governing statute provides otherwise.
- E. Disbursements may be made out of an escrow, settlement or closing account only if deposits in amounts at least equal to the disbursement have first been made directly relating to the transaction disbursed against and if the deposits are in one of the following forms:
  - (1) Cash;
  - (2) Wire transfers such that the funds are unconditionally received by the title insurance agent or the agent's depository;
  - (3) Checks, drafts, negotiable orders of withdrawal, money orders and any other item that has been finally paid before any disbursements;
  - (4) A depository check, including a certified check, governed by the provisions of the Federal Expedited Funds Availability Act, 12 U.S.C. § 4001, *et seq.*; or
  - (5) Credit transfers through the Automated Clearing House (ACH) which have been deemed available by the depository institution receiving the credits. The credits must conform to the operating rules set forth by the National Automated Clearing House Association (NACHA).

**Drafting Note:** States with an existing “good funds” statute should review it to determine if it is sufficient for application to title insurance business. If sufficient, Subsection E should be deleted and a cross-reference to the state good funds statute should be inserted. If the state good funds statute is insufficient, Subsection E should be retained and would be controlling for title insurance transactions.

- F. The title insurance agent shall have an annual audit made of its escrow, settlement, closing and security deposit accounts, conducted by a certified public accountant on a calendar year basis at its expense within ninety (90) days after the close of the previous calendar year. The title insurance agent shall provide a copy of the audit report to each title insurance company which it represents. The commissioner may promulgate regulations setting forth the minimum threshold level at which an audit would be required, the standards of audit and the form of audit report required. Title insurance agents who are attorneys and who issue title insurance policies as part of their legal representation of clients are exempt from the requirements of this paragraph. However, the title insurer may, at its expense, conduct or cause to be conducted an annual audit of the escrow, settlement, closing and security deposit accounts of the attorney. Attorneys who are exclusively in the business of title insurance are not exempt from the requirements of this paragraph. The commissioner may also require the title insurance agent to provide a copy of its audit report to the commissioner.
- G. If the title insurance agent is appointed by two (2) or more title insurers and maintains fiduciary trust accounts in connection with providing escrow, closing settlement services, the title insurance agent shall allow each title insurer reasonable access to the accounts and any or all of the supporting account information in order to ascertain the safety and security of the funds held by the title insurance agent.
- H. Nothing in this Act shall be deemed to prohibit the recording of documents prior to the time funds are available for disbursement with respect to a transaction, provided all parties consent to the transaction in writing.
- I. Nothing in this section is intended to amend, alter, or supersede other sections of this Act, or the laws of this state or the United States, regarding an escrow holder's duties and obligations.
- J. The commissioner may prescribe a standard agreement for escrow, settlement, closing or security deposit funds.

**Section 11. Record Retention Requirements**

The title insurance agent shall maintain sufficient records of its affairs, including its escrow operations and escrow trust accounts, so that the commissioner may adequately ensure that the title insurance agent is in compliance with all provisions of this Act. The commissioner may prescribe the specific record entries and documents to be kept, and the length of time for which the records must be maintained.

**Drafting Note:** States should ensure that their record-keeping requirements for the title insurance agency operations of depository institutions do not place the depository institutions in a position where they cannot comply with both the state requirements and the record-keeping requirements of the institution's primary functional regulator.

**Section 12. Application of Other Insurance Code Sections to Title Insurance Agents**

A title insurance agent shall be subject to all other applicable provisions of the insurance code unless specifically addressed by this Act and other state and federal law.

**Section 13. Rules and Regulations**

The commissioner may issue rules, regulations and orders necessary to carry out the provisions of this Act.

**Section 14. Penalties and Liabilities**

- A. If the commissioner determines that the title insurance agent or any other person has violated this Act, or any regulation or order promulgated thereunder, after notice and opportunity to be heard, the commissioner may order:
  - (1) A penalty not exceeding \$[insert amount] for each violation; and
  - (2) Revocation or suspension of the title insurance agent's license.

- B. If an order of rehabilitation or liquidation of the insurer has been entered pursuant to [insert state's rehabilitation or liquidation statute], and the receiver appointed under that order determines that the title insurance agent or any other person has not complied with this Act, or any related regulation or order, and the insurer suffered any resulting loss or damage, the receiver may maintain a civil action for recovery of damages or other appropriate sanctions for the benefit of the insurer and its policyholders and creditors.

**Drafting Note:** If state law does not otherwise provide, amend the bracketed citation in the preceding paragraph to include the rehabilitation or liquidation statute of any reciprocal state. This is intended to codify the standing of a receiver to maintain a civil action in a reciprocal state.

- C. Nothing contained in this section shall affect the right of the commissioner to impose any other penalties provided for in the insurance code.

**Drafting Note:** Each state should consider whether references to regulations or specific statutory chapters should replace “code” in this subsection.

- D. Nothing contained in this Act is intended to or shall in any manner limit or restrict the rights of policyholders, claimants and creditors.

### **Section 15. Violations of the Real Estate Settlement Procedures Act (RESPA)**

The commissioner or attorney general may bring an action in a court of competent jurisdiction to enjoin violations of RESPA, 12 U.S.C. Section 2607, as amended.

### **Section 16. Severability**

If any provision of this Act, or the application of the provision to any person or circumstance shall be held invalid, the remainder of the Act, and the application of the provision to persons or circumstances other than those to which it is held invalid, shall not be affected.

### **Section 17. Effective Date**

This Act shall be effective as of [insert date] and applies to all activities or agreements of the title insurance agent engaged in or entered into after the effective date. The title insurance agent shall amend all existing agreements to comply with Section 8 of this Act within sixty (60) days from its effective date.

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

*1995 Proc. 2<sup>nd</sup> Quarter 2, 39, 695, 698, 710-719 (adopted).*

*2003 Proc. 1<sup>st</sup> Quarter 45, 45-55 (amended and reprinted, adopted by working group).*

*2003 Proc. 2<sup>nd</sup> Quarter 12, 15 (adopted by Plenary)*