

# LEGISLATIVE UPDATE 2011

Provided by

National Investors Title Insurance  
Company

Presented by

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# TEXAS LEGISLATION 2011

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- b. renewal of agency license
- c. limiting and defining the procedures and results of a TDI disciplinary action
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#### HB 2604

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**HB 1456**

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**SB 1187**

**10. Prohibition on requiring deed to later avoid foreclosure.**

**SB 1320**

**11. Other interesting legislation**

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**1. TDI**

- (a) Designates and clarifies specifically that providing education or certain promotional activities are not a rebate.

**Effective: September 1, 2011**

Texas Insurance Code, section 2502.055 was amended to:

1. specifically clarify that an agent or underwriter may provide education or promotional activities, if providing such education or promotional activities are: (a) not conditioned on the referral of business and (b) not otherwise prohibited by advertising requirements otherwise restricted or prohibited by the Insurance Code. (this affects the interpretation of P-53 but does not change the actual wording of P-53)
2. clarify and specifically authorize agent or underwriter to “continue” providing educational courses (to realtors or other related industry professionals [lenders, surveyors, etc.]) at **market rates** and regardless of whether the participants receive credit hours or not.

(b) [Initiation or renewal of agent license](#)  
**Effective: September 1, 2011**

1. TDI is required to process an agent’s license renewal application within:
  - a. 20 days to inform applicant that the application is incomplete,
  - b. 5 days after receipt of corrected form to acknowledge or agree that the application is now complete,
  - c. 30 business days after application is complete, unless TDI provides written notice of reasons why denied, the application is automatically approved.
2. TDI cannot reject, delay or deny an underwriter’s notice of appointment of an agent or the agent’s license based on pending actions against either the agent or underwriter of a:
  - a. TDI audit
  - b. complaint investigation, or
  - c. disciplinary action.
3. TDI can reject a notice of appointment of agent or the agent license if TDI determines that the underwriter or agent intentionally made a material misstatement, misrepresentation or perpetrated a fraud in the notice of appointment or the application for agent license.

4. TDI can delay approval of a notice of appointment or the agent license if:
  - a. agent or underwriter is subject to a criminal investigation or prosecution, or
  - b. there is a determination that there is credible suspicion of ongoing fraud by agent or underwriter.

(c) Limiting and defining the procedures and results of a TDI disciplinary action

**Effective: September 1, 2011**

TDI must notify an agent or underwriter in writing of a disciplinary or enforcement action against the agent or underwriter not later than the 30<sup>th</sup> business day after the date TDI assigns a file number to the action, except in the case of a criminal complaint or determination of ongoing fraud.

TDI is authorized to provide information about an enforcement action against an agent to any underwriter or proposed underwriter for the agent.

If a disciplinary or enforcement action is pending against an agent or underwriter, the agent or underwriter can request a hearing on the matter and if TDI does not serve a notice of hearing on the matter on the agent or underwriter within 60 business days after TDI received the hearing request, the action is automatically dismissed, with prejudice.

(d) Rate & Rule hearing procedures

**Effective: September 1, 2011 but subject to TDI finalizing new hearing rules**

Greatly changes the format of future **rate** hearings and establishes specific time frames within which certain aspects of the hearing including a ruling must be accomplished. In particular:

- (a) the required every-other-year hearing (biennial hearing) is abolished,

- (b) a rate hearing can be called at any time by:
  - 1. an underwriter,
  - 2. TLTA
  - 3. an agent organization composed of at least 20% of all licensed agents, or
  - 4. OPIC (consumer advocate within TDI called Office of Public Insurance Counsel).
- (c) a hearing will be held every 5 years (now called a “periodic” hearing) if not called sooner by a party in (b) above.
- (d) the rate hearing does not have to be conducted as a “contested hearing” unless a party established in (b) above so requests.
- (e) if a hearing is conducted not as a contested case, the Commissioner shall render a decision and final order not later than 120 days after the original request for a hearing.
- (f) if a hearing is conducted as a contested case, the Commissioner is bound to very specific and tight time frames to conduct the hearing and announce in a public hearing, decisions on all matters considered, within 60 days after the record made in the public hearing is closed.

(e) **Agency solvency/Agent capitalization relief**  
**Effective: June 17, 2011 but subject to TDI finalizing applicable rules**

Changed Section 2651.012(a)(2) of the Texas Insurance Code to allow agents (and underwriter direct shops) to meet capitalization requirements that were established by the legislature in 2009 in a more sensible and feasible manner.

With this change in law, agent is authorized to establish a capital account (solvency account) with a federally insured banking institution located in Texas, which account is accessible only by TDI (upon specific order of the Commissioner of Insurance). This account may be funded under an accrual system created in this new law. Agent must pay at least quarterly (based on calendar quarter) into the account a minimum amount based on the greater of \$5 or one percent (1%) of the agent’s portion of the premium, rounded to the nearest whole dollar, collected on every issued policy.

## 2. Minerals

Effective: January 1, 2012

As of January 1, 2012:

- (a) the 2% credit goes away – the 2% credit currently required on premium by R-36 when a title company makes a general exception or exclusion as to all minerals per P-5.1,
- (b) there will no longer be a premium (charge) for issuance of the T-19.2 or T-19.3, and
- (c) T-19.2 and T-19.3 will no longer be required to be issued upon request. Title company will have complete discretion as whether or not to provide either of those endorsements.

## 3. Payoff Statements

Effective: September 1, 2011 – but not actually effective until the form is promulgated by the State Finance Commission.

This law amends Chapter 343 of the Texas Finance Code so that on residential transactions:

- (a) the Texas Finance Commission is required to create a standard payoff statement form,
- (b) the residential lender or mortgage servicer must provide the payoff amount and requirements on the promulgated form,
- (c) the Texas Finance Commission is also required to create rules regarding the payoff statement, the most important being the time frame in which the lender/mortgage servicer must produce the payoff statement. The law says that the rule cannot require its delivery in less than 7 business days after receipt of the request,
- (d) if lender/mortgage servicer discovers that it has provided an incorrect payoff statement, it can correct such statement if it delivers a corrected version on or before the second (2<sup>nd</sup>) business day before the proposed closing date,

- (e) if title agent closes using the payoff statement but it is later determined that the payoff amount provided on statement was incorrectly understated:
  - i. lender cannot require title agent to pay difference,
  - ii. the lien is release (on refi. the lien is subordinated to new loan) and lender/mortgage servicer is required to provide a release of lien within a reasonable time, and
  - iii. the original borrower still owes the difference and any funds disbursed to or for the former borrower are subject to a constructive trust for benefit of unpaid lender.

## **4. Acknowledgement of foreign persons**

**Effective: September 1, 2011**

Section 121.005(a) of the Texas Civil Procedures and Remedies Code, which authorizes notaries to acknowledge the signature and presence of the signing party if the notary has certain knowledge or proof of the person's identity, is now amended to add as proof of identity on a deed or other documents which affect residential real property only – a current passport issued by a foreign country.

TIP: to verify authenticity of a passport from any country go online to WIKIPEDIA and put in the name of the country followed by the word: "passport" and it will tell and/or show you everything about that country's passport and what must be on it.

## **5. Private Transfer Fees (a.k.a Freehold estates)**

**Effective June 17, 2011**

Texas Property Code, Chapter 5 is amended to add Subchapter G, Sections 5.201-5.207 and the former law attempting to limit private transfer fees, Section 5.017 is repealed.

Defines "private transfer fee" as – an amount of money payable on the transfer of an interest in real property or payable for a right to make or accept a transfer.



A private transfer fee created on or after June 17, 2011 is void and is not enforceable against a subsequent seller or purchaser or the land.

*Underwriting note: Hopefully we will not see any “private transfer fee agreement/restrictions” filed on Texas property on or after June 17, 2011, but if they are, we will need to review on a case by case basis to verify whether they are void under this new law and do not need to be shown as a Schedule B exception, or whether they are not governed by this new law and will need to be excepted in Schedule B.*

A private transfer fee recorded before June 17, 2011, is now subject to strict notice requirements to keep the right alive as follows:

- (a) on or before January 31, 2012, a person that owns a private transfer fee obligation must record a “Notice of Private Transfer Fee Obligation.
- (b) multiple payees under a transfer fee obligation must designate one payee as the payee of record to receive the fee.
- (c) the “Notice” described above must be refiled not earlier than 30 days before the third anniversary of the original filing and again every 3 years.
- (d) the payee of record must accept the payment on or before the 30<sup>th</sup> day after the date the payment was tendered (not sure what it means to “accept” payment other than cashing check)
- (e) if payee of record does not timely accept the payment, then:
  - i. the payment must be returned,
  - ii. future payment cannot be required as to transfer of the property, and
  - iii. the transfer fee is void as to that property.

The new law does not allow any provision of the law to be waived by contract and authorizes the Attorney General to strictly enforce the provisions through injunctive or declaratory actions, and civil penalties up to \$250,000 against the transfer fee holder.

As of January 1, 2012 there must be a notice provided in every earnest money contract that covers property that may be subject to a private transfer fee. This is not an issue of the title industry, but for realtors and all parties to such transactions. The new law does not provide any penalty or remedy if this contract notice is not provided.

## 6. HOA/POA resale certificates

Effective: September 1, 2011

Amends Section 207.003 of the Texas Property Code regarding the issuance of a Resale Certificate by a HOA/POA as follows:

- (a) specifically adds the buyer or the buyer's agent as a authorized party to order the certificate,
- (b) allows HOA to require proof that buyer has a contractual right to buy the property
- (c) clarifies that the resale certificate must be provided within 10 "business" days after receipt of request, necessary verifications and payment of required fee (and 7 "business" days as to an update of a resale certificate),
- (d) requires more information about the HOA fees associated with the transfer of ownership,
- (e) establishes the buyer as the party to pay the necessary fee to get the resale certificate, unless otherwise agreed by the parties to the transaction,
- (f) allows HOA to require payment before beginning the process of providing the resale certificate, BUT does not allow the HOA to "process" the payment (cash the check or run the credit card) until the certificate is actually available,
- (g) removes HOA's ability to charge for the resale certificate if not provided within the time frame discussed in (c) above.

*Underwriter note: The TREC forms are in the process of being changed to establish that buyer pays for the resale certificate. This should improve the title company's position in who orders and who pays for the resale certificate and eliminate HOA's attempts to force title company to pay for certificate or updates with title company funds.*

*This bill was carried by freshman Representative Rodney Anderson who has worked in the title industry for many years.*

## 7. Correction Deeds

Effective: September 1, 2011

In the wake of uncertainties generated by the Texas Supreme Court's ruling in *Myrad Properties, Inc. v. LaSalle Bank National Association* (300 S.W. 3d 746) as to correction instruments, the Texas legislature enacted S.B. 1496 to outline requirements for these curative documents.

Section 5.027, Texas Property Code, applies only to correction of a "recorded original instrument of conveyance to transfer real property or an interest in real property." The ability to make a correction is limited to "ambiguity or error" in the original instrument. There is a further restriction against correcting a Deed of Trust to add property, when the original instrument did not include that property, and the correction is for purposes of conducting a foreclosure on the additional property.

The new statute divides corrections into two categories:

- (a) **nonmaterial corrections**, and
- (b) **material corrections**.

A nonmaterial correction may be made by a person having personal knowledge of facts relevant to the correction and the basis for such personal knowledge must be set forth in the correction instrument.

**Nonmaterial corrections** include clerical errors as to:

- (a) elements of the legal description,
- (b) a party's name,
- (c) a party's marital status,
- (d) date of execution,
- (e) references to recorded instruments, or
- (f) facts relating to the document's acknowledgment or authentication.

Section 5.028 (d), Texas Property Code requires the correction instrument be recorded in every county where the original instrument is of record and requires notice to all parties to the original instrument unless the parties have all joined in the correction.

**Material corrections** may be made only by the parties to the original transaction or the parties' heirs, successors, or assigns. The correction instrument must be executed by each party to the recorded original instrument, or by a party's heirs, successors, or assigns as applicable.

**Material corrections** include:

- (a) addition of a buyer's disclaimer of interest in real property originally conveyed, (b) addition of a mortgagee's consent or subordination to a recorded document executed by the mortgagee,
- (c) addition of land to a conveyance that correctly conveys other land,
- (d) removal of land from a conveyance that correctly conveys other land, and
- (e) accurate identification (by way of various identifying elements) of property owned by a grantor that was inaccurately identified as another parcel owned by the same grantor in the original conveyance.

Section 5.029 (b)(2) requires recording of the correction instrument in similar fashion to 5.028 (d); note there is no notice requirement with material corrections because the actual parties must sign.

Section 5.030 governs the effect of the correction instrument. Among other provisions, it provides that the correction instrument is effective as of the effective date of the recorded original instrument and may be relied upon by a bona fide purchaser "against any person making an adverse or inconsistent claim."

Section 5.031 retroactively makes effective all compliant correction instruments recorded prior to September 1, 2011 (the effective date of the new law) to clarify the effect of the new law as to such earlier corrections.

## 8. Mechanic Lien issues

### (a) Lien waivers & release of mechanic's liens

**Effective: January 1, 2012 – but only applies to original contracts entered into on or after January 1, 2012.** All contracts entered before effective date are governed by prior law.

Chapter 53, Texas Property Code is amended and Subchapter L is added to:

1. create statutory forms for waiver or release of mechanic lien rights or payment bond claims,
2. creates conditions for enforceability of lien waivers or release of liens based on:
  - i. substantial compliance with new statutory forms,
  - ii. the waiver and release is signed by the claimant and notarized, and
  - iii. in the case of a conditional release, there is evidence that claimant has actually been paid.
3. attempts to exclude lien waivers contained in contracts that are for any construction on a single family residential property from these new and complicated rules.

### (b) Creates a right for a subcontractor or supplier to assert a mechanic's lien claim for landscaping

**Effective Date: January 1, 2012**

### (c) Revision of time periods and notices regarding retainage

**Effective Date: September 1, 2011, but applies only to a lien claim for labor or materials furnished under a subcontract where the original contract was entered into, on or after September 1, 2011.**

Section 53.057, Texas Property Code, is amended to:

- i. change the time that a claimant has to give an owner notice to trigger retainage from the 15th day of the second month after work done to 30 days after the construction agreement is completed, terminated, or abandoned or the original contract is terminated or abandoned,

- ii. affirms that a claimant has a lien on and the owner is personally liable for the retained funds, if notice of retainage is properly given and claimant files a lien affidavit within a of time frame now based on a list of variable time frames specific to certain factual aspects of completion, termination, or notices, (it is very complicated), and
- iii. affords a subcontractor more ability to collect under a lien affidavit even when certain retainage notices have not been met or other procedural defects have occurred.

## **9. Lis Pendens – when it affects property**

**Effective Date: September 1, 2011**

Changed Section 13.004, Texas Property Code, so that a Lis Pendens is not effective as notice to the world or an encumbrance on the named property until the Lis Pendens is recorded **and indexed** by the County Clerk. This is to protect the title industry from Lis Pendens when they are impossible to find by a down date of title because the County Clerk's office has recorded but not yet indexed the Lis Pendens.

## **10. Prohibition on requiring deed to later avoid foreclosure.**

**Effective Date: September 1, 2011**

As to residential real property, a seller or a person that makes a loan to buyer (lender), cannot request or require at or before the conveyance of the property to buyer, that buyer execute and deliver to seller or lender a deed conveying the residential real property back to seller or lender.

A deed executed in violation of this law is voidable within 4 years of the deed being recorded unless after recording there is a BFP.

## **11. Other interesting legislation**

- (a) catchin' catfish - noodling
- (b) shootin' feral hogs and coyotes Sarah Palin style
- (c) speed limit changes
- (d) slow down or move over for tow trucks
- (e) abusing a pet is now a criminal act of domestic violence
- (f) a driver may not allow a child under 18 to ride in a watercraft while it is being towed on a street or highway.
- (g) you can now bring a gun on a boat or other watercraft, but it must not be "in plain view."
- (h) to vote a person will have to have proper ID, and one acceptable is a Concealed Handgun License.

You can look up any bill by number at:

[www.legis.state.tx.us/billlookup/billnumber.aspx](http://www.legis.state.tx.us/billlookup/billnumber.aspx)

choose the "enrolled" version