

# DEPARTMENT OF REGULATORY AGENCIES

## Division of Insurance

### 3 CCR 702-8

#### CONCERNING TITLE INSURANCE

#### Proposed New Regulation 8-1-4

#### TITLE INSURANCE – FIDUCIARY DUTIES

Section 1	Authority
Section 2	Scope and Purpose
Section 3	Applicability
Section 4	Definitions
Section 5	Rules Regarding Fiduciary Duties
Section 6	Reporting Requirements for the Prevention of Defalcations
Section 7	Safe Harbor
Section 8	Unfair or Deceptive Act or Practice
Section 9	Severability
Section 10	Enforcement
Section 11	Effective Date
Section 12	History

#### **Section 1 Authority**

This regulation is promulgated, and adopted by the Commissioner, pursuant to the authority of §§ 10-1-108(7), 10-1-109, 10-2-104, 10-2-704, 10-2-801, 10-3-131, and 10-3-1110, C.R.S.

#### **Section 2 Scope and Purpose**

The purposes of this regulation are to set forth the fiduciary duties of title entities and to create reporting requirements to assist the Division of Insurance (Division) with identifying and mitigating certain risk factors which may have an immediate and direct impact on the solvency of title insurance entities.

Numerous defalcations have occurred in Colorado resulting in losses to Colorado consumers and insurers. As a result, the Commissioner finds that the provisions of this regulation are necessary in order to protect the title insurance industry, its policyholders and members of the general public that may not directly be title insurance policyholders.

#### **Section 3 Applicability**

This regulation governs title entities and any other persons transacting the business of title insurance.

#### **Section 4 Definitions**

- A. "Affiliate" means a person who directly, or indirectly through one or more intermediaries:
1. controls a title entity;
  2. is controlled by a title entity; or
  3. is under common control with a title entity.

- B. "Closing and settlement services" shall have the same meaning as § 10-11-102(3.5), C.R.S.
- C. "Person" has the same meaning as that in § 10-2-103(8), C.R.S.
- D. "Reconcile" means, for the purpose of this regulation, the accounting process of comparing transactions and activity in order to balance accounts and resolve any discrepancies in an amount that exceeds five hundred dollars (\$500.00).
- E. "Sweep account" means, for the purposes of this regulation, a banking arrangement in which a bank account balance is automatically transferred to and from an interest-bearing account.
- F. "Title insurance agency" shall mean a corporation, partnership, association, or foreign or domestic entity as defined in § 7-90-102, C.R.S., or other legal entity that transacts the business of title insurance.
- G. "Title insurance agent" shall have the same meaning as in § 10-11-102(9), C.R.S.
- H. "Title insurance company" shall have the same meaning as in § 10-11-102(10), C.R.S.
- I. "Title entity" shall mean title insurance agents, title insurance agencies and title insurance companies, unless otherwise stated in the regulation.

## **Section 5      Rules Regarding Fiduciary Duties**

- A. All title entities, their authorized agents, and affiliates in possession of funds received and belonging to others shall maintain the funds in a fiduciary capacity in a separate fiduciary fund account or accounts supported by books and records sufficient to identify such funds. Any such fiduciary fund account shall be identified as "fiduciary fund account", "trust account" or "escrow account", or identified similarly.
- B. Funds that must be maintained as fiduciary funds include, but are not limited to, underwriter portions of title insurance premiums, earnest money deposits, loan proceeds, seller proceeds, homeowner association dues, and any other funds received as part of a title entity conducting closing and settlement services.
- C. All fiduciary funds shall be maintained in an account separate from other monies and assets of the title entity. Commingling of other monies and assets of the title entity with fiduciary funds is prohibited. Notwithstanding the foregoing, nothing herein shall prohibit the advancement of funds authorized pursuant to § 38-35-125(2), C.R.S.
- D. All fiduciary funds shall be deposited within three business days of receipt with a state or federal bank, or a savings and loan association whose depositors are insured by an instrumentality of the United States Government, unless otherwise directed in writing by all necessary parties to the transaction.
- E. Except as otherwise consented to in writing by the parties to a transaction establishing the need for fiduciary funds, a title entity or its authorized agent shall not use such fiduciary funds for any purpose other than the purpose or purposes set forth in the written agreement for which the fiduciary funds were deposited with the title entity.
- F. Unless otherwise consented to in writing by all necessary parties, fiduciary funds, other than earnest money, held by a title entity shall either be disbursed for the purpose that the funds were collected or returned to the party that deposited the funds with the title entity within 135 days of the closing of the transaction.

- G. Unless prior written authorization has been received by all necessary parties, fiduciary funds shall not be deposited by a title entity into a treasury management account or any other type of investment account.
- H. Fiduciary funds may only be deposited into a sweep account by a title entity if the funds are segregated and held in a fiduciary capacity in the account the funds are swept into.
- I. A title entity shall not earn interest on fiduciary funds unless disclosure is made to any parties to a transaction, for who said funds are being held, that interest is or has been earned. Said disclosure must offer the opportunity to receive payment of any interest earned on such funds beyond any administrative fees as may be on file with the Division. Said disclosure must be clear and conspicuous, and may be made at any time up to and including closing.
- J. Until a title entity receives written instructions pertaining to the holding of fiduciary funds, in a form agreeable to the title entity, it shall comply with the following:
1. The title entity shall deposit funds into an escrow, trust, or other fiduciary account and hold them in a fiduciary capacity.
  2. The title entity shall use any funds designated as “earnest money” for the consummation of the transaction as evidenced by the contract to buy and sell real estate applicable to said transaction. Except, if the transaction does not close, the title entity shall:
    - a. Release the earnest money funds as directed by written instructions signed by both the buyer and seller; or
    - b. If acceptable written instructions are not received, uncontested funds shall be held by the title entity for 120 days from the scheduled date of closing, after which the title entity shall return said funds to the depositing party.
  3. In the event of any controversy regarding the funds held by the title entity (not withstanding any termination of the contract), the title entity shall not be required to take any action unless and until such controversy is resolved. At its option and discretion, the title entity may:
    - a. Await any proceeding; or
    - b. Interplead all parties and deposit such funds into a court of competent jurisdiction, and recover court costs and reasonable attorney and legal fees; or
    - c. Deliver written notice to the buyer and seller that unless the title entity receives a copy of a summons and complaint or claim (between buyer and seller), containing the case number of the lawsuit or lawsuits, within 120 days of the title entity's written notice delivered to the parties, title entity shall return the funds to the depositing party.
  4. Nothing herein shall be read as relieving the responsibilities, if any, of any title entity in complying with the Colorado unclaimed property act, § 38-13-101, et seq., C.R.S.
  5. Every title agent or title agency shall reconcile all fiduciary accounts, or similarly identified accounts, at least every forty-five (45) days.

## **Section 6 Reporting Requirements for the Prevention of Defalcations**

- A. A title insurance company shall notify the Division within thirty (30) days if:

1. At any point a title insurance company becomes aware that a title insurance agent or agency fails to remit premium to the insurer, on the later of, forty-five (45) days after the contractual due date, or if there is no contractual due date, ninety (90) days after receipt;
  2. At any point a title insurance company becomes aware that a title insurance agent or title insurance agency fails to reconcile the title insurance agent's or title insurance agency's fiduciary bank accounts, or similarly identified accounts, at least every forty-five (45) days;
  3. At any point a title insurance company becomes aware that a title insurance agent or title insurance agency has an account shortage or file shortage of more than \$10,000 in a title insurance agent's or agency's fiduciary account;
  4. The title insurance company enters into any repayment agreement with a title insurance agent or a title insurance agency; or
  5. The title insurance company becomes aware of any commingling of other monies or assets with fiduciary funds held by the title insurance agent or title insurance agency.
- B A title insurance company shall provide the Division with a comprehensive list of all title insurance agencies that are authorized in the state of Colorado to issue title insurance products of the title insurance company within thirty (30) days of the effective date of this regulation.
- C. A title insurance company shall notify the Division in writing within thirty (30) days if the title insurance company:
1. Authorizes a new title insurance agency or agent to issue its title insurance products;
  2. Suspends the authority of a title insurance agency or agent to issue its title insurance products; or
  3. Cancels the authority of a title insurance agency or agent to issue its title insurance products.

#### **Section 7 Safe Harbor**

If a title insurance company properly complies with the requirements of Section 6 of this regulation, the Division shall not take any regulatory action against the title insurance company for a shortage in a title insurance agent's or title insurance agency's fiduciary account, with the exception of any necessary regulatory actions to order that restitution be paid by the title insurance company.

#### **Section 8 Unfair or Deceptive Act or Practice**

Knowingly violating Section 6 of this regulation shall be an unfair or deceptive act or practice prohibited by § 10-3-1104, C.R.S.

#### **Section 9 Severability**

If any provision of this regulation or the application of it to any person or circumstance is for any reason held to be invalid, the remainder of this regulation shall not be affected.

#### **Section 10 Enforcement**

Noncompliance with this regulation may result in the imposition of any of the sanctions made available in the Colorado statutes pertaining to the business of insurance, or other laws, which include the imposition

of civil penalties, issuance of cease and desist orders, and/or suspensions or revocation of license, subject to the requirements of due process.

**Section 11      Effective Date**

This regulation is effective February 1, 2017.

**Section 12      History**

Regulation promulgated on February 1, 2017.

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