**WFG Washington Underwriting Bulletin**

**WFG National Title Company**

**10800 NE 8th St., Suite 200, Bellevue, WA 98004**

**Date:** February 17, 2015

**To:** WFG WA Title and Escrow Employees

**Re:** Washington Transfer on Death Act

**Bulletin #:** WFG-WA-2014-1-RJH

 **Overview.** The Washington Uniform Real Property Transfer on Death Act (“Act”), set forth in RCW 64.80.010-64.80.904, took effect on June 12, 2014 and allows an individual to transfer real property to one or more designated beneficiaries automatically upon the transferor’s death, without probate. This is accomplished by using a new type of deed known as a transfer on death deed (“TODD”).

 The purpose of this Bulletin is to outline the key elements of the Act as well as the underwriting guidelines that apply to transactions involving TODDs.

 **Who May Make and Who May be the Beneficiary of a TODD?** The Act defines a permitted beneficiaryof a TODDas a “person” that receives property under a TODD. A “person” (and therefore a permitted beneficiary of a TODD) is in turn defined as an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

 The definition of a transferor who may make a TODD, on the other hand, is limited to an “individual.” That term does not include a corporation, partnership, limited liability company, or any other legal or commercial entity. Hence, only individuals may legally make a TODD.

 **General Nature of and Requirements for a TODD.** A TODD (i) is nontestamentary (meaning that, since the property passes in accordance with the deed instead of in accordance with a will, the property does not need to pass through the probate process) and requires the same capacity required to make a will, (ii) is revocable (as set forth below and even if the TODD or another instrument contains a contrary provision), (iii) is effective without consideration and without notice or delivery to or acceptance by the designated beneficiary during the transferor’s life, and (iv) transfers property without any covenants or warranties of title (even if the TODD contains a contrary provision).

 A beneficiary under a TODD may disclaim all or any part of the beneficiary’s interest by complying with the disclaimer requirements set forth in RCW Chapter 11.86.

 A TODD must: (1) contain the essential elements and formalities of an inter vivos TODD deed; (2) state that the transfer to the designated beneficiary is to occur at the transferor’s death; and (3) be recorded before the transferor’s death in the public records in the office of the auditor of the county where the property is located.

 **Revocation of a TODD.** A recorded TODD may only be revoked, in whole or in part, in one of the following three ways: (1) by a subsequent TODD that expressly or by inconsistency revokes all or a portion of the prior TODD; (2) by an instrument of revocation that expressly revokes all or a portion of the TODD; or (3) by an inter vivos deed that expressly revokes all or a portion of the TODD. Once recorded, an act of revocation on the TODD itself is not sufficient to revoke the TODD.

 In each instance, the revoking instrument must be acknowledged and recorded before the transferor’s death in the public records of the county auditor of the county where the deed is recorded.

 If a TODD is made by more than one transferor, (i) revocation by a transferor does not affect the interest of any other transferor, (ii) a TODD by joint owners is revoked only if it is revoked by all of the joint owners living at the time the revocation is recorded, and (iii) a TODD of community property must be revoked by both of the spouses or domestic partners, as applicable; however, if one of the spouses or domestic partners is deceased, the survivor may revoke the TODD.

 **Effect of TODD During Transferor’s Life.** During a transferor’s life, a TODD does not:

1. affect any interest or right of the transferor or any other owner of the property, including the right to transfer or encumber the property;
2. affect any interest or right of a transferee, even if the transferee has actual or constructive notice of the TODD;
3. affect any interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the TODD;
4. affect the transferor's or designated beneficiary's eligibility for any form of public assistance;
5. create a legal or equitable interest in favor of the designated beneficiary; or
6. subject the property to claims or process of a creditor of the designated beneficiary.

 Simply put, during a transferor’s lifetime the beneficiary has no interest in the property and the transferor retains the full power to transfer or encumber the property or revoke the TODD. For that reason, the beneficiary’s creditors cannot attach the property prior to the transferor’s death since the property does not pass to the beneficiary until that time.

 **Effect of TODD at Transferor’s Death.** Upon the death of the transferor, the property is automatically transferred to the designated beneficiary in accordance with the deed. However, if the designated beneficiary dies before the transferor, the interest of that beneficiary lapses.

 The beneficiary under the TODD takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor’s death, including liens recorded within twenty-four months after the transferor’s death by the Washington Health Care Authority (“HCA”) or the Washington Department of Social and Health Services (“DSHS”).

 The beneficiary under the TODD also takes the property subject to the deceased transferor’s liabilities, claims, estate taxes and administration expenses as set forth in RCW 11.18.200, to the extent of the decedent’s ownership in the property immediately before death.

 Concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship. If the transferor identified two or more designated beneficiaries to receive concurrent interests in the property and the share of one of those beneficiaries lapses or fails for any reason, the lapsed/failed share is transferred to the other or others in proportion to the interest of each in the remaining part of the property held concurrently.

 If the transferor is a joint owner and is survived by other joint owners, the property belongs to the other surviving joint owners or owners with right of survivorship. If the transferor who dies is the last surviving joint owner, the TODD transfers title to the designated beneficiary. The Act defines a “joint owner” as an individual who owns property concurrently with one or more individuals with a right of survivorship, including a joint tenant with a right of survivorship but excluding a tenant in common or an owner of community property.

 In the case of community property, (i) if the transferor is married or in a registered domestic partnership and the TODD is not executed by the transferor’s spouse or domestic partner, then the transferor’s interest is transferred to the designated beneficiary in accordance with the TODD on the transferor’s death, or (ii) if the TODD is executed by the transferor’s spouse or domestic partner and the transferor is survived by the transferor’s wife or domestic partner, the TODD is not effective upon the transferor’s death.

 **Real Estate Excise Tax Implications.** Effective October 6, 2014, WAC 458-61A-202 was amended to provide that the transfer of real estate pursuant to a TODD is not subject to the real estate excise tax unless the transfer satisfies a contractual obligation that the transferor owed to the designated beneficiary. It also provides that, if property is being transferred pursuant to a TODD, a certified copy of the death certificate must be recorded to perfect title.

 In addition, WAC 458-61A-303 has been revised as follows:

1. An excise tax affidavit is not required when the TODD is recorded by the transferor.
2. An excise tax affidavit is, however, required if a TODD was previously recorded and the designated beneficiary wishes to perfect title following the transferor’s death by recording a certified copy of the transferor’s death certificate. In such an event, the affidavit need only be signed by the designated beneficiary on behalf of the transferor.

**If we are asked to insure a sale or refinance of property subject to a TODD, you must contact and obtain approval to do so from your WFG underwriter.**

***UNDERWRITING GUIDELINES***

 The following underwriting guidelines apply to TODDs:

1. If title to the property is still held in the transferor’s name and the transferor is alive, disclose the TODD on Schedule B of the commitment as a Note, rather than as a special exception. This note should not, however, appear on the loan or owner’s policy issued at the close of the transaction.
2. If the transferor has conveyed the property to a third party, the TODD is automatically revoked and it is not necessary to disclose it on the commitment. The same is true if the TODD is revoked by a written, recorded revocation (but see #10 below).

3. If you are notified from a source other than a recorded death certificate that the transferor has died, show the TODD as an exception and include a sub-paragraph calling for a certified copy of the death certificate. Do not insure through the TODD until the certified copy is obtained and recorded.

1. Before agreeing to insure title based on a TODD prior to the expiration of the 24-month period during which the HCA and DSHS may file liens, obtain written confirmation from both the HCA and DSHS that no amounts are owing for assistance provided to the deceased transferor. Absent such confirmation, show as a special exception any liens that may be filed by the HCA and/or DSHS within 24 months of the transferor’s death for assistance provided to the transferor prior to his/her death.
2. In connection with every transaction subject to a TODD, obtain from the designated beneficiary or beneficiaries a fully completed, dated, executed and acknowledged Affidavit of Beneficiary in Transfer on Death Deed with Indemnity in the form attached hereto as Exhibit A.
3. Confirm that the transferor under the TODD was a natural person (i.e., an individual as opposed to a corporation, partnership, limited liability company, or other legal or commercial entity).
4. Confirm that the TODD was executed and acknowledged by the transferor and recorded prior to the transferor’s death.

Note the following:

(a) A power of attorney may not be used to convey a transferor’s interest under a TODD unless the POA specifically authorizes the execution of a TODD on behalf of the transferor.

(b) Unless the intent is to terminate a joint tenancy, all joint tenants must execute the TODD. Otherwise, following the death of a joint tenant who executed a TODD, the designated beneficiary of that deceased joint tenant will be a tenant in common with the surviving joint tenants who did not join in the TODD.

1. Confirm that the TODD states that the transfer to the designated beneficiary is to occur at the transferor’s death.

Note the following:

(a) It would not be appropriate for a spouse or domestic partner to use a TODD to name the other spouse/domestic partner as a sole heir if the TODD property was already community property. A TODD could be used, however, to deal with the separate property of the transferor spouse/domestic partner.

(b) The death of one joint tenant transferor does not operate to vest title through the TODD. The TODD only vests title in the designated beneficiary after the death of the last surviving joint tenant.

(c) Similarly, where both spouses or domestic partners join in a TODD, the death of the first vests title only in the surviving spouse/domestic partner and not in the designated beneficiary. The beneficiary only acquires the interest of the second once the second dies.

(d) If both spouses or domestic partners do not join in a TODD, upon the death of the death of the spouse/partner who executed the TODD, (i) the designated beneficiary becomes the owner of the deceased spouse’s/partner’s interest, and (ii) the designated beneficiary’s interest would presumptively be subject to the community interest of the surviving spouse/partner.

1. Confirm that the designated beneficiary(ies) (i) survived the deceased transferor(s), and (ii) did not disclaim any interest in all or any part of the TODD property.
2. Confirm that no instruments revoking the TODD were recorded before the transferor’s death.

If an instrument of revocation was timely recorded, note the following:

(a) If there were multiple transferors and less than all of them executed the instrument of revocation, the revocation does not affect the grant made by the other, non-revoking transferor(s).

(b) If the original transferors were married or domestic partners and both executed the TODD, both must execute the instrument of revocation unless the spouse or domestic partner is deceased – in which case only the surviving spouse/domestic partner must execute the revocation.

(c) If the original transferors were joint tenants and all of them executed the TODD, all must execute the instrument of revocation unless a joint tenant is deceased – in which case only the surviving joint tenant(s) must execute the revocation.

1. Confirm that the transferor(s) did not (i) record an inconsistent TODD (such as a TODD to a different beneficiary), or (ii) make any other conveyance that appears to be inconsistent with the apparent intent of the TODD.
2. Obtain the appropriate excise tax affidavit executed by the designated beneficiary on behalf of the transferor.

If you have any questions related to this Bulletin, please contact your local WFG underwriting personnel.

***THIS BULLETIN IS A CONFIDENTIAL COMMUNICATION BETWEEN WFG AND THE ADDRESSEE AND IS INTENDED ONLY FOR WFG’S INTERNAL USE. WFG DOES NOT AUTHORIZE THE DISCLOSURE OF THIS COMMUNICATION TO ANY THIRD PARTY IN ANY MANNER WITHOUT WFG’S PRIOR WRITTEN CONSENT.***

**EXHIBIT A**

**WFG National Title Company
AFFIDAVIT OF BENEFICIARY IN TRANSFER ON DEATH DEED WITH INDEMNITY**

STATE OF WASHINGTON )
 )
County of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

 I,\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, being duly sworn, depose and say that I am the \_\_\_\_\_\_\_\_\_\_ (relationship to deceased) of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, who died on or about \_\_\_\_\_\_\_\_\_\_\_\_\_, in \_\_\_\_\_\_\_\_\_\_, County, Washington. Attached is a certified true copy of his/her death certificate.

1. At the time of death, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ was the owner of the real property legally described on the attached exhibit. [WFG NOTE: Attach legal description for the property, not just the property address.] The estimated value of such property is $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
2. Prior to the time of death, the deceased executed and recorded a Transfer on Death Deed designating me as the named beneficiary under the deed. Attached is a copy of the recorded Transfer on Death Deed.
3. To the best of my knowledge (i) the deceased had the capacity to execute the Transfer on Death Deed, and (ii) the Transfer on Death Deed was not procured by fraud, duress or undue influence.
4. There are no other primary beneficiaries named under the Transfer on Death Deed, except for\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
5. To the best of my knowledge, the Transfer on Death Deed was never revoked, whether by (a) any subsequent Transfer on Death Deed, (b) any instrument of revocation, (c) any inter vivos deed, or (d) any other document.
6. The following are all the heirs and devisees of the deceased:

NAME ADDRESS RELATIONSHIP AGE

1. The children listed above are also all the children of the spouse, shown in #6 above, except for \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
2. If any children predeceased the decedent and left children of their own, such children are listed in #6 above.
3. Decedent left a will: yes ( ) no ( ). If, yes, a complete, true and correct copy of the will is attached.
4. No application or petition for the appointment of a personal representative has been filed or granted in Washington.
5. All claims against the estate of the decedent and all bills of the decedent, including costs of any last illness and death, have been paid in full. In addition, any and all estate taxes, federal or state, have been paid in full. In the alternative, all bills that are unpaid are listed below and are being submitted to escrow to be paid from the proceeds of this sale out of the escrow established in this matter.

Name of Creditor Address Type of Debt Amount

1. There are no monies owing to the Washington Health Care Authority or the Washington Department of Social and Health Services. [WFG NOTE: If the deceased received Medicaid benefits, sums typically ARE owed.]

**This affidavit is made to induce WFG National Title Company to insure title to the real property described in Section 1 above without requiring the probate of the estate of the deceased. I/we hereby agree to defend, indemnify and hold harmless WFG National Title Company and its affiliates, officers, directors, shareholders and employees from and against any and all liabilities, obligations, expenses, suits, actions, and costs of any kind or nature, including but not limited to, legal fees and costs, whether or not a suit or action is filed, arising directly or indirectly out of the falsity or inaccuracy of any statement made in in this affidavit, whether made intentionally, negligently or innocently.**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_

State of Washington )

 )
County of \_\_\_\_\_\_\_\_ )

     I certify that I know or have satisfactory evidence that \_\_\_\_\_\_\_\_\_\_\_\_ is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.

 Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_

 Name Printed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Notary Public in and for the State of

 Washington, residing at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 My appointment expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

State of Washington )

 )
County of \_\_\_\_\_\_\_\_ )

     I certify that I know or have satisfactory evidence that \_\_\_\_\_\_\_\_\_\_\_\_ is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.

 Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_

 Name Printed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Notary Public in and for the State of

 Washington, residing at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 My appointment expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_