

Draft Pending Adoption

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Title Insurance (C) Task Force
Louisville, Kentucky
March 23, 2023

The Title Insurance (C) Task Force met in Louisville, KY, March 23, 2023. The following Task Force members participated: Eric Dunning, Chair, and Connie Van Slyke (NE); Kevin Gaffney, Vice Chair, and Emily Brown (VT); Mark Fowler represented by Jimmy Gunn (AL); Michael Yaworsky represented by Anoush Brangaccio (FL); Doug Ommen represented by Travis Grassel (IA); Vicki Schmidt represented by Monica Richmeier (KS); James J. Donelon represented by Chuck Meyers (LA); Kathleen A. Birrane represented by Mary Kwei (MD); Grace Arnold represented by Paul Hanson (MN); Troy Downing represented by Bob Biskupiak (MT); Mike Causey represented by Tracy Biehn, Timothy Johnson, and Angela Hatchell (NC); Judith L. French represented by Maureen Motter (OH); Glen Mulready represented by Erin Wainner (OK); Michael Humphreys represented by Michael McKenney (PA); Elizabeth Kelleher Dwyer represented by Patrick Smock (RI); Michael Wise represented by Melissa Manning (SC); and Larry D. Deiter represented by Tony Dorschner (SD). Also participating was Michael Conway represented by Peg Brown (CO) and Amy Beard represented by Pat O'Connor (IN).

1. Adopted its 2022 Fall National Meeting Minutes

Commissioner Gaffney made a motion, seconded by Hatchell, to adopt the Task Force's Dec. 14, 2022, minutes (see *NAIC Proceedings – Fall 2022, Title Insurance (C) Task Force*). The motion passed unanimously.

2. Discussed its Charge to Open Model #628

Director Dunning stated that the Task Force is charged to review the *Title Insurers Model Act (#628)*, Section 15C to determine if a request should be made to remove the requirement for the on-site review of underwriting and claims practices. As the pandemic demonstrated, on-site reviews are not always practical. However, based on research done by NAIC legal staff, only eight states adopted the model. Only three of these states still require on-site review. An additional two states require on-site review, but they did not adopt the NAIC model. As a result of the low adoption, Model #628 will be put on the list of models to be reviewed for the Model Law Review Initiative this year. The initiative deals with retention/archiving models, but the full process for this has not yet been finalized. Given this new information, he recommended that the Task Force postpone reviewing Model #628 pending the outcome of its review under the Model Law Review Initiative.

Commissioner Gaffney stated that he supports postponing the review of Model #628. Director Dunning stated that given that there were no objections, the Task Force has a consensus to postpone reviewing Model #628 pending the outcome of its review under the Model Law Review Initiative.

3. Heard an Update on Requested Information from Voxtur

Director Dunning stated that Stacy Mestayer (Voxtur) presented to the Task Force during the 2022 Fall National Meeting on Voxtur's attorney opinion letter (AOL). Following her presentation, the Task Force requested that Voxtur share information on: 1) its operations; 2) whether it has a prominent notice that it does not participate in the guarantee fund in states where applicable; 3) how its carriers are reserving; 4) what due diligence was performed to try and obtain admitted coverage before going to the nonadmitted market; 5) its standard letters and policy; 6) the release of its white paper addressing conflicting characterizations of the Voxtur AOL; and 7) a comparison of the Voxtur AOL and title insurance.

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On March 14, Commissioner Gaffney, Director Dunning, and NAIC staff met on a background call with Mestayer to discuss the requested items. Mestayer stated that Voxtur relied on its insurance broker for coverage, and it is working on connecting the Task Force with the broker and carriers for direct communications on insurance questions. She is discussing with Voxtur leadership if there are methods of sharing the other requested information that they are comfortable with, as they have confidentiality concerns.

4. Heard a Presentation on UWM's Alternative to the Traditional Lender Title Process and the FNMA's Pilot Program on Title Insurance Requirements

Steve Gottheim (American Land Title Association—ALTA) said the new alternatives to title insurance on the market are meant to provide more affordable options to homeowners. However, ALTA worries that the lack of transparency on these products is confusing homeowners' understanding of what they will be protected on. On April 6, 2022, the Federal National Mortgage Association (FNMA) updated its selling guidance on AOLs to permit lenders to obtain either a lender's title insurance policy or, in limited circumstances, an attorney title opinion letter. Shortly thereafter, Voxtur announced that it would be selling an AOL on FNMA loans. In June 2022, the FNMA and the Federal Home Loan Mortgage Corporation (FHLMC) issued their government-sponsored enterprise (GSE) equitable housing finance plans. These plans were requested of them to help support low- and moderate-income homeownership, especially for minorities. In October 2022, United Wholesale Mortgage (UWM), the largest U.S. mortgage finance company, announced that it would be entering the space through its title review and closing (TRAC) product. While Voxtur's AOL purports to offer owners' coverage, the UWM only offers lenders coverage. In February 2023, there was an article in Politico stating that the FNMA is rumored to be looking at forgoing title insurance. It would serve as a default insurer by waiving the title insurance requirement from lenders and reserving funds for claims related to title matters.

ALTA proposes the following questions to guide the Task Force in its discussions on these topics: 1) how these products are marketed to consumers; 2) what type of title search and curative work is done with these alternatives; 3) what the differences are in coverage and who takes on the additional risk; 4) whether owners' coverage is provided and how it compares to title insurance; 5) whether there is a duty of defense; 6) whether these products are being sold in the market; 7) how these products are licensed; 8) whether their coverage and forms are filed publicly; 9) what level of reserves for future loss the insurer holds; and 10) how these reserves are actuarially determined.

The actual underwriting that goes into these products is critical. About 70% of the cost of title insurance comes from underwriting costs (e.g., search, examination, and curative efforts to ensure a clean record). The potential for an increase in title consumer complaints from insufficient underwriting should be examined. Duty to defense is also critical, as most consumers view title insurance as litigation insurance. Model #628 defines the business of title insurance as "guarantying, warranting, or insuring searches or examinations of title to real property or any interest in real property; or 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 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."

This is not the first time alternative lighter search products have entered the market stating that they are not title insurance and therefore do not need to be regulated as such. Norwest Mortgage, now Wells Fargo Home Mortgage, offered a similar product to the alternatives entering the market now. In *Norwest Corp. v. State, Dept. of Ins.*, 253 Neb. 574, 571 N.W.2d 628 (1997) and *State, Division of Insurance v. Norwest Corp.*, 1998 S.D. 61, 581 N.W.2d 158, the Court found an alternative product involving a title search and representation that the loan that was in first lien position was title insurance because representation involved a transfer of risk.

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The UWM partners with brokers rather than having its own mortgage originators. TRAC products provide lenders' with coverage only, and in-house attorneys write the opinions, creating a question on moral hazard. The purchase price is based on a certain basis point of the loan amount as is owed from the broker to the UWM. This purchase price is not necessarily the price charged from the brokerage company to the consumer. TRAC products are available in Arizona; California; Colorado; Connecticut; Delaware; Florida; Georgia; Illinois; Massachusetts; Michigan; Nevada; New Hampshire; New Jersey; New York; Ohio; Pennsylvania; Rhode Island; Texas; Utah; Virginia; Washington; and Washington, DC. Per frequently asked questions (FAQ) issued to mortgage brokers, the UWM will take on the risk of title defects and issue an AOL. The FNMA is believed to be the sole secondary market purchaser for these products. Despite these products being designed for cost effectiveness, ALTA believes they are more expensive than title insurance in most circumstances. This is particularly true because of the number of states where it is customary for sellers to pay for an owner's policy. There is usually a discount when the loan and owner's policy are purchased together because the underwriting work overlaps. The UWM requires settlement agents to sign a closing indemnification letter, which is a rearranged version of a standard ALTA closing protection letter (CPL). ALTA has concerns about another set of closing letters that only place the agent at risk, instead of an insurer.

ALTA has been engaging directly with the FNMA and the FHLMC to help support the mission of more affordable homeownership. There has been some success with ALTA members offering newer or discounted products to help meet the need for lower closing costs. These include first-time homebuyer discounts, community reinvestment rates, special purpose credit programs, and partnering with state housing agencies.

Commissioner Gaffney asked for more information on the first-time homebuyer discounts and whether there are any regulatory barriers. He also asked what percentage of purchasers purchase an owner's policy versus a lender's policy. Gottheim stated these are rates title companies have filed in a handful of states to offer discounted rates to first-time homebuyers. Occasionally, states will have laws that state that rates cannot be discriminatory, excessive, or unfair, which make it difficult to get a lower rate for first-time homeowners approved. Due to FNMA and FHLMC guidelines, 99% of homebuyers purchase a lender's policy. ALTA national member data indicates that about 75% of homebuyers purchase an owner's policy. The uptake rate for owner's policies is consistent between low-, middle-, and upper-income homebuyers. Commissioner Gaffney stated that he would be interested in seeing ALTA's national data on take-up rates.

McKenney stated that he is concerned that if these alternative products do not include the same extensive search and curative work as occurs with title insurers, there would be an increase in unclean titles that would then increase the price of title insurance. Gottheim stated that ALTA believes the curative work done with the alternative products is not as detailed. ALTA is concerned that if more loans are going through these processes, there will be less of an incentive to fix a legal description issue or an issue with the satisfaction of the loan from two owners that never got recorded. If there is a large enough uptake in these alternative products, title insurers may have to pick up an additional expense item, stemming from the lack of diligence done with the alternative products.

Hanson stated that the \$370,000 mortgage amount used in the example to illustrate the UWM's pricing seems excessive for a product meant to save lower-income buyers money. Gottheim stated that the \$370,000 mortgage pricing example came from the UWM's marketing. The national sales price of a home is \$375,000. ALTA is concerned that these programs are set up to help cherry-pick higher income products. There is a rumor that the FNMA will be taking on title insurance risks only for homes with a 20% down payment. The median down payment for a first-time homebuyer is 7%.

Birny Birnbaum (Center for Economic Justice—CEJ) stated that the cost of title insurance is significant for first-time homebuyers, and while required to purchase it, they have little understanding of it. His daughter purchased a home in Texas for \$225,000, and she was asked to pay several thousands of dollars for title insurance. In Texas,

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title insurance includes the search, underwriting, and portions of the closing. The title agent also wanted an additional \$700 for title and escrow. Eventually, the \$700 was removed, as the title insurance policy was supposed to include it. However, most consumers would not have known that they could negotiate its removal. The automated underwriting process includes pulling information from a database, running it through an algorithm, and developing a score that indicates whether the policy is issued automatically. This is a similar process to getting a credit score for a loan. However, a credit score is \$25, and a title insurance policy is \$2,500. Mortgage lenders set up affiliated title agencies or title insurers to monetize access to the consumer. Title insurance is ripe for innovation, disruption, and consumer protection. Iowa guarantees titles, but it does not allow title insurance. A title insurance policy does not guarantee a title; it provides a marketable title.

Gottheim stated that those offering alternative products are asserting that they are not subject to state regulation, despite offering similar products to title insurers. This should concern state insurance regulators. Automated title insurance engines are in their infancy and used in refinancing. Otherwise, the underwriting process is still a very paper and labor-intensive process.

Birnbaum stated that the FNMA's *Barriers to Entry: Closing Costs for First-Time and Low-Income Homebuyers* report was issued Dec. 2, 2021. The report found that closing costs are a meaningful obstacle to sustainable homeownership for first-time and low-income first-time homebuyers, including Black and Hispanic borrowers. Within the low-income first-time homebuyers in the study, 21% of African American and 19% of Hispanic buyers paid closing costs equal to or greater than their down payment. Title insurance is an expensive proposition for first-time homebuyers.

5. Discussed if Additional Questions Should be Added to the Survey of State Laws Before it is Distributed for Update

Director Dunning stated that the Task Force is charged to administer the *Survey of State Insurance Laws Regarding Title Data and Title Matters* (Survey of State Laws) this year. It was last administered in 2018 and published in 2019. Task Force members were asked to email NAIC staff with any questions they believed should be added to the Survey of State Laws. Additional questions proposed were submitted by Louisiana and Rhode Island, and they are included in the materials. Under the Data Reporting section, Rhode Island proposed adding, "If the number of policies issued is collected, is the number separated by standard title policies and enhanced title policies?" after question 9. Under the Policy Rate and Form Regulation section, Rhode Island proposed adding, "Does the department set requirements for standard title policies? For enhanced title policies?" after question 12. Under the Procedural Regulation section, Louisiana proposed adding two questions: 1) "Is there a statutory requirement for an attorney opinion letter concerning the title examination for the issuance of a title insurance policy?"; and 2) "Is there a statutory standard for the information contained in: a title examination? A title opinion letter?" Under the Insurer-Agent Relationship section, Rhode Island proposed adding, "What are the requirements for title insurers to confirm/verify valid license status of title agents? How often is confirmation/ verification completed?" after question 47. Rhode Island also proposed adding a new category for Title Opinion Letters, with the following questions: "1) Does the state department regulate title opinion letters?"; 2) "Does the state department regulate the pricing of title opinion letters?"; 3) "Does the state license the entity that generates the title opinion letters?"; 4) "What license is required?"; and 5) "Are title opinion letter forms and rates filed with the state department?"

Smock stated that he is supportive of all the questions, and he particularly liked the ones suggested by Louisiana. Birnbaum stated that the CEJ appreciates the proposed questions, and he has no further questions to propose.

Commissioner Gaffney made a motion, seconded by McKenney, to add the proposed questions to the Survey of State Laws. The motion passed unanimously.

Having no further business, the Title Insurance (C) Task Force adjourned.

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