

## **BILL ANALYSIS**

Senate Research Center

H.B. 4338  
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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Weaknesses in the existing regulatory system have been brought to the forefront during the current economic downturn. Several title insurance agents have failed, leaving files in the middle of closing, offices and file storage facilities padlocked, and Texas Department of Insurance (TDI) staff uncertain whether to place the agent into receivership or into the hands of the Texas Title Insurance Guaranty Association. On the last day of July 2008, one of the largest independent title insurance companies in Texas was shut down by its out-of-state owners with no warning to its underwriters, employees, customers, or landlords, or TDI. TDI had just completed an escrow audit of the agent and was reasonably certain that there were no shortages in the escrow account. This belief prevented TDI from referring the case to the Guaranty Association. Because of the size of the agent and the fact that TDI and the association were also involved with other failed agents, TDI's resources were stretched very thin, and TDI and the agent's underwriters were forced to devise a system to deal with the files that were in various stages of closing with upwards of \$12 million needing to be funded.

While extraordinary efforts by TDI staff and the underwriters allowed this failed agent's customers to have their transactions closed, existing liens paid, and documents recorded all with no known loss of funds, it became apparent that changes to the title insurance act were needed to head off similar problems in the future. However, the out-of-state owner of the agent placed it in bankruptcy in another state. Since current Texas law does not specify that funds owed to an agent's underwriter or another agent for providing title evidence or closing services be held in trust by the agent, neither the underwriters nor the numerous agents that sold information to the failed agent are likely to receive a cent of their money. At least holding the money in trust moves the underwriter and other agents into a more secure position. This bill allows the commissioner of insurance more flexibility in handling impaired title insurance agents and companies.

H.B. 4338 provides a mechanism for TDI, as the receiver for an impaired agent or the title insurance companies for which the agent was licensed, to have improved access to the agent's files and provides for the confidentiality of the information contained in such files. The bill allows TDI to obtain information about the possible insolvency of a title insurance agent, places the funds derived from a division of premium between an agent and an underwriter or another agent into a trust, and requires all abstract plants to cover a period beginning not later than January 1, 1979. The bill increases the educational requirements for title insurance agents and their management personnel and specifies the entities that can provide such education. The bill establishes a staggered period during which many title insurance agents and direct operations must reach a certain level of minimum capitalization based on the population of the county or counties for which the agent is licensed.

H.B. 4338 amends current law relating to title insurance agents and title insurance companies.

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the commissioner of insurance in SECTION 12 (Section 2651.0021, Insurance Code), SECTION 13 (Section 2651.011, Insurance Code), SECTION 14 (Section 2651.012, Insurance Code), and SECTION 15 (Section 2651.158, Insurance Code) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 2501.004(b), Insurance Code, to require the Texas Department of Insurance (TDI), to provide for the safety and protection of policyholders, to require that an abstract plant be geographically arranged, cover a period beginning not later than January 1, 1979, and be kept current, and be adequate for use in insuring titles, as determined by TDI. Makes a nonsubstantive change.

SECTION 2. Amends Section 2602.002(a), Insurance Code, to provide that this chapter is for certain reasons, including the protection of consumers served by agents. Makes nonsubstantive changes.

SECTION 3. Amends Section 2602.003(6), Insurance Code, to redefine "impaired title insurance company."

SECTION 4. Amends Sections 2602.011(a) and (e), Insurance Code, as follows:

(a) Requires the commissioner of insurance (commissioner) to notify the Texas Title Insurance Guaranty Association (association) of the existence of an impaired title insurance company not later than the third day after the date on which the commissioner gives notice of the designation of impairment or learns the title insurance company is impaired as described by Sections 2602.003(6)(A) (relating to being placed under an order of supervision, conservatorship, rehabilitation, or liquidation), (B) (relating to being placed under an under order of supervision or conservatorship), (C) (relating to being placed under an order of rehabilitation or liquidation), or (D) (relating to being otherwise found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due).

(e) Authorizes the commissioner to require that the association notify the insureds of the impaired title insurance company and any other interested party that the company is impaired, rather than of the designation of impairment, and of the person's rights under this chapter.

SECTION 5. Amends Section 2602.110, Insurance Code, as follows:

Sec. 2602.110. New heading: EXPENSES OF ADMINISTERING IMPAIRED INSURER. Authorizes the association to advance money necessary to pay the expenses of administering the supervision, rehabilitation, receivership, conservatorship, or, as determined by a court, other insolvency of an impaired title insurance company or impaired agent, rather than to pay expenses of administering the receivership or conservatorship estate of an impaired title insurance company or agent, on terms the association negotiates, if the company's or agent's assets are insufficient to pay those expenses.

SECTION 6. Amends Section 2602.152, Insurance Code, to require the board of directors of the association (board), annually or more frequently, to determine the amount of the guaranty fee, rather than to determine the amount of the guaranty fee, not to exceed \$5, considering the amount of money to be maintained in the guaranty fee account that is reasonably necessary for efficient future operation under this chapter.

SECTION 7. Amends Sections 2602.153(b) and (d), Insurance Code, as follows:

(b) Requires that the following claims, rather than the following covered claims, be paid from guaranty fees only and prohibits them from being paid from assessments: covered claims against trust funds or an escrow account of an impaired agent under Section 2602.252 (Claim Against Trust Funds or Escrow Account); expenses incurred in complying with Subchapter J; conservator and receiver expenses under Section 2602.254 (Certain Conservator and Receiver Expenses Covered); and administrative expenses with respect to the estate of an impaired agent under Section 2602.110 (Expenses of Receivership or Conservatorship). Makes nonsubstantive changes.

(d) Authorizes guaranty fees to be used only for payment of claims described by Subsection (b) and expenses related to an audit or an examination conducted by TDI or the association, rather than covered claims described by Subsection (b) or (c) (relating to requiring that administrative expenses be paid from the guaranty fee account) and audit and review expenses under Section 2602.103(b) (relating to requiring the association to retain one or more persons to audit and review agent escrow and trust accounts and make a report to the commissioner).

SECTION 8. Amends Section 2602.251, Insurance Code, to provide that an unpaid claim is a covered claim for certain reasons, including if the title insurance company that issued the policy under an assumption certificate is an impaired title insurance company that has been placed in receivership or conservatorship.

SECTION 9. Amends Sections 2602.401(a) and (b), Insurance Code, as follows:

(a) Prohibits the company, if an assessment has been made under this chapter for an impaired title insurance company or association funds have been provided for the company, on release from the supervision, rehabilitation, conservatorship, receivership, or other proceeding in which the company was found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due, from issuing a new or renewal insurance policy until the company has repaid certain amounts.

(b) Prohibits the agent, on release from the supervision, conservatorship, rehabilitation, receivership, or other proceeding in which the agent was found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due, subject to dischargeability, from acting as an agent, rather than issuing a new or renewal insurance policy, until the agent has repaid in full the amount of guaranty fees paid by the association, if an assessment has been made under this chapter for an impaired agent or guaranty fees have been provided for the agent.

SECTION 10. Amends Chapter 2602, Insurance Code, by adding Subchapter J, as follows:

#### SUBCHAPTER J. ADDITIONAL DUTIES OF ASSOCIATION

Sec. 2602.451. **APPLICABILITY.** Provides that this subchapter applies, at the commissioner's discretion and regardless of whether there are covered claims against an agent, to any agent that is designated by the commissioner as an impaired agent or that is placed under an order of supervision, conservatorship, rehabilitation, or liquidation or is otherwise found by a court of competent jurisdiction to be insolvent or otherwise unable to pay obligations as they come due.

Sec. 2602.452. **ACTIONS FOR CERTAIN AGENTS.** Authorizes the commissioner, at the commissioner's discretion, to require the association, at the association's expense, to take on behalf of the agent certain actions.

SECTION 11. Amends Section 2651.002, Insurance Code, by amending Subsection (c) and adding Subsection (d), as follows:

(c) Requires that the completed application state certain information, including that the proposed agent has unencumbered assets in excess of liabilities, exclusive of the value of abstract plants, as required by Section 2651.012.

(d) Requires an agent applying for an initial license under this subchapter, except as provided by Section 2651.0021(d), to provide evidence that the agent and its management personnel have successfully completed a professional training program that complies with Section 2651.0021. Requires that the program have been completed within one year preceding the date of application.

SECTION 12. Amends Subchapter A, Chapter 2651, Insurance Code, by adding Section 2651.0021, as follows:

Sec. 2651.0021. PROFESSIONAL TRAINING PROGRAM. (a) Requires the commissioner to adopt by rule a professional training program (program) for a title insurance agent and the management personnel of the title insurance agent.

(b) Requires that the program be designed to provide certain information.

(c) Authorizes program hours to be used to satisfy the continuing education requirements established under Section 2651.204 (Continuing Education).

(d) Requires that a program course be offered by certain entities.

(e) Exempts an individual from the professional training requirement of this section if the individual has held in this state for at least five years a position as management personnel with a title insurance agent, or a comparable position, as determined under rules adopted by the commissioner.

SECTION 13. Amends Section 2651.011, Insurance Code, as follows:

Sec. 2651.011. New heading: PRIVILEGED COMMUNICATIONS; FINANCIAL INFORMATION. (a) Creates this subsection from existing text. Provides that any information, including a document, record, or statement, and including information provided to or received from the commissioner under Subsection (b) or (c), required to be made or disclosed to TDI under this subchapter, other than Section 2651.001 (License and Bond or Deposit Required), is not public information subject to Chapter 552 (Public Information), Government Code, is a privileged communication, and is not admissible in evidence in a court action or proceeding except under a subpoena issued by a court of record. Provides that this subsection does not apply to a document, record, or statement required to be made or disclosed to TDI under Chapter 36 (Department Rules and Procedures). Makes nonsubstantive changes.

(b) Authorizes a title insurance company to provide information to, or receive information from, the commissioner about a financial matter that would reasonably call into question the solvency of an agent that the company appointed. Prohibits an entity, other than the title insurance company appointing the agent, from requesting or receiving the information described by this subsection from the commissioner.

(c) Requires each title insurance agent, on a quarterly basis, to provide TDI with a copy of the agent's quarterly withholding tax report furnished by the agent to the United States Internal Revenue Service. Requires the title insurance agent to also provide to TDI proof of the payment. Requires an agent who does not have employees, on a quarterly basis, to certify to TDI that there has not been a material change in the agent's financial condition.

(d) Authorizes the commissioner to prescribe the types of information under Subsections (b) and (c) that are privileged under Subsection (a).

SECTION 14. Amends Subchapter A, Chapter 2651, Insurance Code, by adding Sections 2651.012 and 2651.013, as follows:

Sec. 2651.012. UNENCUMBERED ASSETS. (a) Defines "unencumbered assets."

(b) Requires an agent, except as provided by Subsection (e), to maintain unencumbered assets in excess of liabilities, exclusive of the value of abstract plants, in certain amounts unless the commissioner establishes different amounts by rule.

(c) Exempts an agent that maintains its principal office in a county with a population of less than 10,000 from this section, except as provided by the commissioner by rule.

(d) Requires an agent that maintains a principal office in more than one county to meet the asset standards for the largest county for which the agent will hold a license.

(e) Authorizes an agent to elect to maintain unencumbered assets as required by this section or place a deposit with TDI in the manner authorized by Section 2652.102 (Alternative to Bond).

(f) Provides that an agent that holds a license on September 1, 2009, and that has held the license for at least three years on that date is not required to comply with Subsection (b) on September 1, 2009, but is required to increase the unencumbered assets held by the agent, or make and increase the required deposit, until the agent is in compliance with the required capitalization amounts in accordance with the schedule established by this subsection. Requires the agent to hold certain unencumbered assets or to make a deposit in a certain amount.

(g) Provides that this subsection and Subsection (f) expire September 2, 2018.

Sec. 2651.013. DIVISION OF PREMIUM HELD IN TRUST; RULES. (a) Provides that the funds held by a title insurance agent that are owed to a title insurance company, another title insurance agent, or a direct operation arising from a division of premium, whether as determined under rules adopted by the commissioner or by agreement among the parties, are considered to be held in trust for the title insurance company, other title insurance agent, or direct operation.

(b) Provides that this section does not require, and prohibits the commissioner from requiring by rule, that funds described by Subsection (a) be held in a separate account or be subject to an audit of TDI.

SECTION 15. Amends Subchapter D, Chapter 2651, Insurance Code, by adding Section 2651.158, as follows:

Sec. 2651.158. CERTIFICATION OF UNENCUMBERED ASSETS. (a) Requires that the annual audit of escrow accounts, unless the agent has elected to make a deposit with TDI under Section 2651.012(e), be accompanied by a certification by a certified public accountant that the title insurance agent has the appropriate unencumbered assets in excess of liabilities, exclusive of the value of its abstract plants, as required by Section 2651.012.

(b) Requires the commissioner by rule to establish a procedure to be used by an agent and the agent's certified public accountant to determine the value of categories of assets and the method by which the certification required by this section is required to be made.

SECTION 16. Amends Subchapter E, Chapter 2651, Insurance Code, by adding Section 2651.205, as follows:

Sec. 2651.205. POSSESSION OF GUARANTY FILE. (a) Prohibits a title insurance agent from giving possession of the agent's guaranty file to any third party, including a landlord or storage facility, unless the third party accepts possession of the file subject to the right of access of the title insurance company involved in the transaction that the file documents, whether the right of access exists by contract or other statutory basis, and agrees to maintain the confidentiality of nonpublic information in the title insurance agent's file according to state and federal laws that govern the title insurance agent.

(b) Requires the association to take possession of each guaranty file of the agent and make the file available to the title insurance company involved in the transaction that the file documents, if the title insurance agent ceases operations without complying with rules adopted by the commissioner.

(c) Prohibits a title insurance company from entering into a new contract or agreement or amending an existing contract or agreement with an individual, firm, association, or corporation to act as the company's agent unless the contract or amendment contains a requirement that any lease, storage agreement, or other contract entered into by the agent that may relate to files maintained by the agent contains certain language.

(d) Defines "title insurance agent."

SECTION 17. Repealer: Section 2602.153(c) (relating to requirement that administrative expenses be paid from the guaranty fee account), Insurance Code.

SECTION 18. Provides that an abstract plant that exists on September 1, 2009, but that does not, on that date, cover a period beginning not later than January 1, 1979, as required by Section 2501.004, Insurance Code, as amended by this Act, is not required to comply with that section before January 1, 2014.

SECTION 19. Provides that Section 2651.158, Insurance Code, as added by this Act, applies beginning with annual audits conducted under Subchapter D (Annual Audit), Chapter 2651 (Title Insurance Agents and Direct Operations), Insurance Code, for the 2011 calendar year.

SECTION 20. (a) Authorizes the commissioner, not later than September 30, 2009, by order, to delay the implementation of Section 2651.205, Insurance Code, as added by this Act, if the commissioner determines that rules to implement that section are necessary to the effective administration of that section.

(b) Provides that Section 2651.205, Insurance Code, as added by this Act, applies only to the conduct of a title insurance agent, and a contract or agreement executed or renewed by a title insurance agent, on or after January 1, 2010, if the commissioner does not issue an order under Subsection (a) of this section, or the effective date of rules adopted by the commissioner, if the commissioner does issue an order under Subsection (a) of this section.

(c) Provides that the conduct of a title insurance agent, and a contract or agreement executed or renewed by a title insurance agent, before the date determined under Subsection (b) of this section are governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 21. Effective date: September 1, 2009.