

December 20, 2021

Via Email Only

Michael Conway, Commissioner
Colorado Division of Insurance
1560 Broadway
Suite 850
Denver, CO 80202

Re: Comments on Proposed Changes to 8-1-2

Dear Commissioner Conway:

Thank you for opportunity to submit public comments to Proposed Regulation 8-1-2.

1. Section 5.L – Request to remove this section.

We appreciate the Division taking our previous comments under advisement and eliminating the previous draft form that contained Private Personal Information. However, the revised draft still contains many of the problems of the original draft rule and introduces new ones. As before, the proposed rule seeks to impose requirements that are not provided for in Colorado statutes relating to title companies, and in fact, conflict with other areas of law specific to notaries. In addition, it does not consider reciprocity provisions of notary laws or the unintended consequences regarding Appendix B.

Consumer Harm. The Division’s stated intent for adding this requirement is to protect consumers from fraudulent activity in real estate transactions; however, we believe the proposed rule will in fact harm consumers. Most criminals who assume the identity of another person to misappropriate funds do so with fraudulent or stolen identification. Moreover, fraud is a covered risk under all policies of title insurance. In the unfortunate instance where there is a problem, consumers are protected by their title insurance policies.

Further, a significant number of closings involve third-party notaries (both mobile and Remote Online Notaries) who are not directly employed by, or under the control of, the title entity. In the case of mail out closings and closing involving remote online notaries (RON), the notary may be located out of state. **An out-of-state notary, is not subject to Colorado law and per their state notary law would not be required to sign a document like the one proposed as Appendix B.** It is highly likely that an out-of-state notary, or a notary not under the control of the title entity, would sign proposed Appendix B.

It is common for a least one party to a transaction to be remote throughout the duration of the transaction. If the proposed Appendix B form is not signed, a title entity would have to stop the closing and delay parties from taking possession of the property and closing on their loans until the form could be obtained from a notary outside of the industry’s control. Many buyers have already vacated their current home and have

their possessions loaded onto moving trucks waiting for them to close and take possession of their new home. These delays will cause actual monetary damages to buyers through no fault of their own. Interest rate loan locks would likely be lost while awaiting this form. In addition, a seller will not timely receive their anticipated proceeds from the postponed sale of their property. These proceeds are routinely used to purchase their replacement home, which they will not be able to do. This could easily result in a default on their purchase contract of their new home, permitting the seller to terminate the contract and sell to another party. The financial and emotional harm to the original purchaser is unavoidable, clear, and inevitable. This proposed form would not lessen the occurrence of fraud in a transition and is not currently required by statute or by underwriter guidelines.

Because the proposed form would cause consumer harm, and would not prevent fraud in the transaction, LTAC respectfully requests that Section 5.L and Appendix B be deleted from the proposed regulation.

Authority. It is our understanding that the Division is relying on C.R.S. § 10-1-108 (7) as the statutory authority for requiring the proposed form in Appendix B. For the reasons set forth below, we respectfully disagree that this statute provides authority for such a requirement:

The proposed form in Appendix A would impose a requirement on notaries both within and outside the State of Colorado. The Colorado Commissioner of Insurance has no jurisdiction over notaries outside of the State of Colorado. The requirement for a notary public performing notarial services to chronicle the notarial act falls within Article 55 of Title 12 of the Colorado Statutes, not within the Insurance Statutes or Regulations. Specifically, CRS §24-21-519 addresses the records a notary must maintain to chronicle the notarial act. It is the duty of the Colorado Secretary of State, not the Commissioner of Insurance, to administer, promulgate rules, and enforce rules and regulations concerning the RULONA.

Chronicling notarial acts have nothing to do with determining the insurability of title. The act of acknowledgement on a deed or deed of trust is not required under Colorado law to convey or insure title to real property. Pursuant to C.R.S. § 38-35-101 (2)(3) and (4), the act of acknowledgment provides prima facie evidence of the proper execution the deed or deed of trust – but it is not required by law. A deed or deed of trust does not have to be acknowledged in order to be valid or insured. Without an acknowledgment, one must prove proper execution of the instrument through other methods in court. Likewise, the act of acknowledgment is only presumptive proof in a court of law. If fraud has been committed in a real estate transaction, the evidence of fraud will overcome the presumption of valid execution.

We believe the proposed rule constitutes regulatory overreach in light of the Division’s clear lack of authority over notarial acts, and that the proposed form will have no impact on preventing fraud in the transaction.

2. The penalty of perjury language in Appendix B must be removed and the Appendix requires clarification generally.

As stated above, LTAC requests that Section 5.L and Appendix B be deleted from the proposed regulation. However, at the very least the following issues need to be addressed.

The form the DOI is requesting contains a statement that the Notary acknowledges that they could be subject to the perjury statute C.R.S 18-8-502.

C.R.S. 18-8-502 states that “(1) A person commits perjury in the first degree if in any official proceeding he knowingly makes a materially false statement, which he does not believe to be true, under an oath

required or authorized by law. (2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense, although it may be considered by the court in imposing sentence. (3) Perjury in the first degree is a class 4 felony.

Based on this definition this form would require that the Notary MUST have the Appendix B signed before a second Notary to subject them to perjury in order to administer an oath. Additionally, a real estate closing is not an "official proceeding" within the meaning of the statute.

Elevating this to a class 4 felony is unnecessary as notaries already have enforcement mechanisms in their own statutes. Under C.R.S. §24-21-523 and C.R.S. §§ 24-21-531 – 533, a notary's license can be revoked, and criminal liabilities imposed.

Clarification Needed. Please verify what the Acknowledgement form is asking the notary and how many forms are necessary. The proposed form states the notary is "confirming that all **information** in this document is **accurate and true.**" Isn't that saying the notary is confirming the veracity of the statements contained in the document itself as opposed to just the identity of the party whose signature is being notarized? Moreover, since "this document" is singular, does this need to be signed for every notarized document within a transaction. LTAC believes that the intent is to have one of these for every real-estate closing but it is not clear based on the language within the form.

3. Stakeholder Inclusion.

We feel very strongly as an industry that the Division postpone any further action until all stakeholders have been included in the discussion. As a general rule, many of the entities that would be affected by this rule do not regularly monitor insurance rulemaking changes. Primarily, independent notaries and the notary association. When discussing changes to acknowledgements, that is governed by state law and a statutory change would be more appropriate. In addition, since this includes changes to both the actions of a notary and enforcement, we feel Secretary of State should be included. As an alternative to this rule change, we ask the Division of Insurance to consider working with LTAC and other stakeholders on a legislative change to the acknowledgement for deeds under statute (CRS 38-25-101) as has been done in other states.

Thank you again for the opportunity to comment on draft regulation 8-1-2.

Respectfully submitted,

Michael R. Lucero

Michael R. Lucero
President
Land Title Association of Colorado

Cc: Matt Mortier
Christine Gonzales-Ferrer
Title Commission