The Title Office Staff recommends that the Commissioner of Insurance amend Procedural Rule P-11 to specify that the term "insuring around" shall not include the circumstances in new subsection (11) where a mortgage securing a loan on property has been released by an affidavit that is filed in compliance with all of the requirements that are specified in Section 12.017 of the Texas Property Code. This amendment is necessary to implement the changes to Section 12.017 of the Texas Property Code that were enacted by HB ~~3768~~ 3945 by the 81st Legislature, Regular Session, effective, September 1, 2009. The recommended changes are as follows:

**P-11. Insuring Around**---Article 9.08 of the Texas Title Insurance Act - 1967, defines "Insuring Around" as follows:

"Insuring Around' is defined as the willful issuance of a title binder or title insurance policy showing no outstanding enforceable recorded liens while the Title Insurance Company knows that in fact a lien or liens are of record against the real property, and shall be prohibited, except under circumstances as the commissioner under his or her rulemaking powers shall approve. A title insurance company knows that an outstanding enforceable recorded matter exists if it determines that the matter is valid and enforceable based on the examination of the title pursuant to which the title binder or title insurance policy is issued. In its discretion, the title insurance company may determine the insurability of title and those matters which it considers to be insurable under the title binder or title insurance policy; provided, however, that insuring around enforceable recorded liens shall be prohibited except as allowed by regulation." Pursuant to the authority and instruction given the commissioner by the Legislature as above stated, the commissioner hereby sets forth the following rule to be followed by all title insurance companies and title insurance agents in complying with such Article 9.08, viz.:

a. "Willful issuance" shall be defined as the issuance of a title insurance policy or binder with intent to conceal information by suppressing or withholding title information, the consequence of which could result in a monetary loss either to the title insurance company or to the Insured under the policy or binder.

b. "Insuring Around" shall not be construed as prohibiting the issuer of a title insurance policy or binder from issuing a policy or binder without taking exception to a specific lien, or liens, of record when sound underwriting standards and practices would not otherwise prohibit such issuance. Specifically, but not limited to, the term "insuring around" shall not include the issuance of a title insurance policy or binder under the following circumstances:

(1) Where liens securing obligations which, though not released of record, have been discharged to the satisfaction of the title insurance company or agent, and the title insurance company or agent has evidence in its file that the lien has been paid in full;

(2) Where funds are in escrow to pay same, and a recordable release is forthcoming and will be filed for record in the ordinary course of business;

(3) Where liens, in the opinion of counsel, are barred by the statute of limitation;

(4) Where liens are inchoate and sufficient indemnity executed by a financial institution regulated by State or Federal Government, such as a bank, savings and loan association, life insurance company or surety company has been delivered to, and accepted by, the title insurance company, or where sufficient funds have been deposited with the title insurance company or its agent to assure the ultimate payment and release of record of the liens; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its file;

(5) Where sufficient indemnity executed by a financial institution regulated by State or Federal Government, such as a bank, savings and loan association, life insurance company or surety company is delivered to, and accepted by, the title insurance company, or where sufficient funds have been deposited with the title insurance company or its agent to protect against mechanic's liens by affidavits which are being contested or disputed; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its files;

(6) Where a title insurance company has previously issued a policy without taking exception to a specific lien and is called upon to issue a new policy and is already obligated under such prior policy, and will not increase its liability or exposure to the lien by the issuance of such new policy; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its files;

(7) Where a title insurance company has erred as in (6) above, and another title insurance company discovers the error in preparing to make a subsequent issuance, the second title insurance company may rely upon an indemnity agreement and/or an agreement to defend by the first company, and insure against such lien; provided the written consent of the Insureds (owner and mortgagee) shall be delivered to the title insurance company and retained in its files;

(8) When issuing a Mortgagee Policy insuring the validity and priority of a lien, the issuer shall not be required to itemize liens and leases that affect the title to the estate or interest, which are subordinate to the lien insured, either by express subordination or by operation of law, unless requested to do so in writing by the insured in which case paragraph 4 of Schedule B may be deleted, and the subordinate lien(s) and lease(s) shall be excepted in Schedule B and the Company may insure therein such lien(s) and lease(s) are subordinate; however, when issuing a Mortgagee's Title Policy Binder on Interim Construction Loan, the Company shall be required to show all subordinate liens in Schedule B-Part 2 of said binder, but a statement may be made therein that such lien(s) is subordinate. When insuring that a lien or lease is subordinate to the lien of the insured mortgage, the Company shall state: "Company insures the insured against loss, if any, sustained by the insured under the terms of the Policy if this item is not subordinate to the lien of the insured mortgage."

(9) In instances where federal estate taxes and state inheritance taxes have not been paid, but the title insurance company:

(a) Examines a balance sheet of the estate and determines that the estate will have no difficulty in paying its estate and inheritance taxes, and the title insurance company takes an indemnity from responsible persons protecting itself against loss due to unpaid estate and inheritance taxes, or

(b) Requires sufficient money or other securities to pay estate and inheritance taxes to be left in escrow with it pending payment of such taxes, or pending the receipt of waivers of lien from the taxing authority or authorities, or

(c) Examines the balance sheet of the estate and determines the estate will have no difficulty in paying its inheritance and estate taxes, and the title insurance company obtains a letter from a responsible person agreeing to see that such taxes are paid out of the assets of the estate.

(10) When a title insurance company previously issues a policy without taking exception to matters covered by the Master Indemnity Agreement (T-29) and is called upon to issue a new policy and is already obligated under such prior policy, and will not increase its liability or exposure to some matter by the issuance of such new policy.

(11) Where a mortgage securing a loan on (1) property consisting exclusively of a one-to-four-family residence, including a residential unit in a condominium regime; or (2) property other than property described by subdivision (1), if the original face amount of the indebtedness secured by the mortgage on the property is less than $1.5 million has been released by an affidavit that is filed in compliance with all of the requirements that are specified in Section 12.017 of the Texas Property Code.

c. "Texas Master Indemnity Agreement (T-29)" A title insurance company may, in lieu of the execution of separate transaction specific indemnity letters or agreements, indemnify another title insurance company in accordance with P-11b(7) and/or P-11b(10) above by executing the Texas Master Indemnity Agreement (T-29). If a title insurance company elects to provide another title insurance company with a master indemnity agreement, the Texas Master Indemnity Agreement (T-29) must be used if the master indemnity agreement is intended to cover the liens and other matters set forth in the Texas Master Indemnity Agreement (T-29).

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**Justification**

Often, title insurance agents are unable to obtain a release of lien for a property once a mortgage is paid off. Some mortgagees are less responsive than others in handling a request for a release of lien. Under the prior law, if a mortgagee failed to execute and deliver a release of mortgage to the mortgagor or the mortgagor's designated agent within 60 days after receipt of payment of the mortgage, only a title insurance company officer was authorized on behalf of the mortgagor or a transferee of the mortgagor to execute an affidavit and record it in the same county in which the mortgage was recorded. Title insurance agents were not authorized to file an affidavit as a release of the mortgage and were, therefore, required to leave the file open for extended periods of time and spend many hours attempting to obtain the release.

The amendments to Section 12.017 of the Texas Property Code provides procedures whereby a title insurance agent is authorized to file an affidavit which will function as a release of lien by amending an existing procedure which presently only applies to underwriters under certain circumstances.

The amendment to Procedural Rule P-11 specifies that the term "insuring around" shall not include the circumstances in new subsection (11) where a mortgage securing a loan on property has been released by an affidavit that is filed in compliance with all of the requirements that are specified in Section 12.017 of the Texas Property Code. This amendment to the Basic Manual implements the changes to Section 12.017 of the Texas Property Code that were enacted by HB 3768 by the 81st Legislature, Regular Session, effective, September 1, 2009.