STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street, 24th Floor
San Francisco, California 94105

FINAL STATEMENT OF REASONS

Date: August 19, 2010 **REG-2009-00019**

LIMITATION ON UNDERWRITTEN TITLE COMPANY LIABILITY

UPDATED INFORMATIVE DIGEST

There is no need to update any of the information contained in the Informative Digest for this rulemaking proceeding, which is incorporated by reference from the notice of proposed rulemaking.

UPDATE OF INFORMATION CONTAINED IN INITIAL STATEMENT OF REASONS

INTRODUCTION

Title insurers and underwritten title companies perform different but symbiotic functions in the title marketplace. Underwritten title companies perform title searches upon which title insurance policies are written, and also title related escrow services if specifically licensed for that purpose. Title insurers indemnify property owners and others for title related losses by issuing insurance policies and may perform title related escrow services. A title insurer can act on a direct basis without the use of an underwritten title company, but an underwritten title company may only transact business if it is in contract with a title insurer. These contracts between the title insurer and the underwritten title company are generally known as underwriting agreements. Underwriting agreements delineate the business relationship between title insurers and underwritten title companies. As a result of the underwritten title company needing a title insurer to operate, the parties to the underwriting agreement, the title insurer and the underwritten title company, are not equals and the underwriting agreement provisions which control the operations of the underwritten title company may be economically disadvantageous to the underwritten title companies.

The purpose of the proposed action is to enact a long standing position of the California Department of Insurance ("CDI") to limit the liability of underwritten title companies to indemnify title insurers to five thousand dollars ($5,000) with some specific exceptions for intentional, willful acts and escrow related losses, which limitation fosters the solvency of underwritten title companies. Further, the proposed action limits the liability that may be transferred from the title insurer that is generally more highly capitalized and able to bear the loss, to the underwritten title company agent that is generally less able to bear the loss. The proposed action also creates an incentive for underwritten title companies to use a duty of care by permitting the transfer of some risk to

underwritten title companies.

Towards the achievement of that goal, the proposed regulation establishes the limitations on risk transfer between title insurers and underwritten title companies that may be agreed to by contract. The Commissioner believes these proposed regulations are reasonably necessary to carry out the purpose of the Underwritten Title Company statute, namely to promote the regulation of the business of title insurance, to facilitate new market entry, to promote California small businesses, to provide for proper risk bearing amongst the licensed entities, to facilitate fair dealing, prevent fraud and promote fair claims practices for California consumers of title insurance and to promote the alignment of risk assumed with capital requirements amongst the licensed entities. Further, the proposed regulations will clarify expectations for compliance by title insurers and underwritten title companies with the permitted liability transfer or risk shifting in their underwriting agreements. The proposed regulation is reasonably necessary to achieve regulatory compliance in this area.

SPECIFIC PURPOSE AND REASONABLE NECESSITY OF EACH REGULATION

The specific purposes of proposed adoption and the rationale for the Commissioner's determination that the adoption is reasonably necessary to carry out the purposes for which it is proposed are set forth below.

Proposal to adopt a new Article 14 "Underwritten Title Companies" and to adopt a Section 2194.70 entitled "Underwritten Title Company Limitation on Liability" of Title 10, chapter 5, subchapter 1 of the California Code of Regulations.

New regulatory section 2194.70 states that no contract between a title insurer and an underwritten title company shall provide for indemnity of the title insurer by the underwritten title company in excess of five thousand dollars ($5,000) of loss per policy. This section is reasonably necessary to establish the limitations on underwritten title company liability upon which underwritten title companies may conduct business. Further, this proposed new regulation will continue the longstanding CDI requirement that limits risk shifting between the licensed underwritten title companies and their title insurers. This regulation will create an incentive for underwritten title companies to perform their functions carefully and diligently.

This regulation will also provide an exception for losses that are caused by willful or intentional acts of the underwritten title company or its employees, and clarify that such losses may be indemnified by contract in excess of five thousand dollars ($5,000) per policy. This section is reasonably necessary to establish the limitations on underwritten title company liability upon which underwritten title companies may conduct business. This exception will follow California law and permit insurers to recover for intentional and willful acts of their underwritten title companies.

This regulation will in addition define the terms "loss" to include title losses and any other business of title insurance losses caused by the underwritten title company's

operations but shall not include escrow losses. This definition is reasonably necessary to establish the limitations on underwritten title company liability upon which underwritten title companies may conduct business. Further this definition will clarify that escrow losses are not included within the regulation liability limitation.

This regulation will in addition define the term "contract" to include “underwriting agreement." This definition is reasonably necessary to establish the limitations on underwritten title company liability upon which underwritten title companies may conduct business. By defining the word contract to include underwriting agreements, title insurers and underwritten title companies will not be permitted to use other contracts to shift additional liability in excess of the five thousand dollar ($5,000) limit.

As the regulation clarifies and makes specific the Underwritten Title Company statute and related statutes, this section is reasonably necessary to regulate the conduct of underwritten title companies and their title insurers.

UPDATE OF IDENTIFICATION OF STUDIES AND OTHER INFORMATION

No material other than public comments, the transcript of the public hearing and this final statement of reasons has been added to the rulemaking file since the rulemaking record was opened, and no additional material has been relied upon.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

Adoption of these regulations would not mandate the use of specific technologies or equipment.

MANDATE UPON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department has determined the proposed regulation will not impose a mandate upon local agencies or school districts.

ALTERNATIVES - ECONOMIC IMPACT ON SMALL BUSINESS

The Commissioner has determined that no reasonable alternative would be more effective, or as effective and less burdensome to affected persons, than the proposed regulation to carry out the purposes for which these regulations are proposed. One alternative proposed in the comments was to increase the five thousand dollar ($5,000) liability limit for inflation. This proposal was rejected for being less reasonably effective and more burdensome on the impacted underwritten title companies. The purpose of the rulemaking is to promote the regulation of the business of title insurance, to facilitate new market entry, to promote California small businesses, to provide for proper risk bearing amongst the licensed entities, to facilitate fair dealing, prevent fraud and promote fair claims practices for California consumers of title insurance and to promote the alignment of risk assumed with capital requirements amongst the licensed entities.

The proposal was rejected because the minimum net worth requirements set forth in Insurance Code section 12389 have not been increased for inflation and it would be less effective and more burdensome to increase the liability exposure for these entities without a corresponding increase in the minimum net worth solvency requirements. Another proposal inferred from the comments was to cap the liabilities based upon a percentage rather than a fixed dollar amount. This proposal was rejected because the minimum net worth requirements set forth in Insurance Code section 12389 are fixed dollar amounts. Another proposal in the comments was to consider another rulemaking to control the percentage of premium as divided between the title insurers and the underwritten title companies. This proposal was rejected also because it was found to be less effective and more burdensome. This proposed alternative rule, to address the premium division between the title insurer and the underwritten title company, would not be as effective because liabilities may exceed premium charges.
Another proposal inferred from the comments was to promulgate regulations addressing other sections of the Insurance Code, specifically permitting UTCs to be licensed on a statewide basis (UTCs are licensed by county pursuant to Insurance Code section 12389 (a) (2)), or modifying SB 133 (Insurance Code section 12404) which suggestions it was determined would require legislative enactments. Other suggestions were related to rate regulation, suggesting either the Department prohibit discounted rates as anticompetitive, reduce or eliminate costs for trustee sales, or preventing the raising of fees by title insurers when contracting with UTCs. The proposals were rejected as less effective alternatives, being impractical, potentially confiscatory or beyond the Commissioner's authority. One proposal was to require errors and omissions coverage for the UTC negligence on title searches. That proposal was determined to violate the monoline restrictions placed on title insurers. See Insurance Code section 12360. Escrow liabilities are specifically excluded from the proposed rule, however one suggestion was that closing protection letter liabilities be included in the proposed rule. That proposal was rejected as there are separate statutes that address title insurer responsibilities for escrow losses. By implication it was recommended that title insurers be required to contract with smaller UTCs, that banking relations between title insurers and large financial institutions be addressed. The Department has determined that the rulemaking as proposed will be more effective, convenient and reasonably necessary to for the solvency of the underwritten title companies. Also, the Commissioner has reason to believe that limiting the liability of underwritten title companies will serve to preserve and enhance the opportunities for small business formation and entry into the title market. Furthermore, as opposed to the two proposed alternatives, the rulemaking as proposed promulgates a longstanding regulatory rule, providing consistency and clarity to the affected businesses.

SUMMARY OF AND RESPONSE TO COMMENTS

Written Comments: Regarding Proposed Regulations: Regulation file: reg-2009-00019

Commentator: Linda Blood, Managing Director of **American Coast Title Company**

("ACT"): letter of 9/4/09 to Jill Alexis Jacobi.

1. Underwritten title companies ("UTCs") require an underwriting agreement with a title insurer to operate.

RESPONSE: The Department accepts this comment. The comment does not suggest a change to the proposed regulations.

2. UTCs and title insurers are not equals and underwriting agreement provisions may be disadvantageous to UTCs in several respects.

RESPONSE: The Department accepts this comment and has explained in its Summary of Existing Law and Policy Statement Overview ("Summary") why the superior economic position of title insurers and the unequal bargaining power between the two entities underlies the necessity for the rule and the continuing enforcement of the Department's long-standing position. The comment does not suggest a change to the proposed regulations.

3. Even with the $5,000 liability limit in its contracts, in several cases the underwriter has elected to settle "superfluous" claims for just under the $5,000 limit without allowing ACT to dispute the claim.

RESPONSE: The comment does not suggest a change to the proposed regulations. If such practices exist, that underwriters have elected to settle claims just under the $5,000 amount without allowing the UTC to dispute the claim, then not promulgating the proposed regulation would further impair the solvency of the UTC, and not promulgating the proposed regulation wouldn't require fair dealing by the UTC and the title insurer, see California Insurance Code ("CIC") § 12389 (d). Certainly, the impact of such a practice, and its potential to erode a UTC's solvency, would increase if the liability limit were not adopted, reduced or increased. Therefore it appears that this comment supports the proposed rulemaking. However, to the extent the comment implies that we not proceed with the proposed rulemaking, the Commissioner rejects the comment.

4. ACT wishes to address other issues regarding title insurer/underwriting relationship, the first of which concerns insurer's "arbitrary raising" of their percentage payment ("split") despite ACT's track record.

RESPONSE: The comment suggests an alternative to the proposed regulation, suggesting that an additional regulation be promulgated to address the premium percentage split between UTCs and title insurers. This comment does not directly address the proposed rule, however, it does reflect the impact of a highly concentrated title insurance marketplace and further attests to the competitive disadvantages borne by UTCs in their dealings with title insurers and, in

particular, their weak bargaining power in negotiating terms of underwriting agreements, agreements without which the UTCs are precluded from licensing. To the extent the comment impliedly suggests an alternative, that the premium split between title insurers and UTCs be addressed, the Department has not historically limited the percentage of premium split between the UTC and the title insurer, in the underwriting agreement, however it is relevant to title rate regulation. Title rate regulation is the subject of separate laws; see CIC sections 12401 *et seq.* To the extent the comment suggests the rulemaking limit the percentage of premium received by the title insurer, that doesn't appear to be a more effective or less burdensome alternative. The Department believes the alternative proposal would be less effective in preventing the insolvency of the UTCs, which are small business, than the regulation as proposed. The regulation as proposed addresses the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements, by title insurers, who are the risk bearing entities and should be paying the claims. As liabilities may exceed premium, the rule as proposed, which addresses liabilities, is more effective and less burdensome on the impacted UTC small businesses.

5. Commentator details following occurrences. ACT had underwriting agreements with two insurers, one of which was Lawyers Title. Following the recent "takeover" of Lawyers by Fidelity National Title, Fidelity increased the premium split from 10% to 13%. When ACT pointed out that they had had no claims and were current on their fees, [a representative of Fidelity] responded that this record had no bearing and that they were raising fees across the board due to claims and losses suffered nationwide. He further contended that ACT would not be harmed by the increase because Fidelity was increasing its fees for resale transactions. However, ACT does mostly refinance "because it's next to impossible to get resale business from realtors in the Southern California area due to all the 'special arrangements' realtors have with the larger companies." Commentator believes that, while the consumer will be charged higher rates, only the title insurer benefits.

RESPONSE: This comment does not directly address the intent or effect of the proposed rule, however it does reflect the impact of a highly concentrated title insurance market and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from operating under their UTC license. To the extent the comment impliedly suggests an alternative, that the premium split between title insurers and UTCs be addressed by regulation, the Department has not historically limited the percentage of premium split between the UTC and the title insurer in the underwriting agreement. Further, that alternative doesn't appear to be as protective of UTC solvency since liabilities may exceed one hundred percent of premium received. Further the premium split is subject to separate regulatory review as title insurance premium charges are subject to rate

regulation, which is governed by separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. To the extent the comment implies that we not proceed with the proposed rulemaking, the Commissioner rejects the comment.

6. As a consequence of the above actions, ACT had no choice but to terminate its contract with Lawyers because it was unable to afford the smaller fee. It is left with only one underwriter, which is not prudent.

RESPONSE: This comment does not directly address the intent or effect of the proposed rule, nor does it directly suggest a change to the proposed regulations. However, the comment does reflect the impact of a highly concentrated title insurance market and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from licensing. To the extent the comment impliedly suggests an alternative, that the premium fee between title insurers and UTCs be addressed, the Department has not historically limited the percentage of premium split between the UTC and the title insurer, in the underwriting agreement, however it is relevant to title rate regulation. Title rate regulation is the subject of separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. To the extent the comment suggests the rulemaking limit the percentage of premium received by the title insurer, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. That alternative doesn't appear to be as protective of UTC solvency since liabilities may exceed one hundred percent of premium received.

7. (Following termination of its agreement with Lawyers), ACT applied for a contract with Old Republic, but has been informed Old Republic was "not interested in taking on 'smaller' entities in California." ACT had previously been turned down by FACTO, which had indicated no interest in obtaining new agents regardless of loss history.

RESPONSE: The comment does not suggest a change to the proposed regulations. This comment does not directly address the intent or effect of the proposed rule. However, it does reflect the impact of a highly concentrated title insurance market and further attest to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from operating. To the extent the comment impliedly suggests an alternative, that title insurers be required to contract with smaller UTCs, the Department has not historically done so and that doesn't appear to be

a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. That alternative doesn't appear to be address the issue of UTC solvency.

8. Unlike admitted title insurers, who are entitled to insure within the entire state of California, UTCs must apply for each county individually, "a very long, labor intensive and extremely expensive endeavor," thus giving title insurers a clear advantage. In other states agents are approved for the entire state "which creates a more efficient and competitive marketplace."

RESPONSE: The Department accepts that UTCs must apply for licensing by county, whereas title insurers are issued a statewide Certificate of Authority. The comment does not suggest a change to the proposed regulations. This comment does not directly address the intent or effect of the proposed rule, however, it does reflect the impact of a highly concentrated title insurance market and further attest to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from licensing. To the extent the comment impliedly suggests an alternative, that that UTCs be provided with a statewide license, that proposal can not be addressed by regulation; it would require new legislation. A statewide UTC license might even the bargaining power to some extent between UTCs and title insurers, however it would not necessarily make capital requirements equivalent; UTCs would still be smaller than title insurers and would still need to operate pursuant to a title insurer contract, therefore it doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements.

9. Another area in which title insurers have a competitive advantage over UTCs is their control and use of "special" rate schedules that only they, and not the UTCs, can offer. For example, Fidelity National Title has an entity called "LSI" that offers a special refinance rate 50% less than any other posted rates for refinance; this can only be used by LSI. Commentator believes that these rates are "predatory" because of how the search is handled, stating that the title work is outsourced abroad where reports are computer generated and leave unresolved issues to be addressed by the loan agent or consumer. In some cases, additional escrow fees are charged on these LSI transactions to make up for the extra work.

RESPONSE: The comment does not directly address the intent or effect of the proposed rule. However, it does reflect the fact that the title insurance market is highly concentrated and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements

without which they are precluded from operating. To the extent the comment impliedly suggests an alternative, that the predatory pricing activities be addressed, title rate regulation is the subject of separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. To the extent the comment suggests the rulemaking limit predatory pricing, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. That alternative doesn't appear to be as protective of UTC solvency since liabilities may exceed one hundred percent of premium received. For these reasons the suggestion is not accepted.

10. An additional area in which a burden is shifted to UTCs involves Trustee's Sale Guarantees which are "being ordered by the thousands" for foreclosures. Commentator describes a process whereby prior liens presented to the title insurer must be extensively researched by the issuing UTCs—resulting in increased costs to the already compromised home owning consumer.

RESPONSE: The comment does not directly address the intent or effect of the proposed rule. However, it does reflect the impact of a highly concentrated title insurance market and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their bearing increased costs associated with Trustee Sale business. To the extent the comment impliedly suggests an alternative, that the higher costs associated with foreclosure title work be addressed, title rate regulation is the subject of separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. To the extent the comment suggests the rulemaking address foreclosure title work pricing, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. For these reasons the suggestion is not accepted.

11. Commentator questions whether small UTCs can compete, and continue in business, when insurers offer special rates that are cheaper than those they offer through the UTCs.

RESPONSE: The comment does not directly address the intent or effect of the proposed rule. However, it does reflect the impact of a highly concentrated title insurance market and further attest to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from operating. To the extent the comment impliedly suggests an alternative, that specially rated title products be addressed or

eliminated by this regulation, title rate regulation is the subject of separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. To the extent the comment suggests the rulemaking address special title pricing, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements.

12. Despite its objective, SB133 also works to the disadvantage of the small UTCs. While it precludes them from even minor commercial contact with lenders ("we can't even buy a cup of coffee for a client"), title insurers enjoy a favored relationship with such lenders in part because of the large reserve deposits they place with such lenders.

RESPONSE: The comment does not directly address the intent or effect of the proposed rule. SB 133 has been enacted into statute and isn't the subject of the proposed rulemaking. To the extent the comment impliedly suggests an alternative, that disadvantages to small UTCs from SB 133 be addressed, that does not appear to be a viable regulatory proposal. Problems with SB 133 as enacted into statute are not modifiable by regulation. To the extent the comment impliedly suggests another alternative, that large reserve deposits be addressed, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. For these reasons the suggestions are not accepted.

13. While SB133 precludes UTCs undertaking many marketing efforts, the large title insurers "continue to cut deals (untraceable), give cash kickbacks (untraceable), and many other illegal things (untraceable) they've always done."

RESPONSE: The comment does not directly address the intent or effect of the proposed rule. SB 133 has been enacted into statute and isn't the subject of the proposed rulemaking. To the extent the comment impliedly suggests an alternative, that disadvantages to small UTCs from SB 133 be addressed, that does not appear to be a viable regulatory proposal. Problems with SB 133 as enacted into statute are not modifiable by regulation. To the extent the comment impliedly suggests an alternative, that cut deals, kickbacks and other illegal things be addressed, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. For these reasons the suggestions are not accepted.

14. ACT is a privately held woman and minority-owned small business in business since 1988 and the source of financial support for many individuals and local businesses. Commentator understands that legislation such as SB133 and "the legislation [read regulation] you currently propose and the Underwritten Title Company Statute are designed to ensure a level playing field and continuance of the small independent title companies." Commentator states they put their faith in the Department to take necessary steps "to create an environment in which we can all equally compete."

RESPONSE: The Department concurs that it has been its longstanding policy and position to facilitate and encourage market entry and diversity and the continued viability of independent title entities within the target market, and that the proposed rule is in furtherance of this position. The comment is of a general, supportive nature and does not suggest a change to the proposed regulations.

Written Comments: Regarding Proposed Regulations: Regulation file: reg-2009-00019

Commentator: Placer Title Company, Patricia A. Laffin, General Counsel: letter of 9/30/09 to Jill Alexis Jacobi. Placer Title Company, an underwritten title company licensed in all 58 counties in California, makes these comments in support of the proposed regulations.

15. Proposed regulation will assist CDI in maintaining marketplace competition and financial solvency of underwritten title companies ("UTCs").

RESPONSE: The Department accepts this comment, which reflects one of the Department's stated rationale for the proposed regulations. The comment does not suggest a change to the proposed regulation. The comment acknowledges that the regulation as proposed is reasonably necessary.

16. If title insures are allowed, and the majority of them should choose, to place ultimate liability for losses on issuing agents, UTCs not owned by the insurers will be unable to remain viable in California.

RESPONSE: The Department accepts this comment and analysis. In proposing the rule, which continues the Department's long-standing position, the Department has emphasized its role in fostering and encouraging market participation and competition within the highly concentrated California title market. The comment does not suggest a change to the proposed regulation.

17. UTCs do not have the same financial resources as title insurers, both because of their relative size and because they are not subject to the policy liability or capitalization and liquidity requirements of title insurers

RESPONSE: The Department accepts and agrees with this comment. The proposed rulemaking addresses the distinct statutorily based license criteria for UTCs and title insurers, including the lower capital requirements for UTCs and the higher capital requirements for title insurers. We assert that the continued limitation of liability shifting is necessary and appropriate to achieve the solvency protection required by California Insurance Code ("CIC") § 12389. The comment is generally supportive of the proposed rulemaking and does not suggest a change to the proposed regulation.

18. UTCs' business plans and reserves are predicated on the different capital requirements for title insurers, which are risk bearing, and UTCs, which are not risk bearing.

RESPONSE: The Department accepts and agrees with this comment which is generally supportive of the proposed rulemaking and its reasonable necessity. The comment does not suggest a change to the proposed regulation.

19. Few California UTCs could absorb the title losses suffered by their authorized underwriters; and, despite its size, Placer would have been unable to do so during the past three years which saw a dramatic increase in claims as a result of conditions, including predatory lending, laxity in lender underwriting guidelines, mortgage fraud, and the real estate meltdown.

RESPONSE: The Department accepts this comment, which supports the necessity for adopting the proposed regulation. The comment does not suggest a change to the proposed regulation.

20. Contrary to the argument that UTCs can insure against such claims through Errors and Omissions policies, over the last few years E&O insurance has become increasingly scare and expensive, with few carriers willing to insure. Even where available, deductibles are much greater than in the past.

RESPONSE: The Department does not refute the commentator's characterization of errors and omissions coverage (E&O) availability and cost. Even if available, the Department does not believe that E&O insurance provides a viable alternative to the proposed regulation. E&O coverage is statutorily available to cover certain losses, notably escrow losses (see CIC section 12389.6 (a) (1)) but is not statutorily available to cover title losses; title losses may only be underwritten by a licensed title insurer (see CIC sections 104, 700 and 12360).

21. For larger UTCs, reliance on E&O coverage is even more difficult and expensive to obtain because of greater perceived risk due to business volume.

RESPONSE: The Department does not refute the commentator's characterization of errors and omissions coverage (E&O) availability and cost. Even if available, the Department does not believe that E&O insurance provides a viable alternative to the proposed regulation. E&O coverage is statutorily available to cover certain losses, notably escrow losses (see CIC section 12389.6 (a) (1)) but is not statutorily available to cover title losses; title losses may only be underwritten by a licensed title insurer (see CIC sections 104, 700 and 12360).

22. The problems of shrinking availability and increased cost for E&O coverage has arisen in the context of providing coverage for the existing limited exposure of UTCs, basically covering losses caused by the closing process. If UTCs must seek E&O coverage against title losses "which will have the practical effect of asking there E&O insurers to become title insurers without the benefit of premium split," it is possible that no carriers will be willing to underwrite such a risk. If only a few carriers are willing to do so, premiums will likely be economically unfeasible and deductibles even larger.

RESPONSE: The Department accepts that if title insurers required UTCs to have E&O coverage with full liability of losses, it would have the effect of requiring E&O to act as title insurers. The Department observes that such an outcome is impermissible as it violates a several key statutes. See, for example CIC § 12360 (title insurance is monoline) and CIC § 12359 (specifying minimum paid-in capital requirements to transact title). Therefore, even if available, the Department does not believe that E&O insurance provides a viable alternative to the proposed regulation.

23. Doing business without E&O insurance is not a viable option, both because UTCs' "risk tolerances" are not sufficient to be "self-insured," and because the majority of lenders require, as a condition of allowing a UTC to act as a closing agent or to accept funds, that the UTC possess E&O coverage. If UTCs are unable to obtain such coverage, due to lack of availability or cost, UTCs will be forced out of business.

RESPONSE: Even if available, the Department does not believe that E&O insurance provides a viable alternative to the proposed regulation. The Department rejects with the comment to the extent it argues that E&O coverage is the sole mechanism relied upon to assure lenders and others of the reliability of a UTC's escrow services. Rather, CIC § 12389.6 expressly requires that, prior to performing certain escrow functions, the underwriting agreement between the title insurer and the UTC must contain one of four procedures "reasonably calculated to prevent the misappropriation, disappearance, or wrongful use of funds deposited in the underwritten title company's escrow or sub escrow." The proposed regulation specifically excludes escrow losses, which CIC § 12389.6 E&O coverage addresses.

Written Comments: Regarding Proposed Regulations: Regulation file: reg-2009-00019

Commentator: Roger McNitt, Esq. for **American Home Ownership Protection Coalition** letter of 10/2/09 to Jill Alexis Jacobi

24. Comment: The $5,000 limitation should be increased to adjust for inflation because the $5,000 limitation on risk shifting by contract was adopted by the Department over twenty years ago when policy and home values in California were substantially less.

RESPONSE: The comment implicitly recognizes the authority of the Insurance Commissioner to promulgate the proposed rule, but also proposes an alternative to said rule, which is to increase the $5,000 limitation to track inflation. Insurance Code Section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of the business of underwritten title companies, to carry out the purposes of Section 12389 including the maintenance of company solvency. The minimum net worth requirement for underwritten title companies (statutorily provided for in Insurance Code Section 12389) has not been adjusted for inflation. The important factors for maintaining the solvency of underwritten title companies are not policy or home values, but maintaining the net worth and capitalization of the companies. Net worth as defined in Insurance Code Section 12389 is the excess of assets over all liabilities and required reserves. The dollar amounts of required minimum net worth set forth in Insurance Code Section have not been changed by the legislature. If the UTCs were to take on additional risk the dollar amounts of the required minimum net worth would need to be increased by the legislature. After careful consideration, the Insurance Commissioner has determined that the proposed alternative would not be more effective in carrying out the purpose for which proposed rule was promulgated, nor would it be as effective and less burdensome to the UTCs than the proposed rule.

25. Comment: The original purpose of the $5,000 limitation was an attempt by the CDI to protect underwritten title companies which at that time, assumed nearly all of the risk and received substantially less than 90% of the premium, and were actually acting like title insurers.

RESPONSE: The proposed regulation promulgates a long-standing regulatory rule regarding the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. There are multiple purposes for the long-standing rule that is the subject of the proposed rulemaking. The primary purpose of the long-standing rule and the proposed regulation is to protect the solvency of the underwritten title company; to prevent the underwritten title company from taking too much of the underwriter's liability

and threatening the underwritten title company's viability. The Commissioner accepts the comment that one of the purposes of the rule was to prevent UTCs from acting like title insurers.

26. Comment: According to Title Insurance Company of Minnesota v State Board of Equalization (1992) 4 Cal. 4th 715, 726, the purpose of the contractual obligation of the underwritten title company (UTC) in the underwriting agreement was to encourage the UTC to perform the search and examination carefully, diligently, and non-negligently. In reality the UTCs' contractual liabilities have increased as well as their percentage of the title insurance premium.

RESPONSE: The Insurance Commissioner is in agreement with the first factual statement. However, the Commentator has not provided a factual basis for the second statement. The proposed regulation promulgates a long-standing regulatory rule regarding the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. There are multiple purposes for the long-standing rule that is the subject of the proposed rulemaking. The primary purpose of the long-standing rule and the proposed regulation is to protect the solvency of the underwritten title company; to prevent the underwritten title company from taking too much of the underwriter's liability and threatening the underwritten title company's viability. The Commissioner accepts the comment that one of the purposes of the rule was to encourage UTCs to perform their work diligently. The proposed regulation is currently being complied with in practice by a majority of both title insurers and underwritten title companies. The title insurance premium split is regulated by the CDI only in the context of rate regulation, which is the subject of separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. The premium split is the subject of contractual negotiations between the title insurer and underwritten title company. That alternative doesn't appear to be as protective of UTC solvency since liabilities may exceed one hundred percent of premium received. For these reasons the suggested changes to the proposed rule are rejected.

27. Comment: The $5,000 limitation originated when errors and omissions insurance was not available for UTCs and the limitation was intended to limit the UTCs' contractual liability but it (the limitation) did not extend to actual errors and omissions or willful or intentional acts, which is consistent with rights a life or property/casualty insurer would have against its agent.

RESPONSE: The Commentator has not provided sufficient information as to whether errors and omissions insurance was available for underwritten title companies at the time the long-standing rule was initially adopted. The

Commentator suggests no change to the proposed regulations treatment of willful/intentional acts. The proposed regulation expressly excepts willful and intentional acts. The proposed rule is limited to the underwritten title company's liability for its negligent conduct. Errors & Omissions coverage protects a different risk than the title insurance risk. CIC § 12389.6 expressly requires that, prior to performing certain escrow functions, the underwriting agreement between the title insurer and the UTC must contain one of four procedures "reasonably calculated to prevent the misappropriation, disappearance, or wrongful use of funds deposited in the underwritten title company's escrow or sub escrow." The proposed regulation specifically excludes escrow losses, which CIC § 12389.6 E&O coverage addresses. The Department observes that such an outcome is impermissible as it violates a several key statutes. See, for example CIC § 12360 (title insurance is monoline) and CIC § 12359 (specifying minimum paid-in capital requirements to transact title). Therefore, even if available, the Department does not believe that E&O insurance provides a viable alternative to the proposed regulation.

28. Comment: The State's ability to limit damages for negligence is constitutionally limited as was clear from the medical malpractice crisis of the 1970s.

RESPONSE: Insurance Code Section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of UTC solvency. The subject of the proposed regulation is not medical malpractice damages. The proposed regulation neither directly affects the rights of consumers as to damages, nor does it address third party tort liability for damages. The regulatory rulemaking procedure provides sufficient notice, hearing, and an opportunity for public review and comment. The liability responsibility between the licensed entities, title insurer and UTC, has been the subject of the longstanding rule which is now proposed as a formal regulation. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance.

29. Comment: Even if it were legally possible to do by regulation without specific legislation what the CDI is attempting to do (by enacting the $5,000 limitation) which is to reduce the tort liability of UTCs, it would require much deeper due process, contractual rights, and equal protection analyses than is set forth in the proposed regulation.

RESPONSE: Insurance Code Section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. The proposed regulation

does not address third party tort liability for damages. The proposed regulation promulgates a long-standing regulatory rule that has not been legally challenged, since it was put into practice at least since 1986. The regulatory rulemaking procedure provides sufficient notice, hearing, and an opportunity for public review and comment. The liability responsibility between the licensed entities, title insurer and UTC, has been the subject of the longstanding rule which is now proposed as a formal regulation. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance.

30. Comment: In Fein v Permanente Medical Group (1985) 38 Cal.3d 137, the California Supreme Court approved medical malpractice reforms which limited providers' non-economic tort liability by a slim 4-3 margin, only after the Legislature had adopted a specific statute setting forth all of the public policy reasons for limiting the liability; the proposed regulation which attempts to exculpate UTCs from their negligence for economic damages lacks specific and appropriate statutory authority.

RESPONSE: The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies and is not inconsistent with statute. The proposed regulation is a longstanding rule of the Department; one of its purposes is to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The regulatory rulemaking procedure provides sufficient notice, hearing, and an opportunity for public review and comment. The liability responsibility between the licensed entities, title insurer and UTC, has been the subject of the longstanding rule which is now proposed as a formal regulation. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance.

31. Comment: An increase in the $5,000 limitation would be consistent with CDI's reinsurance regulations relating to property casualty insurance. Title 10, CCR Section 2303.15(b) provides that "except for cessions to affiliates, the failure of a domestic insurer or volume insurer to retain at least 10% of direct premium written per line of business may be grounds for finding that the insurer's reinsurance agreements are materially deficient…"; the same economic concepts which apply to "fronting" (as addressed in the reinsurance regulations) arguably should apply to UTCs.

RESPONSE: The reinsurance regulation cited by the Commentator applies to insurers, not underwritten title companies, and its subject matter is not

addressed by the proposed regulation. Moreover, the concept of "fronting" applies to unlicensed entities; both the title insurer and the underwritten title company, which is required by statute to be a domestic entity, are licensed entities so there is no fronting issue to be addressed. To the extent the comment implies an alternative, that the UTCs retain a percentage of the liability rather than a fixed dollar amount, that percentage would not match the net worth requirements set forth in Insurance Code section 12389. Insurance Code Section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of the business of underwritten title companies, to carry out the purposes of Section 12389 including the maintenance of company solvency. The minimum net worth requirement for underwritten title companies (statutorily provided for in Insurance Code Section 12389) are fixed dollar amounts, not percentages of premium. Net worth as defined in Insurance Code Section 12389 is the excess of assets over all liabilities and required reserves. The dollar amounts of required minimum net worth set forth in Insurance Code Section have not been changed by the legislature. If the UTCs were to take on additional risk the dollar amounts of the required minimum net worth would need to be increased by the legislature. After careful consideration, the Insurance Commissioner has determined that the proposed alternative would not be more effective in carrying out the purpose for which proposed rule was promulgated, nor would it be as effective and less burdensome to the UTCs than the proposed rule.

32. Comment: The proposed regulation will inadvertently discriminate against small businesses. Limitation of recovery to $5,000 at a 90-10 split, might leave the large title insurers with insufficient premiums to cover their policy losses and other costs relating to the UTC; which will result in a smaller percentage of the title insurance premium going to the UTC, yet the UTC will still have to bear all of the underwriting costs or title insurers will be economically forced to attempt to place more business directly at the expense of the UTC.

RESPONSE: The proposed regulation is narrowly tailored in scope and does not address, or in anyway limit the premium split between the title insurer and the underwritten title company. The proposed regulation is a long-standing rule that support small business, namely the underwritten title company. The Commentator has not substantiated any basis for concern that the title insurer will receive insufficient premiums to cover policy losses and other costs relating to the underwritten title company. The Commentator fails to note that historically, market forces, which cannot be addressed by regulation, have a significant impact on the business of title insurance. To the extent the comment implies an alternative, that the regulation address the premium split between UTCs and title insurers, rather than a fixed dollar amount for liabilities, that premium split would not match the net worth requirements set forth in Insurance Code section 12389. Insurance Code Section 12389 provides authority to the

Insurance Commissioner to make reasonable rules and regulations governing the conduct of the business of underwritten title companies, to carry out the purposes of Section 12389 including the maintenance of company solvency. The minimum net worth requirement for underwritten title companies (statutorily provided for in Insurance Code Section 12389) are fixed dollar amounts, not percentages of premium. Net worth as defined in Insurance Code Section 12389 is the excess of assets over all liabilities and required reserves. The dollar amounts of required minimum net worth set forth in Insurance Code Section have not been changed by the legislature. If the UTCs were to receive additional premium and risk of loss, the dollar amounts of the required minimum net worth would need to be increased by the legislature. Further placing more claims payment burden on the UTCs, which are not licensed as risk bearing entities, wouldn't foster fair dealing. After careful consideration, the Insurance Commissioner has determined that the proposed alternative would not be more effective in carrying out the purpose for which proposed rule was promulgated, nor would it be as effective and less burdensome to the UTCs than the proposed rule.

Written Comments: Regarding Proposed Regulations: Regulation file: reg-2009-00019

Commentator: Patrick Shannon, Counsel for Stewart Title, Tim Kemp, Counsel for First American, Tommye Frost, Counsel for Fidelity National (Stewart Title Guaranty, The First American Corporation, Fidelity National Title Group, Inc. and their title insurance company subsidiaries): letter or 10/5/09 to Jill Alexis Jacobi

33. No statutory authority is delegated to the CDI to shift liability from UTCs to title insurers.

RESPONSE: Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921

authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

34. Insurance Code sections 720, 12389 and 12921 provide no authority for a liability limitation regulation.

RESPONSE: Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

35. Insurance Code section 720 empowers the Insurance Commissioner to adopt reasonable rules and regulations to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority but does not bear on issuance, suspension or revocation of UTC licenses nor a limitation on liability of a UTC.

RESPONSE: Insurance Code section 12389 also provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined

basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. The proposed regulation addresses both title insurers and underwritten title companies. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 700 (c) incorporates Insurance Code section 717 (e) and (j) specifically address financial stability, capital and surplus and financial hazard as a continuing certificate of authority requirements. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

36. Insurance Code section 720 empowers the Insurance Commissioner to adopt reasonable rules and regulations to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority but does not empower a shifting of liability to title insurers.

RESPONSE: We agree that Insurance Code section 720 provides such authority. Insurance Code section 12389 also provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. The proposed regulation addresses both title insurers and underwritten title companies. Insurance Code section 12389 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 700 (c) incorporates Insurance Code section 717 (e) and (j) specifically address financial stability, capital and surplus and financial hazard as a continuing certificate of authority requirements. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation promulgates a long standing regulatory rule governing

the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

37. Insurance Code section 12389 sets forth financial threshold conditions for a UTC's license (minimum net worth, current assets and the extension of a license to additional counties) but does not expressly address UTC liability limitations.

RESPONSE: Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 12389, 12389.1 and 12389.2 provide certain continuing basic license requirements for underwritten title companies, including net worth and working capital requirements. Liability is an integral part of the financial condition of an underwritten title company and the title insurer. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

38. As the legislature didn't expressly authorize a $5,000 liability limitation in Insurance Code section 12389, no such liability limitation was intended.

RESPONSE: Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 12389, 12389.1 and 12389.2 provide certain continuing basic license requirements for underwritten title companies, including net worth and working capital requirements. Liability is an integral part of the financial condition of an underwritten title company and the title insurer. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

39. Insurance Code section 12389 provisions that the CDI may "make reasonable rules and regulations to govern the conduct of the business of companies subject to this section" to carry out the purpose of "protecting the solvency of the companies [UTCs]" are not authority for the proposed regulation.

RESPONSE: Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 12389, 12389.1 and 12389.2 provide certain continuing basic license requirements for underwritten title companies, including net worth and working capital requirements. Liability is an integral part of the financial condition of an underwritten title company and the title insurer. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

40. Insurance Code section 12389 provisions that the CDI may "make reasonable rules and regulations to govern the conduct of the business of companies subject to this section" to carry out the purpose of "protecting the solvency of the companies [UTCs]" is "standard language" to implement the enumerated provisions and not a delegation of quasi-legislative authority empowering the CDI to create new requirements.

RESPONSE: The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code

section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 12389, 12389.1 and 12389.2 provide certain continuing basic license requirements for underwritten title companies, including net worth and working capital requirements. Liability is an integral part of the financial condition of an underwritten title company and the title insurer. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

41. To be a delegation of quasi-legislative authority, Insurance Code section 12389 would need to provide an express delegation and it does not.

RESPONSE: The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and

regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 12389, 12389.1 and 12389.2 provide certain continuing basic license requirements for underwritten title companies, including net worth and working capital requirements. Liability is an integral part of the financial condition of an underwritten title company and the title insurer. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

42. Insurance Code section 12921 pertains to the Commissioner's duty to perform his statutory duties and to execute the Insurance laws is irrelevant and does not authorize the proposed regulation.

RESPONSE: Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 also provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

43. *CalFarm Ins Co. Deukmejian* 48 Cal.3d 805 (1989) holding that the Commissioner has power as *may be fairly implied* pertains to interim insurance rates, not the shifting of liability from UTCs to title insurers, therefore it does not provide authority for the proposed regulation.

RESPONSE: The California Supreme Court decision in *CalFarm Ins Co. Deukmejian* 48 Cal.3d 805 (1989) is not so limited. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

44. *CalFarm Ins Co. Deukmejian* 48 Cal.3d 805 (1989) holding that the Commissioner has power as *may be fairly implied* does not provide authority for the proposed regulation since there is no express reference in the title regulatory scheme to shifting of liability from UTCs to title insurers, it may not be fairly implied.

RESPONSE: The California Supreme Court decision in *CalFarm Ins Co. Deukmejian* 48 Cal.3d 805 (1989) provides authority for regulations that may be fairly implied. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a

court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 also provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

45. As *20th Century Ins. Co. v. Garamendi* 8 Cal4th 216 (1994) involved the court recognizing a delegation from the legislature of quasi-legislative authority to create rules that fix rates, it does not provide authority for the proposed regulations governing UTC liability.

RESPONSE: The California Supreme Court decision in *20th Century Ins. Co. v. Garamendi* 8 Cal4th 216 (1994) is not so limited. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital

requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

46. In *McHugh v. Santa Monica Rent Board* 49 Cal.3d 348 (1989) the court reminds that agency authority is "circumscribed" and "extends only so far as necessary" to accomplish the primary purpose; here the CDI primary purpose is not to set and regulate liability limits.

RESPONSE: The California Supreme Court decision in *McHugh v. Santa Monica Rent Board* 49 Cal.3d 348 (1989) is not limited to rate setting and regulation. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. That said, the Insurance Commissioner also believes the proposed rulemaking as proposed is reasonably necessary and that the rulemaking record in its entirety supports its necessity. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

47. In *McHugh v. Santa Monica Rent Board* 49 Cal.3d 348 (1989) the court reminds that agency authority is "circumscribed" and "extends only so far as necessary" to accomplish the primary purpose; if the CDI primary purpose is to protect the solvency of the UTCs, there is no showing of necessity for the proposed regulation.

RESPONSE: The California Supreme Court decision in *McHugh v. Santa Monica Rent Board* 49 Cal.3d 348 (1989) is not limited to rate setting and regulation, however Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. That said, the Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

48. *George v. Department of Alcoholic Beverage Control* 149 Cal.App.2d 702 (1957) upheld a State Board of Equalization licensee rule requiring the surrender of a license if premises are abandoned for two weeks, based on deference to an agency's interpretation of its own rule; it provides no authority on the issue of validity of the rule itself, thus it provides no authority for the proposed regulation here.

RESPONSE: The California Supreme Court decision in *George v. Department of Alcoholic Beverage Control* 149 Cal.App.2d 702 (1957) is not limited to the regulation of licensees of the Alcoholic Beverage Control agency, but does

address the deference provided to agency rulemaking. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. That said, the Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

49. *George v. Department of Alcoholic Beverage Control* 149 Cal.App.2d 702 (1957) argues for the invalidity of the proposed regulation as rules may not be "inconsistent".

RESPONSE: The California Supreme Court decision in *George v. Department of Alcoholic Beverage Control* 149 Cal.App.2d 702 (1957) is not limited to the regulation of licensees of the Alcoholic Beverage Control agency, but does address the deference provided to agency rulemaking. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements, which the Insurance Commissioner has a duty to enforce. Insurance Code sections 717,

12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus, which the Insurance Commissioner has a duty to enforce. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies and is not inconsistent with statute. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

50. A review of the history surrounding the CDI adoption of its rule limiting UTC liability to $5,000 was to limit the shifting of liability from the title insurer to the UTC, not the other way around.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and that one of its purposes was to limit the shifting of liability from the title insurer back to the UTC. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

51. Until recently, the CDI enforced its own rule to limit UTC liability to $5,000 for all purposes and refused to allow title insurers and UTCs to contract otherwise.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and that the Commissioner implemented the rule. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

52. The CDI gave its informal rule the force and effect of a regulation. The CDI required underwriting agreements to cap UTC liability at $5,000 for all events. The CDI plan of operation guidelines reflected this requirement as well.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and that the Commissioner implemented the rule. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

53. In 1986 SafeCo disputed the CDI rule; Stewart is not aware of any CDI RESPONSE to this 1986 objection.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

54. Purpose of $5,000 liability limit rule was not to allow UTC to escape liability for its own negligence or escrow defects, rather it was intended to allow UTC to assume liability for the ordinary risk of loss of an underwriter.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and assert that one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

55. Purpose of $5,000 liability limit rule was to overcome the prohibition against an entity not licensed as an insurer assuming title insurance risk.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and assert that one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

56. Purpose of $5,000 liability limit rule was to expedite small claims payments to consumers.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and assert that one of its purposes may have been to expedite small claims payments to consumers. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

57. Purpose of $5,000 liability limit rule was to prohibit the practice of some underwriters who were shifting large liability amounts ($200,000 to $300,000) to the UTC.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and accept that one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

58. Purpose of $5,000 liability limit rule was to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and accept that one of its purposes was to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

59. Purpose of $5,000 liability limit rule was not to reverse the UTC liability for negligence; the agent (UTC) is liable for its own negligence with respect to the performance if its title and escrow work.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and accept that the UTC is the agent for purposes of liability in the business arrangement (the title insurer is the principal. We reject that one of its purposes was not to reverse the liability of the UTC for negligence and that the UTC should be liable under the rule to the insurer for the UTC's own negligence in regards to title work. The proposed regulation specifically excludes escrow. The proposed regulation deals with indemnification of the principal by the agent for performance of title work, which is the risk the title insurer is insuring. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

60. Shifting of liability is permissible by contract between the UTC and the title insurer.

RESPONSE: We accept that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We reject to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

61. Shifting of liability can be set by statute, however California statutes do not provide for the shifting of liability for negligence of the UTC.

RESPONSE: We accept that shifting of liability can be set by statute, but reject to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and

section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

62. Other states' statutes (Texas, New Mexico) prescribe the liability of a title agent for negligence.

RESPONSE: We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we reject the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also accept that shifting of liability can be set by statute, but reject to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

63. The agent (UTC) is liable for its own gross negligence; Any effort to shift liability for gross negligence is void as against public policy.

RESPONSE: We reject the comment to the extent it implies we should not go forward with the rulemaking as proposed. The commentator acknowledges that the relationship between the title insurer and the UTC is principal and agency. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent

(UTC) by contract. Public policy as established by the legislation supports this. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

64. The agent (UTC) is liable for defects or errors in escrow performance; if the UTC does not represent the underwriter for escrow purposes, then there is no possible liability exposure to the title insurer.

RESPONSE: The proposed regulation specifically excludes escrow. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

65. On September 17, 2008 the CDI agreed that the title insurer is not liable for the errors of the UTC in performance of abstracting and escrow services, that there is no underlying liability and that there is no principal agency relationship unless specified by contract.

RESPONSE: Although we accept with the comment to the extent it addresses escrow liability, we note that escrow liability is excluded from the proposed

rulemaking and therefore the comment is irrelevant and we reject the comment in regards to abstracting, which is title work that is the risk insured by the title insurer. As reflected on the CDI website, there was no agreement governing abstracting. Abstracting relates to the title risk. See Insurance Code section 12389.5. The proposed regulation clearly excludes escrow, but not abstracting. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

66. The proposed regulation impermissibly alters or broadens the statutory scheme since there is no specific statute on limitation of UTC liability for performance of UTC services that the regulation may implement, interpret or make specific.

RESPONSE: We reject the comment that the proposed regulation impermissibly alters or broadens the statutory scheme since there is no specific statute on limitation of UTC liability for performance of UTC services and further we disagree that the California legislature did not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulations that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We accept that shifting of liability can be set by statute, but disagree to the extent the commentator asserts that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

67. The regulation is not necessary.

RESPONSE: We disagree with this comment. The Commissioner has determined that the proposed regulation is reasonably necessary. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient

and reasonably necessary to govern the business of title insurance as supported by the rulemaking file in its entirety. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

68. The regulation purpose as proffered, - to protect UTC solvency - has not been shown that UTC solvency has ever been protected by the rule which has been in place for at least …[comments ends abruptly]

RESPONSE: We accept that the proposed regulation is a longstanding rule to protect UTC solvency, however we reject the rest of this comment. The Commissioner has determined that the proposed regulation is reasonably necessary. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

69. Title insurers would be confronted with unknown and unlimited liability for actions of an independent party over which they have no direct control.

RESPONSE: We reject this comment. As the commentator has stated in other comments, the UTC is an agent of the title insurer and the title insurer exerts control over the operations of the UTC through contracts and other business practices. Insurers are in the business of assessing risk and addressing liability. In the case of title insurance, the negligence of the UTC is the risk that is insured by the title insurer. See Insurance Code section 12340.1. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

70. The proposed regulation is inconsistent with the statutory scheme in that the CDI is treating escrow liability and title liability differently; the CDI has already conceded it has no authority to relieve UTCs of escrow liability.

RESPONSE: We reject this comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for title losses as contracted for between title insurers and underwritten title companies and is not inconsistent with statutes and authority of the CDI in relation to escrow. The CDI has not "conceded it has no authority to

relieve UTC of escrow liability." California statutes that address escrow liability, see for example Insurance Code sections 12376 which addresses title insurer responsibility for escrow shortages in the event of a bankruptcy, receivership or conservation of a UTC and Insurance Code section 12389.6, which provides for provisions to be included in the underwriting agreement between title insurers and UTCs to reasonably limit escrow losses, are different but not inconsistent with the statutes that are the authority for the proposed rulemaking. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

71. The proposed regulation is inconsistent with the statutory scheme in that the CDI is treating escrow liability and title liability differently; the CDI rationale for the proposed rule (solvency) clearly doesn't apply to escrow services.

RESPONSE: We accept that the primary rationale for the proposed regulation is UTC solvency; however we disagree with rest of this comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for title losses as contracted for between title insurers and underwritten title companies and is not inconsistent with statutes and authority of the CDI in relation to escrow. The proposed regulation is not inconsistent with California statutes that address escrow liability. California statutes that address escrow liability, see for example Insurance Code sections 12376 which addresses title insurer responsibility for escrow shortages in the event of a bankruptcy, receivership or conservation of a UTC and Insurance Code section 12389.6, which provides for provisions to be included in the underwriting agreement between title insurers and UTCs to reasonably limit escrow losses, are different but not inconsistent with the statutes that are the authority for the proposed rulemaking. These escrow related statutory provisions are not impacted by the proposed regulation because the proposed regulation specifically excludes escrow. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

72. The CDI provides no evidence of a legislative finding that liability for title services uniquely threatens solvency.

RESPONSE: We reject this comment. We do believe a legislative finding is implicit in the rulemaking authority for the proposed rulemaking. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

73. Absolving UTCs of liability for negligent title services is bad public policy; it undermines the responsibility of UTCs.

RESPONSE: We reject this comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for title losses as contracted for between title insurers and underwritten title companies. The public policy for the proposed regulation is to encourage responsibility and to reduce losses, not to increase them. The commentator in other comments acknowledges that other states have similar rules in their statutes. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

74. If a UTC is not responsible for its own negligence, it will be less diligent and transactions or even the industry will be put at risk.

RESPONSE: We reject this comment. We are not aware of any historical evidence to support this comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for title losses as contracted for between title insurers and underwritten title companies. The public policy for the proposed regulation is to reduce losses, not to encourage them. The commentator in other comments acknowledges that other states have similar rules in their statutes. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

75. Costs to consumers will rise to pay for additional title defects.

RESPONSE: We reject this comment. We are not aware of any historical evidence to support this comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for title losses as contracted for between title insurers and underwritten title companies. The commentator in other comments acknowledges that other states have similar rules in their statutes. The public policy for the proposed regulation is to reduce costs, not to increase them. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

76. Title insurers will forgo the use of independent UTCs to avoid unknown liability, which will hurt not help the solvency of the UTCs.

RESPONSE: We reject this comment. We are not aware of any historical evidence to support this comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for title losses as contracted for between title insurers and underwritten title companies. The commentator in other comments acknowledges that other states have similar rules in their statutes. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not

going forward with the rulemaking.

SafeCo memorandum dated July 9, 1986 (incorporated by reference)

77. CDI has taken the position that underwriting contracts must limit the liability of the UTC to the title insurer to a maximum of $5,000.

RESPONSE: We accept with this comment that at least since 1986 the CDI has taken the position that underwriting contracts must limit the liability of the UTC to the title insurer to a maximum of $5,000 per title policy. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

78. CDI position appears to be any contract of indemnity is insurance; logically then there should be no liability at all (to the UTC) as the UTC is not authorized to act as an insurer; citation Insurance Code section 22.

RESPONSE: We accept that the proposed regulation is a longstanding rule of the Department and assert that one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

79. There are many kinds of indemnity agreements and clauses that are not regulated as insurance.

RESPONSE: We accept that not all contracts of indemnity are insurance as defined in Insurance Code section 22, and that there must be a contingent or unknown event. Title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary

to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

80. CDI would call all indemnity agreements insurance, yet with respect to a UTC would dispense with most of the laws regulating insurers and impose a $5,000 liability limit.

RESPONSE: We reject the comment. Not all contracts of indemnity are insurance as defined in Insurance Code section 22, and that there must be a contingent or unknown event. Title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

81. There is a distinction between insurance and indemnity agreements; insurance is a particular type of indemnity that us subject to special rules and laws.

RESPONSE: We accept that not all contracts of indemnity are insurance as defined in Insurance Code section 22, and that there must be a contingent or

unknown event. Title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

82. Insurance is defined in Insurance Code section 22, an indemnity of another arising from a contingent or unknown event; Indemnity is defined in Civil Code section 2772 and is covered by Civil Code sections 2772 through 2784.5.

RESPONSE: We accept that not all contracts of indemnity are insurance as defined in Insurance Code section 22, and that there must be a contingent or unknown event. Title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

83. Under *Transportation Guarantee Co. v. Jellins* (1946) 29 Cal.2d 242, whether a particular contract of indemnity is insurance depends on the nature of the contract as a whole, not a particular clause or group of clauses. Nearly every business venture entails some assumption of risk.

RESPONSE: We don't reject the comment and recognize that not all contracts of indemnity are insurance as defined in Insurance Code section 22. Title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its

purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

84. The element of assumption of risk is not controlling (on the question whether an indemnity contract is or is not insurance); the question turns on whether assumption of risk is the principal object or purpose of the contract.

RESPONSE: We don't reject the comment and recognize that not all contracts of indemnity are insurance as defined in Insurance Code section 22. Title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

85. It is not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk.

RESPONSE: We don't reject the comment and recognize that not all arrangements for assumption or distribution of risk are insurance as defined in Insurance Code section 22. Title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and

reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

86. *California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 172 P.2d 4 holds that a group medical service plan is not insurance; looking at the plan as a whole, service rather than indemnity is its principal object.

RESPONSE: We don't reject the comment regarding group medical service plans, however title insurance is by statute the business of insurance subject to regulation by the Department of Insurance, see Insurance Code sections 104, 12340.1, and 12340.3 *et seq*. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

87. *Board of Insurance Commissioners v. Kansas City Title Ins. Co.* (Tex. App. 1949) 217 S.W.2d 695 held an underwriting agreement where a title agent agreed to indemnify a title insurer for all losses on policies up to $500 and one half of losses up to $10,000 was not a reinsurance arrangement [whereby the title agent would need to be licensed as a title insurer] as the indemnification is incidental to the title agent's main purpose of selling title abstracts.

RESPONSE: We don't reject the comment. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

88. *Board of Insurance Commissioners v. Kansas City Title Ins. Co.* (Tex. App. 1949) 217 S.W.2d 695 court found contract between title insurer and title agent is one of agency, and the fact that it provides for reimbursement to title insurer for indemnity for agent's failure is legal consideration therefore.

RESPONSE: We accept with the comment that the arrangement between the title insurer and the UTC is one of agency. Further, we don't disagree that title insurers and UTCs may lawfully contract to provide for reimbursement of the title insurer by the UTC as set forth in the proposed regulation. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

89. When a contract is subject to two constructions, the one that makes it legal will be adopted.

RESPONSE: We don't reject the comment, however rules for contractual construction do not support changes to the proposed rulemaking. The proposed regulation is a longstanding rule of the Department and one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

90. Admission (a certificate of authority) is required for transaction of insurance, citing California Insurance Code section 700; there is nothing specific regarding underwriting contracts in Insurance Code section 699 through 735. Insurance Code 717 comprehensively treats the qualification for admission of an insurance company. There is nothing in section 717 which implies that the Commissioner may properly consider the adequacy of benefits flowing to an [title] agent in an underwriting agreement.

RESPONSE: Except for the need for a certificate of authority, license to transact

insurance, we reject this comment and assert there is implied authority for the proposed rulemaking. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

91. Insurance Code section 720 provides that the Commissioner may after notice and hearing promulgate such reasonable rules and regulations as are "necessary and convenient" to carry out the provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority and that any such rule shall be promulgated in accordance with the Government Code section 11371 *et seq.*

RESPONSE: We accept with this comment. The proposed rulemaking is in part authorized by Insurance Code section 720.

92. In *Blood Service Plan Ins. Co. v. Roddis* (1968) 259 Cal.App.2d 807, 66 Cal.Rptr. 649, reversed Insurance Commissioner's denial of a certificate of authority on the grounds that consideration of hazard to public for disruption of blood supply was beyond the scope of the Commissioner's statutory authority.

RESPONSE: We accept with this comment. In 1968, the second district court of appeal *Blood Service Plan Ins. Co. v. Roddis* , *supra*, also held that the term "hazardous" referred to financial condition, which is the subject of the proposed rulemaking. In that case the court of appeal rejected the Insurance Commissioner acting upon general public concerns for a consistent blood supply, not on the Insurance Commissioner regulation of the financial condition of licensed companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations.

Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

93. Insurance Commissioner is a creature of statute with only powers delineated therein. *Blood Service Plan Ins. Co. v. Roddis* (1968) 259 Cal.App.2d 807, 66 Cal.Rptr. 649.

RESPONSE: We reject this comment. In 1968, the second district court of appeal *Blood Service Plan Ins. Co. v. Roddis* , *supra*, rejected the Insurance Commissioner acting upon general public concerns for a consistent blood supply, not on the Insurance Commissioner regulation of the financial condition of licensed companies. The court of appeal also held that the term "hazardous" referred to financial condition, which is the subject of this proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in

capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

94. The Insurance Code sets forth what is considered by the commissioner in reviewing an application for admission.

RESPONSE: We accept that the Insurance Code sets forth the general criteria for admission of insurers, however we reject this comment to the extent it implies that such criteria is comprehensively treated and to the extent the comment implies that the Insurance Commissioner is not authorized to promulgate the proposed regulation. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

95. The qualifications of an insurance company are "now" comprehensively treated and set out in section 717, which was added to the Insurance Code in 1965. *Blood Service Plan Ins. Co. v. Roddis* (1968) 259 Cal.App.2d 807, 66 Cal.Rptr. 649.

RESPONSE: We accept that Insurance section 717 sets forth the general criteria for admission of insurers, however we reject this comment to the extent it implies that such criteria is comprehensively treated in such section, and we assert that section 717 leaves much to the discretion of the Insurance

Commissioner in regards to admissions(licensure) of insurers. In 1968, the second district court of appeal *Blood Service Plan Ins. Co. v. Roddis* , *supra*, rejected the Insurance Commissioner acting upon general public concerns for a consistent blood supply, not on the Insurance Commissioner regulation of the financial condition of licensed companies. The court of appeal also held that the term "hazardous" referred to financial condition, which is the subject of this proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking

96. Any company that complies with all the provisions of the laws of the state shall be entitled to a certificate of authority to do business in the state.

RESPONSE: We accept that the Insurance Code sets forth the general criteria for admission of insurers, however we reject this comment to the extent it states that any company that complies with all the provisions of the laws of the state shall be entitled to a certificate of authority and to the extent the comment implies that the Insurance Commissioner is not authorized to promulgate the proposed regulation. Insurance Code section 717 provides in part that a company shall be denied a certificate of authority upon a finding by the Insurance Commissioner of material deficiency in any of the 717 criteria set forth, including (a) capital and surplus (c) financial stability and (j) hazard to policyholders and creditors. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389

including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

97. Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable."

RESPONSE: We accept that the Insurance Code section 12389 sets forth the certain criteria for licensure of underwritten title companies, however we reject this comment to the extent it states that any company that complies with certain provisions of that section shall be entitled to a license and to the extent the comment implies that the Insurance Commissioner is not authorized to promulgate the proposed regulation. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth

and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

98. A UTC which complies with section 12389 is entitled to be granted a license and to transact business following *Blood Service* and *Commercial Union*.

RESPONSE: We reject this comment. In 1968, the second district court of appeal *Blood Service Plan Ins. Co. v. Roddis* , *supra*, rejected the Insurance Commissioner acting upon general public concerns for a consistent blood supply, not on the Insurance Commissioner regulation of the financial condition of licensed companies. The court of appeal also held that the term "hazardous" referred to financial condition, which is the subject of this proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner

rejects the comment to the extent the comment implies not going forward with the rulemaking.

99. There is nothing in section 12389 that pertains to underwriting agreements.

RESPONSE: We reject this comment. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

100. There is almost nothing in the Insurance Code for title insurance (sections 12340 through 12417) that mentions underwriting agreements. Section 12498.1 requires that

notice be provided to the Insurance Commissioner when underwriting agreements are terminated.

RESPONSE: We accept that Insurance Code section 12498.1 requires that notice be provided to the Insurance Commissioner when underwriting agreements are terminated, otherwise we reject this comment. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

101. The statutory purpose and rulemaking authority is found in subsection (d) of section 12389 "…to maintain the solvency of the companies subject to this section and to protect the public by preventing fraud and requiring fair dealing."

RESPONSE: We accept with this comment. The proposed rulemaking is in part authorized by Insurance Code section 12389.

102. Such rules and regulations shall be adopted in accordance with Government Code section 11371 *et seq.*

RESPONSE: We reject this comment. The rulemaking does propose that a regulation be adopted in accordance with the Administrative Procedures Act of the California Government Code, but not with provisions of the Government Code pertaining to adjudicative hearings. No hearing before an administrative law judge is required to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

103. The Insurance Commissioner's code powers and duties do not warrant interference with underwriting contracts; they mainly sets forth enforcement powers with respect to substantive requirements in the rest of the code

RESPONSE: We reject this comment. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable

rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

104. CDI regulations as of 1986 do not address underwriting arrangements except as incidental to preventing excessive, inadequate or unfairly discriminatory rates; these title rate regulation is designed more generally to otherwise implement the title insurance chapter (Insurance Code sections 12340 through 12417); CDI review of underwriting arrangements is not required by the regulations in effect in 1986.

RESPONSE: We reject this comment. The CDI has reviewed in a regulatory context underwriting arrangements in the licensure context at least since 1986 without court challenge. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable

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105. To enforce the liability limit rule - an exercise of quasi-legislative power - the $5,000 liability limit rule must be promulgated as a regulation under the Administrative Procedures Act, assuming such regulation is constitutional.

RESPONSE: We reject the comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance

by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

106. The proposed regulation is invalid under the statutes: an administrative officer may "fill up the details" but may not vary or enlarge the terms or conditions of the legislative enactment citing *Knudsen Creamery C. v. Brock* (1951) 37 Cal.2d 485, 492-493, 234 P.2d 26.

RESPONSE: We reject the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is fills up the details of the statutes addressing solvency of UTCs, it does not vary or conflict with the applicable statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the

rulemaking as proposed.

107. A regulation is valid only if it is reasonably necessary to effectuate the statute or reasonably designed to aid a statutory objective citing *Ross General Hospital, Inc. v. Lackner* (1978) 83 Cal.App.3d 346, 354, 147 Cal.Rptr. 801.

RESPONSE: We reject the comment to the extent it suggests there is no authority for the proposed rulemaking. In 1978 the second district court of appeal in *Ross General Hospital, Inc. v. Lackner* (1978) 83 Cal.App.3d 346, 354, 147 Cal.Rptr. 801 held that a regulation that imposes a further requirement, meaning one that isn't expressly in the statute, is valid only if it is "reasonably necessary to effectuate the statute" or "reasonably designed to aid a statutory objective." The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

108. Where a statute empowers an administrative agency to adopt regulations, such regulations must be consistent, not in conflict with the statute and reasonably necessary

to effectuate its purpose, citing *Woods v. Superior Court* (1981) 28 Cal.3d 668, 679, 170 Cal.Rptr. 484.

RESPONSE: We reject the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

109. A regulation which imposes conditions that are both omitted from and at variance with the statute are deemed to alter or amend the statute, impair its scope and are void, citing *Ontario Community Foundation, Inc. v. State Board of Equalization* (1984) 35 Cal.3d 811, 817, 201 Cal.Rptr. 165.

RESPONSE: We reject the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not vary, alter or amend the statutes. The proposed regulation promulgates

a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

110. "No state shall pass any law impairing the obligations of contracts." citing the United States Constitution Article 1 section 10.

RESPONSE: We reject the comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code

section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

111. Iowa Insurance Commissioner's approval of reimbursement formula was quasi-legislative and, to the extent it affected (abrogated) existing contractual relationships, it violated federal and Iowa Constitutions forbidding impairment of contracts.

RESPONSE: We reject the comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section

12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

112. If legislature is prohibited from abrogating contracts, so is Insurance Commissioner when performing quasi-legislative functions which have legislative force and effect.

RESPONSE: We reject the comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing

requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

113. New Hampshire and federal constitutions prohibit the legislature from impairing the integrity of contracts, but they do not prohibit the power to enact statutes under the police power. The contract clause is not a "dead letter" and does impose some limits on the power of the state to abridge existing contracts.

RESPONSE: We reject the comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

114. A statute that works a severe, permanent and immediate change in a contractual relationship is rendered unconstitutional by the contract provision of the United States Constitution, *Allied Structural Steel Co. v. Spannaus* (citation [omitted]).

RESPONSE: We reject the comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

115. South Carolina court found a state law provision preventing insurers from cancelling contracts with local agents primarily because of volume to be a violation of the contract clauses of the state and federal constitutions, citing *Insurance Financial Services, Inc. v. South Carolina Insurance Company* (S.C. 1984) 318 S.E. 2d 10. Another court addressed the same law, finding to allow an agent to sue his principals for exercising a contractual right to terminate an agency agreement which existed before the wrongful termination statute became law would impair that contractual right and

would violate both the state and federal contract clauses, citing *Morgan v. Kemper Insurance Companies* (4th Cir. 1985) 754 F.2d 145.

RESPONSE: We reject the comment to the extent it implies lack of authority to promulgate the proposed regulation. The purpose of the state laws as described in the comment is substantially different from the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

Reporter Transcript Comments- Hearing on 10/5/09
Commentator: **Linda Blood, Joel Phillips, American Title**

116. Welcomes and Believes Proposed Policy is Necessary Because UTCs are in Jeopardy; Requests to Broaden Discussion

Mr. PHILLIPS: Okay. Great. First of all, this policy is necessary. So I think it is a great thing that the Department is doing on this. We have a long-term relationship with our underwriter. We have not had this issue come up.

RESPONSE: The Department notes commentator's support for promulgation of the proposed regulations.

117. Underwriters Refuse to Allow New Agreements & Are Changing Contract Terms Without Warning or Rationale

Mr. Phillips: But the issues we are confronting with underwriters is the failure of underwriters to allow new agreements, new contracts, and the issue of underwriters changing the contract with their agents without warning and without any reasoning or reason behind it. For example, an agent losing their contract because even though they have had no claims and even though they have faithfully paid the portion that they agreed to -- submitted the portion that they agreed to the underwriter. In Los Angeles County, there are -- it's dominated with the acquisitions made by Land America. And now with Land America being purchased or whatever happened there by the Fidelity Group, we are down to very, very few agents. And of those agents, even some of those are controlled corporately either by a broker, a real estate broker, by a lender or they are controlled by an underwriter themselves owning a large portion of it. I don't know the details on this. You would know better than I, but it has made for a very hostile environment.

RESPONSE: The comment does not suggest a change to the proposed regulations. This comment does not directly address the intent or effect of the proposed rule. However, it does reflect the impact of a highly concentrated title insurance market and further attest to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from operating. To the extent the comment impliedly suggests an alternative, that title insurers be required to contract with UTCs, the Department has not historically done so and that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. That alternative doesn't appear to be address the issue of UTC solvency.

118. Despite Long-Standing Agreement & Lack of Claims, Underwriters Are Increasing Rates ("Split") and Required Minimum Remittances Based on Questionable Rationales

MR. PHILLIPS: Since 1991. Very few claims even if the environment that we live in is Los Angeles, and that has continued. Yet one of our underwriters -- we were underwritten by Land America lawyers, and we just received a notice 60 days ago or 90

days ago that they were raising our rate and that they were canceling -- that they were demanding a minimum. I don't have that exact minimum.
MS. BLOOD: 40,000.
MR. PHILLIPS: $40,000 in remittance. We have zero claims. So there are certainly no procedural issue and no financial issue that could have caused them to suffer through.
MS. BLOOD: Fidelity is the one who informed us. When I asked the Fidelity attorney why they were raising 10 percent to 13 percent when we had no claims, they said, oh, not to worry. They were increasing their policy fees on resale transactions and that it would all even out because we get a higher policy fee, but we would be paying them 13 percent, so we would kind of earn the same thing, and of course, they would earn a little bit more. The majority of our business is not resale, because in Los Angeles, unless you are Fidelity or FATCOLA, it is almost impossible to get new resale business even with the new SB 133. When I say to him, "The majority of my business is refinance," they just said, "Well, we just feel with our fee increase that is going to be coming in, everything is going to even out. I said, "I can't pay 13 percent. I pay 10. Everyone is barely making it as it is." They said, "That's unfortunate. You will have to cancel." We have been talking to other underwriters. Old Republic said, "Oh, yeah, you have a really good claim history, but we don't want to take on any small agents right now." And Joel has been working with some others.

MR. PHILLIPS: We hope to have another agreement in place with another underwriter, but we
don't have that currently. We don't feel in jeopardy with our underwriting agreement with Stuart Title. I certainly don't want anybody to get that idea, but a title company of our size should have multiple underwriters, which basically are not available at this time. About a year and a half ago, we had a request that we join the First American team, but later on very shortly after they changed their position on that, and I was told they were taking no new underwriters – no new agencies.

RESPONSE: The comment does not suggest a change to the proposed regulations and does not directly address the intent or effect of the proposed rule. However, it does reflect the impact of a highly concentrated title insurance market and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from licensing. To the extent the comment impliedly suggests an alternative, that the premium split between title insurers and UTCs be addressed, the Department has not historically limited the percentage of premium split between the UTC and the title insurer, in the underwriting agreement, however it is relevant to title rate regulation. Title rate regulation is the subject of separate laws, see CIC sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, and 12401.10. To the extent the comment suggests the rulemaking limit the percentage of premium received by the title insurer, that doesn't appear to be a viable alternative proposal that will

address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements.

119. Economic Impact [of Impendent UTCs Decline] is Severe

MR. PHILLIPS: One of the other issues that is addressed in the letter that you sent out regarding this, the new limitations on liability, addresses the issue of economic impact. That's an area that I think there is significant impact in the relationship that underwriters have to agencies now. I think agencies are locally owned, locally operated for the most part. They don't outsource nearly as much. For our company, we don't send anything out of the state. Actually, we don't send anything out of Southern California. Obviously, with that statement, you realize we don't send anything offshore. Some of our -- the plant contracts I realize the plants we use we will send things offshore primarily to the Philippines and India. We have no control over that. I think the economic impact locally is severe. I think that is something that the Department should take into account on their handling of the underwriter/agency relationship.

RESPONSE: The comment does not suggest a change to the proposed regulations. To the extent that it highlights the economic importance of retaining independent and local UTCs, it is supportive of Commissioner's position, as stated in it Notice of Proposed Actions, that the regulations could have a "positive impact on jobs and business in California to the extent that it enhances the continued operation of underwritten title companies, all of whom are domestic."

120. Unintended Consequences of SB 133 Have Disproportional Negative Impact on Smaller UTCs: Larger Players Still Engage in Kickbacks, But Cannot Be Traced or Easily Proven

MR. PHILLIPS: As a further thing, SB133, title companies -- I realize SB133 wasn't made up out of old cloth. There are reasons why that law exists, and there are good reasons why that law exists. We do think though that there are unintended consequences. Those unintended consequences affect agencies much more than underwriters. An example of that would be we don't have a large enough reach that we could advertise in a magazine that is distributed throughout Southern California. That would be prohibitive especially for a small company that is only spot marketing to our public. So the things that we did do traditionally, and we feel very good about how we operated our company over the last 20 years, things that we traditionally do we can no longer do. So we found that it is difficult to maintain a market share that we had before, and we fear that will become even more difficult as underwriters with their large geographic coverage are able to have more effective marketing and do marketing in magazines, which we could never afford.
MS. BLOOD: The other issue on that – I apologize for this, but it is true -- you know, for our company we always follow the law that was in effect before. We follow the law now. Things that went on with the large title insurance companies, the kickbacks and so forth,

they still go on, but you can't trace them. So if I go to lunch with someone, that is illegal. I don't do it. Somebody could see me and say, "Linda had lunch with someone from Bank of America."
But when there are cash gifts given from the large underwriters to clients, there is no way to trace it. The real estate agent isn't going to step forward and say, "Yes, I got money from First American or Fidelity." So we have nothing whatsoever. We can't buy a sandwich for a client, but yet the things that go on that I thought SB 133 was trying to stop still go on because we can't prove it. It put us at more of a disadvantage because we can't even do little things to get the attention of the client. I know that wasn't the intention. I know it was to get rid of the Vegas
trips and all the other things, but the stuff that went on underground still goes on. When we speak to the representatives at the Department of Insurance, she wants hard facts for anything that we knew about, and we can't provide it. So we are even more disadvantaged because now we have nothing other than, "Gee, American Coast has better service. You can get your premium real fast. The product is really efficient." It has really put us at a bigger disadvantage unfortunately since this law has been in effect.

RESPONSE: The comment does not suggest a change to the proposed regulations and does not directly address the intent or effect of the proposed rule. SB 133 has been enacted into statute and isn't the subject of the proposed rulemaking. To the extent the comment impliedly suggests an alternative, that disadvantages to small UTCs from SB 133 be addressed, that does not appear to be a viable regulatory proposal. Problems with SB 133 as enacted into statute are not modifiable by regulation. To the extent the comment impliedly suggests an alternative, that cut deals, kickbacks and other illegal things be addressed, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. For these reasons the suggestions are not accepted.

121. UTCs Also Harmed by Competing with Underwriter Products Not Made Available to Them.
MS. BLOOD: One of the other things that is having a tremendous impact on our company -- I can't speak for the other agents, because I think -- I don't know who else is here. In Southern California, Fidelity Title has an entity called LSI. LSI is some type of lender product or entity that they have. LSI is the only company that has a special pricing. And basically refinances are 50 percent less than what any other underwriter offers. So my big clients that do a lot of lender volume, refinance volume, LSI can do it for half the cost. Half the cost. I don't even have that to offer.
MS. BLOOD: My underwriter doesn't have that. Fidelity doesn't even offer that. Only LSI can offer that. So I feel that it is predatory pricing from one entity in the State of California that can offer that price, and they are scooping everything up. Again, I don't

know how it is for everyone else, but we are loosing business everyday. The LSI product is done offshore. There's no local title officer. There's no sales rep. It is purely computer. The product that they receive it hasn't even been searched by a live person. It is all computer generated. So the product is -- they show everything in the record even things from 50 years ago, and then it is up to the escrow company, the lender, the agent, the borrower to try to figure out a way to clear up the title. So I know some of the escrows that are having to deal with this product, they have increased their fees because now they have to do a lot more work because the title company isn't doing the work. They are offering this half the price of a regular transaction. They are calling it a same loan policy, but they aren't doing the work. Then meanwhile my customers are calling me and saying, "Help me. How do I get rid of these items on this prelim from LSI?" Well, I can't clear LSI prelims for them. I put in my letter to you, so I won't go through this, how the TSGs are handled. Their big cost saving appears to be really inexpensive, but it is costing everybody else in the long run. Someone has to take a look at it. Is it the intention of the Department of Insurance that one entity in the State of California has this super-discounted rate nobody can touch? How are we supposed to survive with that?

RESPONSE: The comment does not suggest a change to the proposed regulations and does not directly address the intent or effect of the proposed rule. However, it reflects the impact of a highly concentrated title insurance market and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters. To this extent, the comment is supportive of the stated purposes of the proposed regulations. It reflects the fact that the title insurance market is highly concentrated and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from operating. To the extent the comment impliedly suggests an alternative, that the predatory pricing activities be addressed, title rate regulation is the subject of separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. To the extent the comment suggests the rulemaking limit predatory pricing, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. That alternative doesn't appear to be as protective of UTC solvency since liabilities may exceed one hundred percent of premium received. For these reasons the suggestion is not accepted.

122. Two Large Underwriters Control Market; If Something Is Not Done, Agents Will Disappear

MS. BLOOD: The underwriters right now, the two major underwriters especially, they have got control here in California. They have control. If things don't adjust in some

kind of way, you will have no agents. You will just have the big insurance companies, and I'm not sure that is what the Department is looking for.

RESPONSE: The comment is general in nature and doesn't call for a specific response. It reflects the impact of a highly concentrated title insurance market and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters. To this extent, the comment is supportive of the proposed regulations.

Reporter Transcript Comments- Hearing on 10/5/09
Commentator: **Roger McNitt**, **American Homeownership Protection Coalition**

123.Urges Increase in $5K Limit to Reflect Inflation
MR. MCNITT: The notice indicates that the $5,000 limitation on risk shifting by contract is a longstanding Department requirement adopted over 20 years ago. At that time, title insurance policy limits and home values were much less than today. I would urge at an absolute minimum that you increase the 5,000 based on inflation.

RESPONSE: The comment implicitly recognizes the authority of the Insurance Commissioner to promulgate the proposed rule, but also proposes an alternative to said rule, which is to increase the $5,000 limitation to track inflation. Insurance Code Section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of the business of underwritten title companies, to carry out the purposes of Section 12389 including the maintenance of company solvency. The minimum net worth requirement for underwritten title companies (statutorily provided for in Insurance Code Section 12389) has not been adjusted for inflation. The important factors for maintaining the solvency of underwritten title companies are not policy or home values, but maintaining the net worth and capitalization of the companies. Net worth as defined in Insurance Code Section 12389 is the excess of assets over all liabilities and required reserves. The dollar amounts of required minimum net worth set forth in Insurance Code Section have not been changed by the legislature. If the UTCs were to take on additional risk the dollar amounts of the required minimum net worth would need to be increased by the legislature. After careful consideration, the Insurance Commissioner has determined that the proposed alternative would not be more effective in carrying out the purpose for which proposed rule was promulgated, nor would it be as effective and less burdensome to the UTCs than the proposed rule.

124. Speculates on Conditions, Rationale Underlying $5K Limit
MR. MCNITT: Presumably, the original limitation came into being when some underwritten title companies assumed all or nearly all of the risk. And at that time, even received substantially less than the 90/10 split today. Presumably also the Department

was also concerned that underwritten title companies taking all the risk were in fact not acting as underwritten title companies, but as insurers transacting in insurance.

Response: The proposed regulation promulgates a long-standing regulatory rule regarding the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. There are multiple purposes for the long-standing rule that is the subject of the proposed rulemaking. The primary purpose of the long-standing rule and the proposed regulation is to protect the solvency of the underwritten title company; to prevent the underwritten title company from taking too much of the underwriter's liability and threatening the underwritten title company's viability. This comment is supportive of the proposed rulemaking.

125. Purpose of the contractual obligation requirements of the underwritten title company was to encourage it to perform the search and examination carefully and diligently and in a non-negligent manner.
MR. MCNITT: Presumably, also in this -- and this was subsequently confirmed in a case that you cite "Title Insurance Company of Minnesota vs. State Board of Equalization." The purpose of the contractual obligation requirements of the underwritten title company was to encourage it to perform the search and examination carefully and diligently and in a non-negligent manner. Obviously, the economic reality of the higher percentage, which is subsequently given to underwritten title companies, recognizes that they take on contractual liabilities have increased as well as their percentage of the title insurance premium.

Response: The Insurance Commissioner is in agreement with the first factual statement. However, the Commentator has not provided a factual basis for the second statement. The proposed regulation is currently being complied with in practice by a majority of both title insurers and underwritten title companies. The title insurance premium split is not regulated by the CDI. It is the subject of contractual negotiations between the title insurer and underwritten title company.

126. Discusses What UTC Contractual Liabilities Cover
MR. MCNITT: Let's talk for a little bit about what these contractual liabilities cover. Historically, the title policy has covered more than just errors in searches, but actually covers some true risk in the insurance sense. That risk would be, for example, fraud on the deeds, which we are seeing some of now in terms of mortgages; the wrong name of the party. Mary Smith is not the same Mary Smith.

Response: The Commentator has not provided sufficient information as to whether errors and omissions insurance was available for underwritten title companies at the time the long-standing rule was initially adopted. The Commentator suggests no change to the proposed regulations treatment of willful/intentional acts. The proposed regulation specifically excepts willful and

intentional acts; it is limited to the underwritten title company's liability for its negligent conduct, the title risk of loss which is borne by the title insurer. Errors & Omissions coverage protects a different risk than title insurance. Insurance Code section 12389.6, which references E&O coverage, addresses escrow liability, which is specifically excepted from the proposed regulation.

127. History of Underwriters and UTCs Knowingly Assuming A Risk
MR. MCNITT: Additionally, there has been in the title business to my knowledge for over 30 years title -- underwritten title companies and title insurers knowingly assuming a risk.

And one example of this is where they write around a mechanics lien. You come in and you see there's a mechanics lien on file. Let's suppose you're a seller selling a home and you're in a battle with the remodeler. The seller is going to sell it and can't sell it. The remodeler is holding a gun to their head because they have a lien on there. The lien may or may not be valid. The title insurer makes a decision in many of those cases and assumes that liability. Sometimes when they assume that liability, they actually take collateral either in the form of a personal promise to pay it or cash or other type of collateral. So these are knowing assumptions and some underwritten title companies take it. In my experience, some of the underwriting agreements will limit how far underwritten title companies can go in writing around. So there is known acceptance of a risk there.

There's also the risk of reconveyances. That is what we call recon to follow or used to follow.
That is when a loan pays off to the lender, a reconveyance is supposed to, in theory, be timely recorded. We have had problems with that for years and the legislature stepped up in recent years. Historically, the title companies even had what they called recon-to-follow parties where everybody would get together on Saturday and exchange recons to clear titles. My point is it is not as simply as just an error and omission. There are a lot of other issues where there's an exposure here.

Response: The Commentator has not provided sufficient information as to whether errors and omissions insurance was available for underwritten title companies at the time the long-standing rule was initially adopted. The Commentator suggests no change to the proposed regulations treatment of willful/intentional acts. The proposed regulation does apply to willful or intentional acts, it limits the underwritten title company's liability for its negligent conduct. Errors & Omissions coverage protects a different risk than title insurance. Insurance Code section 12389.6, which references E&O coverage, addresses escrow liability, which is specifically excepted from the proposed regulation.

128. Commentator Shares His Recollection of Intent Of Original Rule—Relationship to Limits on Medical Malpractice Liability

MR. MCNITT: My recollection of the regulations or -- excuse me -- of the proposed regulation in this so-called drawer rule is that there was no intent to limit errors and omissions at that time. I don't think I'm wrong on that because at that same time, the Department was looking at the medical malpractice crisis. The medical malpractice which is now called tort reform at the national level and public health was here in California, and the Department on a daily basis involved in that. It ended up with the legislature limiting the negligence of liabilities of medical providers. It is was not done by the terms of the Department of Health telling hospitals to enter into a contract with patients or others limiting liabilities. The trial lawyers took on this law as they did in other states. And in some other states, similar laws were found unconstitutional. In California, the statute survive by a four to three vote challenges on due process, equal protection, and infringement of contract. I submit what you are saying -- by the way, that statute only limited what we lawyers call special damages. It didn't go to actual economic damages. There was a special session of the legislature called and AB1XX was passed. It had several very beneficial provisions in it. One of provisions limited pain and suffering damages to $250,000. That was sustained by a four to three vote. There was no attempt to limit actual damages. I would suggest that the State's interest right now has not been properly documented to justify limiting damages for negligence of an underwritten title company against its title insurer.

Response: The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies and is not inconsistent with statute. The subject of the proposed regulation is not medical malpractice damages. The proposed regulation neither directly affects the rights of consumers as to damages, nor does it address third party tort liability for damages. The regulatory rulemaking procedure provides sufficient notice, hearing, and an opportunity for public review and comment. The liability responsibility between the licensed entities, title insurer and UTC, has been the subject of the longstanding rule which is now proposed as a formal regulation. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. One of the purposes of the proposed regulation is to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The rulemaking file in its entirety substantiates that the proposed rule is reasonably necessary.

129. Urges Increase In Liability Limit: "Skin in the Game" Rationale
MR. MCNITT: With respect to alternatives, as I said earlier, I would look to inflation. I think it is very important that we all remember that one of the purposes of this was to make sure that the underwritten title company had adequate skin in the game to adequately underwrite the product.

RESPONSE: The comment implicitly recognizes the authority of the Insurance Commissioner to promulgate the proposed rule, but also proposes an alternative to said rule, which is to increase the $5,000 limitation to track inflation. Insurance Code Section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of the business of underwritten title companies, to carry out the purposes of Section 12389 including the maintenance of company solvency. The minimum net worth requirement for underwritten title companies (statutorily provided for in Insurance Code Section 12389) has not been adjusted for inflation. The important factors for maintaining the solvency of underwritten title companies are not policy or home values, but maintaining the net worth and capitalization of the companies. Net worth as defined in Insurance Code Section 12389 is the excess of assets over all liabilities and required reserves. The dollar amounts of required minimum net worth set forth in Insurance Code Section have not been changed by the Legislature. If the UTCs were to take on additional risk the dollar amounts of the required minimum net worth would need to be increased by the legislature. After careful consideration, the Insurance Commissioner has determined that the proposed alternative would not be more effective in carrying out the purpose for which proposed rule was promulgated, nor would it be as effective and less burdensome to the UTCs than the proposed rule.

130. Parallels to Fronting Regulations
MR. MCNITT: I call your attention to your reinsurance regulations, particularly Title 10 of the Code of Regulations Section 2303.15B, which relates to what I call fronting, and it requires the fronting companies in order to have skin in the game to keep 10 percent of the risk. I'm not saying you should adopt 10 percent. What I am saying is that in my view maybe 5,000 is too low. You need to make sure that the underwritten companies have an adequate economic incentive to do it properly. I simply say you should look at your 10 percent rule and why you put it there and evaluate it when you complete this.

Response: The reinsurance regulation cited by the Commentator applies to insurers, not underwritten title companies, and its subject matter is not addressed by the proposed regulation. Moreover, the concept of "fronting" applies to unlicensed entities; both the title insurer and the underwritten title company, which is required by statute to be a domestic entity, are licensed entities so there is no fronting issue to be addressed. To the extent the comment implies an alternative, that the UTCs retain a percentage of the liability rather than a fixed dollar amount, that percentage would not match the net worth

requirements set forth in Insurance Code section 12389. Insurance Code Section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of the business of underwritten title companies, to carry out the purposes of Section 12389 including the maintenance of company solvency. The minimum net worth requirement for underwritten title companies (statutorily provided for in Insurance Code Section 12389) are fixed dollar amounts, not percentages of premium. Net worth as defined in Insurance Code Section 12389 is the excess of assets over all liabilities and required reserves. The dollar amounts of required minimum net worth set forth in Insurance Code Section have not been changed by the legislature. If the UTCs were to take on additional risk the dollar amounts of the required minimum net worth would need to be increased by the legislature. After careful consideration, the Insurance Commissioner has determined that the proposed alternative would not be more effective in carrying out the purpose for which proposed rule was promulgated, nor would it be as effective and less burdensome to the UTCs than the proposed rule.

131. States Personal Concern: Proposed Regulation Will Encourage Underwriters to Either Raise Their Premium Share or Write Directly.
MR. MCNITT: Lastly, this is a personal concern. That is that I am concerned that if we come up with a regulation as it is now, it will give the title insures such an economic incentive to either increase their share of premium as we are hearing now or write directly through their own company. That will have the opposite effect which you are trying to have. It will force a lot of underwritten title companies out of business.

Response: The comment suggests an alternative to the proposed regulation, suggesting that an additional regulation be promulgated to address the premium percentage split between UTCs and title insurers. This comment does not directly address the proposed rule, however, it does reflect the impact of a highly concentrated title insurance marketplace and further attests to the competitive disadvantages borne by UTCs in their dealings with title insurers and, in particular, their weak bargaining power in negotiating terms of underwriting agreements, agreements without which the UTCs are precluded from licensing. To the extent the comment impliedly suggests an alternative, that the premium split between title insurers and UTCs be addressed, the Department has not historically limited the percentage of premium split between the UTC and the title insurer, in the underwriting agreement, however it is relevant to title rate regulation. Title rate regulation is the subject of separate laws; see CIC sections 12401 *et seq.* To the extent the comment suggests the rulemaking limit the percentage of premium received by the title insurer, that doesn't appear to be a more effective or less burdensome alternative. The Department believes the alternative proposal would be less effective in preventing the insolvency of the UTCs, which are small business, than the regulation as proposed. The regulation as proposed addresses the extent of the claims payment burden being shifted to

the underwritten title companies, who have lower capital requirements, by title insurers, who are the risk bearing entities and should be paying the claims. As liabilities may exceed premium, the rule as proposed, which addresses liabilities, is more effective and less burdensome on the impacted UTC small businesses.

132. Advises: "Take Your Time and Get It Right"
MR. MCNITT: I encourage you to use what I call the Doug Harvey Rule. Mr. Harvey was senior umpire in the National League. He tells the story of how he operated in the first series. As a young rookie umpire, he was at the Bush Stadium and Stan Musial comes up. The first pitch comes up and he calls a first strike on him. The ball was very close. The fans were all over
the umpire. Musial doesn't show him anything at all. He hits his bat on the home plate, looks down, and he says, "Ump, I know you're new. I know you have a good reputation, but my advice to you is take your time and get it right." So my advice to you is study seriously the $5,000 limitation, and let's get it right. I will be happy to take any questions you might have.

RESPONSE: The comment is general in nature and does not suggest a change to the proposed regulations and does not directly address the intent or effect of the proposed rule.

Reporter Transcript Comments- Hearing on 10/5/09
Commentator: **Patrick Shannon**, Counsel for **Stewart Title Guaranty Company** and Affiliates

133. Main Point: Department Lacks Authority to Impose Proposed Rule
MR. SHANNON: So the overarching point that we -- Stuart, Fidelity, and First American -would like to make in opposition to the proposed regulation is that the Department lacks authority to impose the $5,000 liability limitation on UTCs and shift the excess burden to title insurers.

Response: Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority

requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

134. Enactment of Rule is Exclusively Reserved for Legislature
MR. SHANNON: A regulatory agency has no authority to create a new rule of this magnitude at all, but certainly not without an expressed legislative delegation. Imposing a new rule of this magnitude is the province of the legislature. The proposed regulation is an impermissible attempt by the Department to assume for itself power exclusively reserved for the legislature.

Response: Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

135. Legislature May Delegate Its Power
MR. SHANNON: Of course, it is possible for the legislature to delegate power to a regulatory agency to create a rule to, quote, fill gaps in the statutory scheme. But such a delegation must be done so clearly and expressly and must be a limited delegation of

power just to fill gaps in a specific scheme, the parameters of which have already been set forth in the statute.

RESPONSE: We reject the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is fills up the details of the statutes addressing solvency of UTCs, it does not vary or conflict with the applicable statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

136. The Legislature Has Made No Such Delegation

MR.SHANNON: The current situation is not close to that. Here the legislature has made no delegation to the Department to fill in gaps on liability provisions. Once more, there's not even so much as a reference in the Code to a liability limitation on UTCs, much less a statutory team on liability that begs for CDI to fill in gaps. If at all, the only possible way for this proposed rule to be valid would have been if the legislature had set

forth a liability limitation scheme for UTCs and had specifically left it to the Department to set the numeric threshold.

RESPONSE: We reject this comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is fills up the details of the statutes addressing solvency of UTCs, it does not vary or conflict with the applicable statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

137. Questionable Whether Legislature Could Enact/Enforce or Delegate Making of Such a Rule

MR. SHANNON: Even then, it is highly doubtful that even the legislature could shift liability away from UTCs for their own gross negligence. Such an attempt could be void against public policy. I would even go further to say that I seriously doubt it would pass constitutional muster if the legislature were to attempt to delegate the broad power of

the Department to shift liability from UTCs to title insurers even if the legislature wanted to and did so expressly. This is purely a policy matter affecting the basic rights of parties in an arms-length transaction. Only the legislature can exercise this kind of power. Even if the legislature wanted to, it could not delegate its legislative function to a subordinate agency. That would be an impermissible abdication of its legislative function.

Response: We reject this comment to the extent it implies we should not go forward with the rulemaking as proposed. The commentator acknowledges that the relationship between the title insurer and the UTC is principal and agency. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. Public policy as established by the legislation supports this. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

138. If Legislature Itself Lacks Power to Impair Rights to Contract, then Regulatory Agency Cannot Have That Power

MR. SHANNON: Even the legislature itself is limited in its ability to shift liability. It is doubtful that it is permissible for the legislature to prohibit parties from contracting out of

any scheme that is set forth. This would be an impairment of the party's constitutional right to freedom of contract. If even the legislature does not have the power, than I can say with assurance that a regularity agency certainly does not have the power to shift liability from UTCs and on to title insurers. That would violate separation of powers and freedom of contract Nonetheless, the Department has asserted it possesses authority in its own prerogative to establish this $5,000 liability limitation and shift the liability to the title insurers.

RESPONSE: We reject this comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

139. Statutes and Cases Relied Upon By Department Do Not Provide Authority
MR. SHANNON: But as our written submission makes the case, none of the statutes or cases provided has authority by the Department to do so.

RESPONSE: We disagree with the comment to the extent it implies lack of authority to promulgate the proposed regulation. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The long history of regulation of insurance by this state, and this longstanding rule, is a lawful exercise of state police powers; the privilege of a license is not constitutionally guaranteed and licensing requirements are not unconstitutional exercises of state authority. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

Reporter Transcript Comments- Hearing on 10/5/09
Commentator: **Jonathan Alvinito**,

140. Recent Increase in Claims Made Attributable to Actions of Underwriters, Not UTCs
MR. ALVINITO: It seems to me I understand that liability of underwriting companies -- Stuart, First American, and so on -- are worried about claims issues because they have had a lot of claims to pay out in the past few years with the market being so strong and busy as it was in the early 2000s. Most of the claims that they have indicated at some point along the lines was because of UTCs, underwritten title companies, when in fact it is their own claims that hurt them, typically them going offshore doing their search and examine. That's a decision they made. It's a business decision. I understand that, but

those claims came from that and not so much from UTCs. There were a lot of UTCs that did not pay their premiums, which did hurt the title companies' bottom line as well -- that is why a lot of them got canceled or for misconduct in their search and examining practices.

RESPONSE: The Commentator refers to business operations decision and contract cancellations occurring as a result of increased claims. The comment does not suggest a change to the proposed regulations. This comment does not directly address the intent or effect of the proposed rule. However, it does reflect the impact of a highly concentrated title insurance market and further attest to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from operating. To the extent the comment impliedly suggests an alternative, that title insurers be required to contract with UTCs, the Department has not historically done so and that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. That alternative doesn't appear to be address the issue of UTC solvency.

141. Sees Direct Correlation Between Deductibles and Premiums Charged.
MR. ALVINITO: The way I look at it with underwriting fees, I understand over time when underwritten title companies fees go up because of whatever -- inflation or what have you or because of their poor practice of their packaging of their preliminary title reports to go out to the consumers. With that, they can make direct correlations of canceling these UTCs or not, but I see these deductibles as an issue being a direct correlation of the premiums being charged.

RESPONSE: The comment does not suggest a change to the proposed regulations and does not directly address the intent or effect of the proposed rule. To the extent the comment impliedly suggests an alternative, that the premium fee between title insurers and UTCs be addressed, the Department has not historically limited the percentage of premium split between the UTC and the title insurer, in the underwriting agreement, however it is relevant to title rate regulation. Title rate regulation is the subject of separate laws, see California Insurance Code sections 12401, 12401.1, 12401.2, 12401.3, 12401.4, 12401.5, 12401.6, 12401.7, 12401.71, 12401.8, 12401.9, 12401.10. To the extent the comment suggests the rulemaking limit the percentage of premium received by the title insurer, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. That alternative doesn't appear to be as protective of UTC solvency since liabilities may exceed one hundred percent of premium received.

142. Contends Underwriters Now Using Increases in Fees and Deductibles as Means of Eliminating Competition
MR. ALVINITO: Basically, before SB 133, the underwriters tried to basically put the UTCs out of business by buying their way into the business -- purchasing things, doing things legal or not. A lot of that still goes on, but then it was more blatant. Now, they seem to be doing it in a different fashion in my professional opinion, and that would be more along the lines of raising fees and/or deductibles. That is another way for them to push out their competitors and make it a lock-in market --Stuart, First American, the Fidelity families, and so on. So that is how I just see them going to the next step of trying to push us out.

RESPONSE: The comment does not suggest a change to the proposed regulations and does not directly address the intent or effect of the proposed rule. However, it reflects the impact of a highly concentrated title insurance market and further attests to the competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from licensing. Also, it impliedly recognizes and supports one of the Commissioner's stated purposes in promulgating the rule, namely, to promote and facilitate new market entry and small business participation. SB 133 has been enacted into statute and isn't the subject of the proposed rulemaking. To the extent the comment impliedly suggests an alternative, that disadvantages to small UTCs from SB 133 be addressed, that does not appear to be a viable regulatory proposal. Problems with SB 133 as enacted into statute are not modifiable by regulation. To the extent the comment impliedly suggests another alternative, that large reserve deposits be addressed, that doesn't appear to be a viable alternative proposal that will address the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements. For these reasons the suggestions are not accepted.

143. Supports Fair and Comprehensible Approach
MR. ALVINITO: Southern California is the largest market in the world when it comes to real estate transactions -- the most number of transactions as well as usually the higher dollar amounts as well. So I almost look at it as auto insurance. If you have a good claims record, maybe some of the underwriters want to think some things that they can do -- all right. Fine. If you want to pay less in premiums, fine, we can raise your deductibles because we feel you do have a good practice with regard to preparing your preliminary reports. If you have some claims, maybe you do need to raise your deductible now because there are some issues. It may be on a case-by-case basis. Regardless of who it will be, who the regulatory agency is that is going to do this legislatively through the State senate or here with the Department, makes no mind to me as long as it is fair and comprehensible that we can all agree upon.

RESPONSE: The comment does not suggest a change to the proposed regulations and does not directly address the intent or effect of the proposed rule. However, it impliedly recognizes and supports two of the Commissioner's stated purposes in promulgating the rule, namely, to clarify participants' expectations regarding and understanding of permitted liability transfer in underwriting agreements and to facilitate fair dealing.

144. The Negligence of the UTC is the Risk Insured by the Title Insurer
MR. ALVINITO: Now, with regard to the closing here with regards to the title insurance companies, they make up a lot of these policies. When they come out with new policies -- you know, the homeowner policy regarding fraud and so forth -- they bring these policies forward. We as an underwritten title company didn't tell them, "Increase your risk in liability." They chose to do it. They brought it to the marketplace. They offered it to their agencies. Don't blame us for what you decided to offer. If you said you're going to insure it, then insure it.

RESPONSE: We accept this comment, in that the UTC is an agent of the title insurer and the title insurer exerts control over the operations of the UTC through contracts and other business practices. Insurers are in the business of assessing risk and addressing liability. In the case of title insurance, the negligence of the UTC is the risk that is insured by the title insurer. See Insurance Code section 12340.1. The comment also attests to the limited bargaining power and competitive disadvantages borne by UTCs in their dealings with underwriters and, in particular, their weak bargaining power in negotiating terms of underwriting agreements—agreements without which they are precluded from licensing. Also, it impliedly recognizes and supports one of the Commissioner's stated purposes in promulgating the rule, namely, to facilitate fair dealing by title insurers and UTCs.

145. Under Specified Circumstances, UTCs Already May Be Liable for Full Amount of a Claim
MR. ALVINITO: In most, if not all, cases in the underwriting agreements with underwriters -- and we are blessed right now. We have three underwriters -- it does state regarding misconduct with regards to the underwritten title companies. We have misconduct if we are not following the closing protection letter correctly and so forth because they are not going to pay the claims on that. So if we do something wrong, we are at fault. We pay. That doesn't mean just the $5,000. It means we can actually be liable for the full amount of the potential claim. Let me see if there's anything else.

RESPONSE: Closing protection letters are permitted by statute, see CIC section 12340.3 (e). Closing protection letters are not subject to rate and form filings by the same statute. The proposed regulation does not address closing protection letters, and it specifically excludes escrow liability, intentional and willful misconduct. To the extent the comment suggests a change to the proposed

regulations, that the regulation limit the liability of UTCs to title insurers for escrow activities, closing performance, intentional and willful acts, the Comments is rejected, as it doesn't appear to be a more effective or less burdensome alternative. In the event of a UTC insolvency, title insurers are obliged to protect the public under Insurance Code section 12376, and Insurance Code section 12389.6 already requires certain safeguards in the underwriting agreement to reduce escrow related losses. Insurers are not exonerated by willful acts of the insured, but are not exonerated by negligent acts of the insured, or the insured's agent. See Insurance Code section 533.

146. If Underwriters Continue Raising Fees and Deductibles, It Will Eliminate [Independent] UTCs, Result in Job Loss and Have a Negative Economic Impact
MR. ALVINITO: Regarding the economic impact. If they do raise -- keep raising fees, keep raising deductibles and so forth with both regards, it can have an economic impact upon underwritten title companies. Jobs aren't staying here in Southern California with regard to search and examine with First American and now with Fidelity moving a lot of stuff out of state and going down that road. So underwritten title companies are no longer existing then there will be a monopoly with underwriters as well as a lot of people losing their jobs. It will have an economic impact at that point. That's all I have to say. Thank you very much.

RESPONSE: To the extent the comment refers to rising deductibles, the comment is generally supportive of the proposed rulemaking. The comment also implies an alternative to the proposed regulation, that a regulation be promulgated to address the rising fees and deductibles be charged to UTCs by title insurers. This comment reflects the impact of a highly concentrated title insurance marketplace and further attests to the competitive disadvantages borne by UTCs in their dealings with title insurers and, in particular, their weak bargaining power in negotiating terms of underwriting agreements, agreements without which the UTCs are precluded from licensing. To the extent the comment impliedly suggests an alternative, the Department has not historically limited the fees between the UTC and the title insurer, in the underwriting agreement. Title rate regulation is the subject of separate laws; see CIC sections 12401 *et seq.* To the extent the comment suggests the rulemaking limit the fees charged, that doesn't appear to be a more effective or less burdensome alternative. The Department believes the alternative proposal would be less effective in preventing the insolvency of the UTCs, which are small business, than the regulation as proposed. The regulation as proposed addresses the extent of the claims payment burden being shifted to the underwritten title companies, who have lower capital requirements, by title insurers, who are the risk bearing entities and should be paying the claims. As liabilities may exceed fees charged, the rule as proposed, which addresses liabilities, is more effective and less burdensome on the impacted UTC small businesses.

Re: <u>STEWART TITLE GUARANTY'S MAY 24, 2010 COMMENT LETTER ON PROPOSED ACTION TO LIMIT UNDERWRITTEN TITLE COMPANY LIABILITY, REG-2009-00019</u>

Dear Ms. Jacobi:

147. This letter is submitted on behalf of Stewart Title Guaranty Co. as a supplement to prior comments submitted by title insurers collectively in response to the Notice of Proposed Action by the California Department of Insurance ("the Department" or "CDI") dated August 21, 2009 which purports to limit underwritten title company ("UTC") liability to $5,000 and to shift the excess liability on to title insurance companies.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

148. We hereby request that these comments and any materials incorporated by reference herein become a part of the rulemaking file and the record in this matter. Government Code Section 11347.3 requires that all communications received after the publication of the notice of proposed action and before the rulemaking file is transmitted to the Office of Administrative Law ("OAL") be included in the rulemaking file:

Government Code Section 11347.3 (a): "Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding. Commencing no later than the date that the notice of proposed action is published in the California Regulatory Notice Register, and during all subsequent periods of time that the file is in the agency's possession, the agency shall make the file available to the public for inspection and copying during regular business hours." (Emphasis added)

Government Code Section 11347.3 (b): "The rulemaking file shall include: . . . (6) All data and other factual information, any studies or reports, and any written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation." (Emphasis added)

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

149. This memorandum sets forth the legal analysis supporting the view that the Department's proposed regulation to limit the liability of Underwritten Title Companies (hereinafter "UTCs") is invalid.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

150. The Department has initiated a rulemaking proceeding to adopt a proposed rule to limit the liability of UTCs to $5,000 of loss per policy, except for escrow losses and other losses that are caused by the willful or intentional acts of the UTC, as follows:

"No contract between a title insurer and an underwritten title company shall provide for the indemnity of the title insurer by the underwritten title company in excess of five thousand dollars ($5,000) of loss per policy, except for losses that are caused by willful or intentional acts of the underwritten title company or its employees, which losses may be indemnified by contract in excess of five thousand dollars ($5,000) per policy. For purposes of this section, the term "loss" shall include title losses and any other business of title insurance losses caused by the underwritten title company's operations but shall not include escrow losses and the term "contract" shall include "underwriting agreement." Proposed California Code of Regulation 10 CCR 2194.70; Regulation File: REG-2009-00019.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment

is of a general nature and does not call for a specific response.

160. The regulation would prohibit title insurers and UTCs from including an indemnity provision in their underwriting agreements which allocates more than $5,000 of liability to UTCs for title losses even if such losses were caused by the UTC's own errors or negligence.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

161. Title insurers would thus be barred from bringing actions against UTCs to recover for losses greater than $5,000 attributable to the UTC's error or negligence, which actions, but for the regulation, the title insurer would be fully entitled to bring under current law.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the

extent the comment implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

162. As such, the regulation would shift the costs of the UTC's errors or negligence in the performance of their title services on to title insurers. The title insurer would be forced to suffer the loss above $5,000 without compensation from the UTC. Holding the UTC harmless above $5,000 and foisting the costs of the UTC's negligence on to the title insurer represents a subsidy by the title insurer of the UTC. The title insurer would be forced to bear costs that are rightfully the responsibility of the UTC.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment that the proposed regulation would shift the costs of the UTCs errors or negligence in the performance of their title services to the title insurers. The proposed regulation is a longstanding rule of the Department and we assert that one of its purposes was to limit the assumption of title risk liability by the UTC, which is not an insurer, from the title insurer, which is the insurer. There are multiple purposes for the long standing rule that is the subject of the proposed rulemaking. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's

viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. There is nothing in the proposed rulemaking that requires the title insurer to assume additional risk without compensation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

163. Note that it is the loss allocation provision in the *underwriting agreement* between the title insurer and the UTC that the Department is seeking to dictate, not any provision in the *title insurance policy* between the title insurer and the consumer. The title insurer is fully responsible for any liability to the consumer for any loss under the title insurance policy. The UTC is not a party to the title policy.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

164. However, the title insurer and the UTC maintain a separate agreement between them, i.e., the underwriting agreement, which allocates responsibility for loss between them for breach of contract or negligence in the performance of the UTC's duties to validate clear title and perform escrow services. Loss allocation provisions vary, but a standard provision typically holds the UTC liable for loss attributable to its breach or negligence in the performance of its title search and escrow functions. In the event of loss, such a provision entitles the title insurer to recover from the UTC for losses attributable to the UTC's actions.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement that typically such provisions hold the UTC responsible for the negligence of the UTC. Escrow activities are specifically excluded from the proposed rulemaking. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking

too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

165. Note also that the consumer's right to recover for its losses under the title policy is not affected in any way by the loss allocation provisions in the underwriting agreement. The title insurer remains fully responsible to the consumer under the title policy and the underwriting agreement cannot change that fact.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered.

The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

166. What is at issue here is strictly the economics of the business relationship between the title insurer and the UTC as negotiated in the underwriting agreement and whether the Department has the authority to dictate the terms of every contract between the parties to discriminate in favor of UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

167. The Department suggests that the regulation is intended to limit the shifting of liability "to the smaller, less capitalized underwritten title companies." Notice of Proposed Action at p. 3. But the regulation, in fact, does the opposite: it does not limit the shifting of liability to UTCs, rather it shifts liability for the actions of the UTCs to the title insurers.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court decision in *CalFarm Ins Co. Deukmejian* 48 Cal.3d 805 (1989)

provides authority for regulations that may be fairly implied. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

168. The Department's interpretation of the Legislature's grant of rulemaking authority as permitting them to force title insurers to subsidize UTCs in this way is fundamentally flawed. The Legislature did not grant the Department authority to dictate the contract terms between the parties to discriminate in favor of the UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court decision in *CalFarm Ins Co. Deukmejian* 48 Cal.3d 805 (1989) provides authority for regulations that may be fairly implied. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance,

suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

169. The Office of Administrative Law and/or a reviewing court would be compelled to find the regulation invalid for the following reasons:

1. **The Department's interpretation impermissibly enlarges the scope of the authorizing statute**

The Department has overstated its authority under the enabling statute in two key respects: the purpose of the statute and the reach of the statute. First, CDI wrongly portrays itself as authorized to "foster the solvency" of UTCs. Second, CDI incorrectly extends its authority over *UTCs* under the operative UTC section to apply equally over *title insurers*. Only by arrogating to itself more authority than it was granted under the enabling statute can the Department contend it is empowered to force title insurers to subsidize UTCs in the name of fostering the solvency of UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court decision in *CalFarm Ins Co. Deukmejian* 48 Cal.3d 805 (1989) provides authority for regulations that may be fairly implied. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for

underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

170. The rules for OAL or a reviewing court to assess whether an agency has exceeded its rulemaking authority are well-settled.1 In *Mineral Associations Coalition v. State Mining and Geology Board*, (2006) 138 Cal.App.4th 574, the appellate court recently reprised the rules as follows:

"In reviewing the validity of an administrative regulation, the court's task is twofold: First, the court asks " 'whether the [agency] exercised [its] quasi-legislative authority within the bounds of the statutory mandate.' " (*Yamaha Corp. of America v. State Bd. Of Equalization (1998) 19 Cal.4th 1, 16 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]* (conc. opn. of Mosk, J.) (*Yamaha*), quoting *Morris v. Williams (1967) 67 Cal.2d 733, 748 [63 Cal. Rptr. 689, 433 P.2d 697]* (*Morris*).) "[R]egulations that alter or amend the statute or enlarge or impair its scope are void." (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services (1992) 6 Cal.App.4th 968, 982 [8 Cal. Rptr. 2d 565]* (*Physicians & Surgeons*), citing *Henning v. Division of Occupational Saf. & Health (1990) 219 Cal. App. 3d 747, 757-758 [268 Cal. Rptr. 476]*.)

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule fills up the details of the statutes addressing solvency of UTCs, it does not vary or conflict with the applicable statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that

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1 See Government Code Section 11342.1 – a regulation is ordinarily invalid unless it falls within the scope of authority conferred on the agency by statute.

the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

171. If the regulation passes the first test, the court proceeds to a second line of inquiry: whether the regulation is " ' "reasonably necessary to effectuate the purpose of the statute." ... In making such a determination, the court will not "superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision." ' " (*Yamaha, supra, 19 Cal.4th at pp. 16-17* (conc. opn. of Mosk, J.), quoting *Morris, supra, 67 Cal.2d at pp. 748-749*; accord, see *Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 109 [126 Cal. Rptr. 2d 441]*).

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule fills up the details of the statutes addressing solvency of UTCs, it does not vary or conflict with the applicable statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This

proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

172. . . . Where an agency has the authority to adopt regulations to implement or carry out a legislative scheme, any regulation so adopted must be "consistent and not in conflict with the statute." (*Gov. Code, § 11342.2*; see *City of San Jose v. Department of Health Services (1998) 66 Cal.App.4th 35, 41-42 [77 Cal. Rptr. 2d 609]*.) An administrative agency has no authority to promulgate a regulation that is inconsistent with controlling law. (*Communities, supra, 103 Cal.App.4th at pp. 109-110*.)

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing

requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

173. While it is true that " '[t]he court, not the agency, has "final responsibility for the interpretation of the law" under which the regulation was issued' " (*Communities, supra, 103 Cal.App.4th at p. 110*), the standard governing our resolution of the issue is one of "respectful nondeference." (*Physicians & Surgeons, supra, 6 Cal.App.4th at p. 982*; *Environmental Protection Information Center v. Department of Forestry & Fire Protection (1996) 43 Cal.App.4th 1011, 1022 [50 Cal. Rptr. 2d 892]*.).'' *Mineral Associations Coalition* at 583.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This

longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

174. a. <u>Section 12389 does not authorize the Department to impose requirements to "foster the solvency" of UTCs</u>

The Department's stated rationale for the regulation is to "foster the solvency" of UTCs. But they have misrepresented their charge. Section 12389 on which CDI relies for its authority for the proposed regulation states that the Legislature's intent in imposing financial controls on *UTCs,* such as net worth and working capital requirements, was to "maintain the solvency" of UTCs. But the Legislature only conferred authority on CDI to implement those requirements on UTCs. The Legislature did not give CDI carte blanche to "foster" or otherwise promote the solvency of UTCs, as CDI contends.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed

rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

175. The Legislature created the UTC licensure requirements for the purpose of *maintaining* the solvency of UTCs and *protecting* the public by preventing fraud and requiring fair dealing.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as

contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

176. It does not give CDI the authority to "foster the solvency" of underwritten title companies as CDI portrays its role in its Notice of Proposed Action. "The purpose of the proposed action is to enact a long standing position of the California Department of Insurance ("CDI") to limit the liability of underwritten title companies to indemnify title insurers to five thousand dollars ($5,000) with some specific exceptions for intentional, willful acts and escrow-related losses, **which limitation fosters the solvency of underwritten title companies."** Notice of Proposed Action at p. 3. (Emphasis added) It only gives CDI the authority to implement the provisions that the Legislature created for the purpose of maintaining the solvency of UTCs, for example, the minimum net worth and the working capital requirements.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree

with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

177. It does not give CDI authority to invent new ways to foster the solvency of UTCs. If CDI did have that authority, CDI would have virtually unlimited power. All in the name of fostering UTC solvency, what would prevent CDI from mandating specific revenue splits between UTCs and title insurers? From forcing title insurers to pay for UTC licensing fees? From forcing title insurers to pay for the fidelity bonds of UTCs?

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed

rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

178. The Legislature itself did not create or even contemplate any liability or cost shifting provisions from UTCs to title insurers. It did not provide for any subsidies of UTCs by title insurers. Rather, it enumerated specific measures designed to *maintain* the solvency of UTCs, which require the UTCs on their own using their own resources to maintain their own financial strength.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

179. The statutory provisions which serve to help *maintain* the solvency of UTCs are as follows (the statute frequently uses the term “maintain” to identify which provisions relate to the purpose of “maintaining” solvency):

- Minimum net worth – 12389(a)(2) [UTC must maintain up to $400,000 of assets over all liabilities and required reserves for 1 million or more documents filed; UTCs must at all times maintain current assets of $10,000 over current liabilities]
- Working capital – 12389(a)(2) [UTC shall maintain current assets of at least $10,000 in excess of its current liabilities]
- Annual Audit - 12389(a)(4)(A) [UTC must submit financial information to Insurance Commissioner by March 31 each year]
- Examinations by Insurance Commissioner – 12389(c) [UTC must submit to examinations by Insurance Commissioner]
- Fidelity Bond for escrow – 12389.6(a)(1) [UTC must post bond worth at least ten times the minimum net worth requirement]

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it purports to list all of the financial criteria for licensure of UTCs. The Insurance Code sets forth the general criteria for admission of insurers, however we disagree with this comment to the extent it states that any company that complies with all the provisions of the laws of the state shall be entitled to a certificate of authority and to the extent the comment implies that the Insurance Commissioner is not authorized to promulgate the proposed regulation. Insurance Code section 717 provides in part that a company shall be denied a certificate of authority upon a finding by the Insurance Commissioner of material deficiency in any of the 717 criteria set forth, including (a) capital and surplus (c) financial stability and (j) hazard to policyholders and creditors. A similar regulation may be found in Title 10 section 2275 which regulation explains that statutory minimum criteria are just that, minimums. Regarding UTCs, Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as

contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

180. Far from evincing a legislative intent to force title insurers to subsidize UTCs, the legislative history of Section 12389 shows the opposite – a desire to protect title insurers from suffering additional costs at the hands of UTCs. Back in 1965 what prompted the Legislature to adopt Section 12389 in the first place was a spate of UTC bankruptcies which left title insurers responsible for the debts of the UTCs. The Insurance Commissioner sponsored the bill. The legislation was designed to impose a series of financial controls on UTC's and give CDI oversight and audit power over UTC's in an effort to help prevent insolvencies due to UTC mismanagement.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree with the comment to the extent that it states that a purpose of Insurance Code section 12389 is to prevent UTC bankruptcy and the resulting harm to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

181. Then-Insurance Commissioner Stafford Grady wrote to then-Governor Pat Brown asking him to sign the bill in part to protect title insurers from additional costs and also the public:

"This Section, as first enacted in 1961 and amended in 1963, has proven inadequate to protect the public. Since the last session two such companies have become insolvent **causing large losses to title insurers** and smaller losses to the public and one more is tottering on the brink." (Emphasis added) Department of Insurance, Enrolled Bill Report, signed by Insurance Commissioner Stafford Grady, May 19, 1965.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree with the comment to the extent that it states that a purpose of Insurance Code section 12389 is to prevent UTC bankruptcy and the resulting harm to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

182. The Department of Finance's bill analysis strikes a similar cord:

"This is a Department of Insurance sponsored bill that will strengthen the Insurance Commissioner's control over escrow operations of underwritten title companies. The bill will provide for minimum financial requirements to conduct this kind of escrow business, licensing to transact this business, and examination of escrow accounts to verify compliance with the law regarding trust accounts. This legislation was precipitated by two escrow operation failures in recent times." Department of Finance bill analysis, SB 379 (Collier), signed by Hale Champion, Director of Finance, May 14, 1965.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The proposed rule does not address escrow, and the comment is considered irrelevant to the extent that it addresses escrow activities. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

183. According to the author of the original legislation, Senator Randolph Collier, Section 12389 was enacted to "tighten the regulations of underwriter title companies." Correspondence from Senator Randolph Collier to Governor Pat Brown, May 10, 1965.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree with the comment to the extent that it states that a purpose of Insurance Code section 12389 is to tighten the regulation of UTCs and by implication to prevent any resulting harm to the public from UTC financial failures. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working

capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

184. It would be inconceivable to the author and the sponsor of the original legislation that their intent to crack down on mismanagement of UTCs for the benefit of title insurers would some 45 years later be used to insulate UTCs from the consequences of their own mismanagement at the expense of title insurers.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent that it implies we should not proceed with the proposed rulemaking. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

185. a. <u>Section 12389 does not authorize the Department to impose a new requirement to limit liability not contemplated in the statute</u>

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

186. Section 12389 enumerates very specific requirements that the Legislature imposed on UTCs. Those requirements are finite and mainly establish minimum capital and surplus or net worth requirements. The stated purpose of such finite and limited terms

was twofold: (1) to "maintain the solvency of the companies subject to" the section, (2) "***and*** to protect the public by preventing fraud and requiring fair dealing." (Emphasis added) Significantly, none of the section's terms relate to contractual limitations of any sort, including contracts with title companies. That is a subject or topic that the legislature did not address in the section. The commissioner is only authorized to "make reasonable regulations to govern the conduct of its [sic, read "the"] business of companies subject to this section" on the topics covered by the section. *The statute does not hand the commissioner carte blanche authority to address topics not covered in the statute.* If the commissioner exceeds the topics covered in the statute, it is acting in both an unreasonable and unauthorized manner.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b)

reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

187. Section 12389 was aimed at companies that did not have sufficient capital/surplus/net worth to run their businesses in an accountable manner. That is the problem addressed in the legislation. That is the problem which establishes the scope and limits of the DOI's regulatory authority. Nowhere does the history address inequities in the contract negotiation/agreement process that CDI recites as its basis for the proposed regulation. The subject of contract limitations and protections is not a small matter and would have likely generated significant debate and public policy considerations in the legislature had it been considered. The CDI may not supplant the Legislature's role in this sensitive area.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986,

the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

188. The attached declaration from Carolina Rose, one of California's premier legislative research experts, offers a thorough analysis of why the legislative history does not support CDI's position that CDI enjoys an implied delegation of power to adopt the contract liability limitation based on the theory that the proposed regulation furthers the purposes of the statute.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. Ms. Carolina Rose did not provide comments within the noticed time period. The proposed rule is consistent with and does not conflict with the statutes and there is no need to consider the legislative history of the statute, which is clear on its face. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an

underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

189. Furthermore, the Department's proposed regulation violates controlling case law. There is a line of cases that stands for the proposition that regulatory agencies have no authority to dictate the terms of contracts between regulated entities absent an express or implied grant of authority from the Legislature; courts have ruled this to be an impermissible "invasion of management."

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title

company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

190. The seminal case is *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, where the California Supreme Court struck down a PUC order that barred the utilities from setting their own prices for service contracts between them and mandated that the subsidiary be charged "reasonable value" or "reasonable cost," whichever is less.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The proposed regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners

authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

191. Given the lack of any express delegation of power to regulate payments under such contracts, the court analyzed whether the "power may be fairly implied from the powers that have been granted." *PacTel* at 826.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

192. The court found that the purpose of the Public Utilities Act to insure the public adequate service at reasonable rates did not give the PUC any implied power to regulate contract terms, even though the Commission had been given broad powers to protect the public and regulate the relationship of the utility to the consumer, including the services that must be provided by the utility and the rates therefore. *PacTel* at 826-

7.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also

notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

193. The court held so notwithstanding the fact that the court recognized that negotiations between a holding company and a subsidiary are not at arms-length: "Since the advent of the holding company, however, that both controls and provides services for a network of operating utilities, new problems in regulation have arisen. When services are rendered to an operating utility by an affiliated company that owns a controlling fraction of the stock of the operating company, the safeguards provided by arms-length bargaining are absent, and commissions have been vigilant to protect the rate-payers from excessive rates reflecting excessive payments by operating companies to their parents." *PacTel* at 826.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and

regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

194. The Supreme Court concluded that the lack of an arms-length relationship did not matter; the lack of any express or implied authority left the PUC powerless to dictate contract terms. "It is contended, however, that the license contract between Pacific and American is not like ordinary contracts through which utilities secure materials and services; that because Pacific and American are affiliated corporations *and because American dominates Pacific*, the commission may prescribe the terms of the contract between them. . . . The commission has thus long been conversant with the problems presented by affiliated corporations in the field of utility regulation. The instant case is apparently the first in which it has attempted to prescribe the terms and conditions of contracts between affiliates. The policy of the commission in the past not to prescribe the terms of contracts between affiliated corporations is consistent with the provisions of the Public Utilities Act." (Emphasis added) *PacTel* at 830.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and*

Telegraph Company v. Public Utilities Commission, supra P. 2d at 444. **This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.**

195. The appellate courts have followed suit. In *Barnett Stepak v. American Telephone and Telegraph*, (1986) 186 Cal.App.3d 633, the first appellate court held that there was no implied delegation of legislative authority for the PUC to regulate or even rule on the fairness of the buyout exchange ratio provisions in the merger contract between Pacific Telephone and the acquiring AT&T. The PUC's right to approve stock issues did not "imply jurisdiction over fairness to minority shareholders." *Stepak* at 643. Nor does the PUC's right to approve change of control "imply jurisdiction to protect minority

shareholder interests." *Stepak* at 643. The court found that the buyout contract terms had at best a speculative connection to PUC's charge to insure adequate service at reasonable rates. Note that the right to protect the public does not create a right to discriminate in favor of one party to the contract, the minority shareholders in this case.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Barnett Stepak v. American Telephone and Telegraph*, (1986) 186 Cal.App.3d 633, 231 Cal Rptr 37, is not controlling. In that case the first district court of appeal ruled against the Public Utilities commission in the context of a merger approval. Citing *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 the court explained that there was no specific or implied powers to the agency action in that case, and found that a generalized connection to rates and services to the action taken was too attenuated. The court in the Barnett case also recognized that the rationale for the decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, was limited in *General Telephone Co. v. Public Utilities Com.* (1983) 34 Cal3d 817, 195 Cal Rptr 695. The court explained that the crucial flaw in the overturned PUC actions was a lack of nexus between the agency order and the provision of better service, including better rates, noting that the merger that was under review had not been shown to directly impact consumer rates, which was the subject authority for the action taken. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, *supra*, is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. In the proposed rulemaking there is a direct connection between the liabilities of the UTC title agency, the title insurer, financial solvency and consumer protection. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b)

reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

196. The holding that general legislative intent language to protect the public does not permit a regulatory agency to prescribe contract terms applies with even more force to invalidate CDI's proposed regulation than it did to invalidate PUC's orders. CDI has an even weaker claim than the PUC to any implied delegation of power from the Legislature to dictate contract terms. The Legislature has conferred far more extensive powers on the PUC than it has on CDI. PUC has the power to set rates and the services provided whereas CDI can only strike individual company rates that are excessive or inadequate and has limited oversight for services. The reach of CDI's authority extends only to "maintain the solvency" of UTCs and to protect the public against UTC mismanagement. If dictating contract terms is too attenuated to the PUC's authority to protect the public and set rates and services, then it is totally divorced from CDI's authority to protect the public from UTC mismanagement. (See attached declaration.)

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the

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by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

197. Furthermore, the court held that the PUC had no right to dictate contract terms as a way to redress inequities caused by the superior bargaining position of the parent company since the Legislature did not delegate or imply such power to the agency. The same holds true in the instant case. There is no evidence that the Legislature intended to grant CDI power to redress any inequities in the bargaining relationship between UTCs and insurers so CDI does not have the authority to adopt a regulation to that end.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Barnett Stepak v. American Telephone and Telegraph*, (1986) 186 Cal.App.3d 633, 231 Cal Rptr 37, is not controlling. In that case the first district court of appeal ruled against the Public Utilities commission in the context of a merger approval. Citing *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 the court explained that there was no specific or implied powers to the agency action in that case, and found that a generalized connection to rates and services to the action taken was too attenuated. The court in the Barnett case also recognized that the rationale for the decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, was limited in *General Telephone Co. v. Public Utilities Com.* (1983) 34 Cal3d 817, 195 Cal Rptr 695. The court explained that the crucial flaw in the overturned PUC actions was a lack of nexus between the agency order and the provision of better service, including better rates, noting that the merger that was under review had not been shown to directly impact consumer rates, which was the subject authority for the action taken. The decision in *Pacific Telephone and Telegraph Company v. Public*

***Utilities Commission*, *supra*, is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. In the proposed rulemaking there is a direct connection between the liabilities of the UTC title agency, the title insurer, financial solvency and consumer protection. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.**

198. The courts have invalidated a whole host of requirements or exceptions that regulatory agencies have invented and imposed on regulated entities without express or implied authority to do so. Application of the rules stated in those cases to CDI's proposed regulation shows it to be invalid as exceeding authority under the enabling statute.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes and there is no need to consider the legislative history of the statute, which is clear on its face. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an

underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

199. In *Douglas Bearden v. U.S. Borax, Inc.*, (2006) 138 Cal.App.4th 429, the appellate court declared an Industrial Welfare Commission regulation invalid for exceeding statutory authority. The regulation created an exception to the meal break requirement for employees covered by a collective bargaining agreement. The court held that the IWC had no authority to create additional exceptions to the two exceptions already provided by statute on the theory that if exemptions are specified in statute, the agency may not imply additional exemptions unless supported by clear legislative intent. Applying the same rule to the instant case, CDI is not authorized to invent a new requirement for title insurers to assume liability for UTCs' negligence because a finite list of requirements was already specified in statute and there is no clear legislative intent to imply new requirements.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum

submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The court of appeal in *Bearden v. U.S. Borax, Inc*. (2006) 138 CalApp4th 429, 41 CalRptr3d 482 reviews a different statutory scheme in the Labor Code, including specific statutory exemptions; the regulatory agency involved in the *Bearden* case had different authorization than the Insurance Commissioner has expressed and implied under the Insurance Code. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title

companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

200. In *Hermelinda Aguiar v. The Superior Court of Los Angeles County*, (2009) 170 Cal.App.4th 313, the appellate court invalidated a City of Los Angeles regulation that restricted the living wage ordinance to city employees working greater than 20 hours per week. The court found that the regulation exceeded authority because it limited the authorizing statute which provided that the living wage shall apply to employees that spent "any" time working for the City. The appellant's claim that it had discretion to fill in the details of the authorizing legislation was rejected by the court.2 *Aguiar* at 325-326. Here, CDI invents a new requirement for title insurers to assume liability of the UTCs but similarly fails to identify a gap that authorizes the imposition of that requirement.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department

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2 "Cintas insists Regulation's 20-hour rule does not conflict with the LWO, but merely serves as a "gap-filler" to "fill in the details" of the authorizing legislation. (See *Yamaha, supra, 19 Cal.4th at p. 19* (conc. opn. of Mosk, J.) [statutory scheme may "explicitly or implicitly delegate this interpretive or 'gap-filling' authority to an administrative agency"]; *Ford Dealers Assn. v. Department of Motor Vehicles, (1982) 32 Cal.3d 347, 362 [185 Cal. Rptr. 453, 650 P.2d 328]* ["An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate. '[T]he absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority ... .' [Citations.] The DMV is authorized to ' "fill up the details" ' of the statutory scheme."].) Yet, Cintas fails to identify where in the ordinance the purported gap exists. At best, Cintas observes that, absent a specific hour minimum in the LWO itself, there can be no conflict between the LWO and the minimum time requirements in Regulation 5. Not only is this argument circular, but also it wholly disregards the term "any time" in the statute itself that denotes an express legislative intent not to impose a minimum time requirement." *Aguiar* at 325-326.

which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The court of appeal decision in *Aguiar v. The Superior Court of the City of Los Angeles* (2009) 170 CalApp4th 313, reviews a municipal authority implementation of a minimum wage statute in a manner that conflicted directly with the enabling statute. This decision is not controlling. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section

12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

201. a. Section 12389 regulates the business of UTCs and does not authorize the Department to impose any requirements on title insurers

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to

the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

202. Usually the debate over the scope of an authorizing statute where, as here, the Legislature lists a series of requirements imposed on a regulated party and authorizes an agency to implement those requirements centers on whether the agency only has authority to implement those specific enumerated provisions on the regulated party or has broader authority to invent new requirements on the regulated party in furtherance of the legislative purpose.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. This comment is consistent with other comments by the same Commentator and is factually incorrect. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long

standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of

certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

203. But in this case the issue is categorically different – and involves a radically more expansive assertion of rulemaking authority by an administrative agency. Here, CDI is asserting that the business regulation statute for one party (i.e., UTCs) gives it authority to impose requirements on another party not subject to the section at issue (i.e., title insurers) in order to further the purposes of the statute for the benefit of the regulated party (i.e., UTCs). But the Department does not have the authority to impose requirements on a wholly separate entity not subject to the authorizing statute.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. This comment is consistent with other comments by the same Commentator and is factually incorrect. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the

public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

204. Section 12389 explicitly says that the Commissioner's rulemaking authority is limited to making "reasonable rules and regulations *to govern the conduct of its business of companies subject to this section."* (Emphasis added) Insurance Code Section 12389 (d). The only business subject to Section 12389 is the business of UTCs. Section 12389 regulates the business of UTCs. As the references above to the legislative history bear out, Section 12389 was designed to tighten the requirements on UTCs and there is no reference to even the possibility that Section 12389 could apply to

title insurers.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to

carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

205. Title insurers are not subject to this section. In fact, title insurers are subject to other insurance code sections which regulate the business of title insurance.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title

companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

206. Every single requirement the Legislature specified in Section 12389 to maintain the solvency of UTCs is a financial control that is imposed on a *UTC* exclusively and which calls on the UTC to manage its own financial operations with its own resources for the purpose of maintaining its own solvency.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

207. Section 12389 does not impose any requirements on title insurers nor does it confer any authority on CDI to impose requirements on title insurers for the purpose of maintaining the solvency of UTCs. The operative section strictly has to do with regulating the business of UTCs. Section 12389 strictly governs the conduct of UTCs, and not title insurers.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance

Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

208. Courts have consistently interpreted Section 12389 to find that the phrase "companies subject to this section" applies to UTCs. (See *State ex rel. Harris v. PricewaterhouseCoopers*, LLP, (2006) 39 Cal. 4th 1220 at 1222 at footnote 3. "Insurance Code section 12389**,** subdivision (a)(4) requires an underwritten title company such as Old Republic annually to submit to the Insurance Commissioner an audit report certified by independent auditors. The statutory purpose is to "maintain the solvency of the companies subject to this section and to protect the public by preventing fraud and requiring fair dealing;" See also *Quackenbush v. Superior Court of Santa Barbara County*, (1997) 57 Cal. App. 4th 660 at 662 ("Section 12389, subdivision (d) provides in part: "At any time that the commissioner determines, after notice and hearing, that a company licensed under this section has willfully failed to comply with any of the provisions of this section, the commissioner shall make his order prohibiting the company from conducting its business for a period of not more than one year. [P] . . . [P] The purpose of this section is to maintain the solvency of the companies subject to this section and to protect the public by preventing fraud and requiring fair dealing.")

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of

underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

209. An exhaustive review has found no case that interprets Section 12389 to apply to title insurers.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a

long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

210. The Department is attempting to use its exaggerated version of the legislative intent language in Section 12389 which otherwise supports the Legislature's imposition of financial controls on UTCs as the authority for it to impose a requirement on title insurers to assume the costs of UTC negligence. In other words, the Department is attempting to lift out the intent language supporting its ability to regulate the business of UTCs and use it as the rationale for regulating the business of title insurers. The Department's interpretation of its rulemaking authority impermissibly enlarges the scope of the authorizing statute. The proposed regulation is thus invalid.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule fills up the details of the statutes addressing solvency of UTCs, it does enlarge the scope of the applicable statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for

underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

211. *Pacific Telephone and Telegraph Company v. PUC,* supra, lends direct support to this view. While the Supreme Court railed against a regulatory agency prescribing contract terms between affiliated entities, it was even more vociferous against an agency dictating the terms between separate entities: '"Moreover, there is no basis for such broad jurisdiction in the principles governing the disregard of corporate entity. In the present case the commission is not disregarding completely the separate entities of Pacific and American. It does not seek to exercise regulatory jurisdiction directly over American, under the theory that American is in fact the operating utility subject to its jurisdiction. It recognizes that American provides Pacific with valuable services for which Pacific should pay. It would disregard only the terms of the contract by which it is determined how much Pacific should pay for the services it receives, and this substitute its judgment for that of the management as to the reasonable amount and the method of its computation. *Thus the commission is seeking to disregard the separate corporate entities, not to exercise more effectively its existing jurisdiction, but to extend its jurisdiction."* (Emphasis added) *PacTel* at 831-832.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial

solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

212. In the same way, CDI is attempting to prescribe the contract terms between separate entities to substitute its judgment on the risk allocation issue, not to exercise its jurisdiction, but to extend it. This is impermissible.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and*

Telegraph Company v. Public Utilities Commission, supra P. 2d at 444. **This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.**

213. Furthermore, CDI's claim as to the source of its authority is much weaker than the PUC's claim. The PUC cited as its source of implied authority the Public Utilities Act itself – which governed the activities of both of the regulated parties to the contract at issue there. By contrast, CDI here is citing as its source of implied authority the UTC regulatory section (i.e., Section 12389) – which only governs the activities of one party to the contract (i.e., UTCs), and does not cover the other party to the contract (i.e., title insurers). Thus the case that CDI's proposed regulation is invalid is even stronger than

the rationale for the decision in *PacTel* where the order was invalidated as exceeding the agency's authority.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance

laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

214. In the 30 years since the adoption of the statute, no insurance commissioner has so much as suggested that the Department has regulatory authority even to invent new requirements on UTCs themselves to maintain their solvency, much less assert regulatory authority to force a party other than UTCs to foster the solvency of UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is factually inaccurate. We disagree with the comment to the extent it implies we should not go forward with the rulemaking as proposed. The decision in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1950) 34 Cal.2d 822, 215 P. 2d 441 is not controlling. In that decision the California Supreme Court overturned an administrative order arising out of a securities issuance approval, interpreting rate regulation statutes, concerned contracts with unregulated entities, addressed statutory authority for uniform accounting systems and regulatory concerns regarding minority shareholder rights. See *Pacific Telephone and Telegraph Company v. Public Utilities Commission, supra P. 2d at 444.* This late comment is presented in the context of a regulatory proposal, for which the Commentator received notice and had an opportunity to be heard. The Insurance Code sets forth authority that is different from the Public Utility Commissions' authority. *See Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. The regulation pertains to two licensed entities, both of whom are subject to licensing requirements, including financial solvency. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs

by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The case cited in this late comment also notes that the ruling may have been different if the regulatory order were to protect against impairment of capital or ability to serve the public. *Id*. P. 2d at 447. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

215. Notwithstanding that fact, this Department would interpret its rulemaking authority in truly unprecedented fashion to give itself the power to force a separate business entity to subsidize the operations of UTCs. The proposed regulation would require title insurers to absorb losses solely attributable to the negligence of UTCs. But there is clearly insufficient legislative authority to justify this unwarranted and unprecedented enlargement of the statutory delegation of rulemaking authority for the Department.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1

provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

216. The Department's interpretation is inconsistent with the statutory framework and the corpus of California law

Whether the liability limitation regulation is authorized is an issue of statutory construction to be determined by appropriate application of Section 12389 in consideration of the overall body of law of which the UTC regulation statute is a part as well as other relevant authority.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions

therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

217. Where an agency has the authority to adopt regulations to implement or carry out a legislative scheme, any regulation so adopted must be "consistent and not in conflict with the statute." *Mineral Associations Coalition v. State Mining and Geology Board*, 113 Cal.App.4th 574, 583 (2006), citing Gov. Code Section 11342.2 and *City of San Jose v. Department of Health Services*, (1998) 66 Cal.App.4th 35, 41-42. An administrative agency has no authority to promulgate a regulation that is inconsistent with controlling law. *Mineral Associations Coalition* at 583 citing *Communities for a Better Environment v. California Resources Agency*, (2002) 103 Cal.App.4th 98, 109-110.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department

which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority

requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

218. For example, In *Home Depot v. Contractors' State Licensing Board*, (1996) 41 Cal.App.4th 1592, the court struck down the Board's regulation to bar contracts between general contractors and two or fewer trades or crafts businesses. The court said it was inconsistent with the statutory framework which only defined a general contractor's "principal" business as involving two or more trades, not the contractor's "exclusive" business. *Home Depot* at 1604.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the

commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

219. Similarly, here a court would strike down the proposed regulation because there is no indication in the code to suggest that the Legislature intended, approved, or enacted any provision to force title insures to assume liability for UTCs' errors or negligence or otherwise subsidize UTCs. There is no provision in the overall statutory framework that requires title companies to assume liability for UTCs or to otherwise subsidize UTCs. There is no statement of legislative intent anywhere in the Insurance code to force title companies to assume liability for UTCs or otherwise subsidize UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment to the extent it suggests there is no authority for the proposed rulemaking. The proposed rule is consistent with and does not conflict with the

statutes. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The Insurance Commissioner has express and implied authority under the Insurance Code for the proposed rulemaking. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. The commentator in another comment states that Insurance Code section 12389 (a) provides that a UTC may engage in the business of preparing title searches, etc. "provided that" 1) it is a domestic corporation and it has a certificate of approval for its name 2) it maintains a specific net worth, 3) it obtains a license to transact its business and meets requirements as to securities and filing or an application for license 4) it furnishes an audit to the commissioner annually; with respect to the license the applicant "conforms to the requirements of this section and all other provisions of this code specifically applicable. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of plan of operation (c) financial stability and (i) hazard to the public. Underwriting agreements are part of the plan of operation of an underwritten title company, and provisions therein impact minimum net worth and working capital, financial stability and hazardous condition license criteria. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the

Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

220. To the contrary, other sections of the insurance code build in protections for title insurers from discrimination and infringement of the free market. The Insurance Code prohibits the regulation of rates from being "unfairly discriminatory." Insurance Code 12401.3(a).

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates Insurance Code section 12401.3(a) which statute in part prohibits rates from being unfairly discriminatory; the errant comment and the cited statute are irrelevant to the proposed rulemaking, which does not address title insurance rates. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent

the comment implies not going forward with the rulemaking as proposed.

221. The Code also prohibits the requirement for title insurers to provide financial data to the Department from "in any way impair[ing] competitive rating or the free market." Insurance Code Section 12401.5(d)(3).
Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment and the cited statute are irrelevant to the proposed rulemaking, which does not address title insurance statistical plan captured data. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

222. In fact, the thrust of the insurance code is geared more toward protecting the solvency of title insurers rather than UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets

minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

223. The general legislative purpose of the section authorizing the Commissioner to regulate rates of title insurers reflects the twin priorities of promoting the public welfare and protecting insurers from, among other things, "inadequate" and "unfairly discriminatory" rates. Insurance Code Section 12401. A rate is held to be inadequate if it is unreasonably low for the insurance and other services provided and "the continued use of the rate endangers the solvency of the person or entity using it" or "destroys competition." Insurance Code Section 12401.3(a). One independent criterion for the classification of rates is "the size of a transaction and its effect upon the continuing solvency of the person or entity using the rate in question if a loss should occur." Insurance Code Section 12401.3(d).

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment cites Insurance Code provisions regarding rates not being "inadequate" or "unfairly discriminatory." The comment and the cited statute are irrelevant to the proposed rulemaking, which does not address title insurance rates. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes

and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

224. What's more, California law generally disfavors shielding a party from liability for its own negligence.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment

implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

225. Of particular note is the fact that the regulation is intentionally one-sided: UTCs are insulated from liability and title insurers are saddled with the UTC's excess liability over $5,000.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. Further, Insurance

Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

226. The Department's proposed regulation offends the official public policy of the state against contracts that insulate a party from its own negligence. Civil Code Section 1668 declares: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is irrelevant to the extent it addresses intentional and willful acts which are specifically excluded from the proposed rule. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that

address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

227. Moreover, the Department's proposed anti-indemnity provision is radical. Contrast the anti-indemnity provisions enacted by statute in California for construction contracts. The policy of the state is to invalidate a contract provision which holds one party responsible for the negligence of another: "Except as provided in Sections 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and which purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to such promisee, or for defects in design furnished by such persons, are against public policy and are void and unenforceable; provided, however, that this provision shall not affect the validity of any insurance contract, workers' compensation or agreement issued by an admitted insurer as defined by the Insurance Code." California Civil Code Section 2782.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is irrelevant to the extent it addresses statutes that are not applicable to the proposed rule. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with

the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

228. In stark contrast, the Department's proposed regulation seeks to accomplish the exact opposite objective: to require, not invalidate, contract terms that force one party to assume the liability for the negligence of another party.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates the proposed regulation and is irrelevant. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to

regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the

underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

229. The Department's interpretation is not reasonable

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment and reject it to the extent it requests not going forward with the rulemaking as proposed.

230. Shifting liability for negligence would make any UTC solvency concerns worse, not better.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment and reject it to the extent it requests not going forward with the rulemaking as proposed.

231. A central premise of the proposed regulation is fundamentally flawed. CDI's implicit position is that the problem of UTC negligence is so rampant that it threatens the very solvency of the industry. Its proposed solution, however, only exacerbates the problem. CDI proposes to hold UTCs largely harmless of liability for their own errors and negligence and shift that liability to the title insurers, but this will only undermine the UTCs' incentive to correct the very problem of rampant negligence that the regulation purports to solve in the first place.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates the rationale for the proposed regulation and is irrelevant. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the

underwriter's liability and threatening the UTC's viability. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We recognize that other states may have similar substantive rules that are set forth expressly in statute rather than by rule or regulation, however there is little uniformity in the regulation of title insurance agents amongst the states and we disagree with the implication of the comment that because a few other states expressly regulate the issue through statutes, that the California legislature can not delegate the regulation of this matter to the Insurance Commissioner. Insurance Code section 12389 expressly permits the promulgation of regulation that govern the business of UTCs, which is the business of title insurance. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement, and the proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We also agree that shifting of liability can be set by statute, but disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

232. Shifting liability for negligence away from the responsible party would be unfair.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment

is of a general nature. We disagree with the comment and reject it to the extent it requests not going forward with the rulemaking as proposed.

233. The Department maintains that part of its rationale for the regulation is to redress inequities visited on UTCs due to the title insurer's superior bargaining position. But how is it inequitable to hold UTCs liable for their own negligence? Is it equitable to force title insurers to assume liability for the UTC's negligence?

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The commentator in a previous comment acknowledges that the relationship between the title insurer and the UTC is principal and agency. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. Public policy as established by the legislation supports this. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

234. Foisting the costs of a culpable party's negligence on to an innocent party is unfair.

It runs counter to the fundamental premise of law that liability follows error. It forces an innocent party to subsidize the negligent actions of the culpable party. In so doing, it unjustly enriches the negligent party.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The commentator in a previous comment acknowledges that the relationship between the title insurer and the UTC is principal and agency. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. Public policy as established by the legislation supports this. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

235. The Department's solution perpetuates an inequity, it does not redress one.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree

with the comment. The commentator in a previous comment acknowledges that the relationship between the title insurer and the UTC is principal and agency. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. Public policy as established by the legislation supports this. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

236. The Department has not established an evidentiary basis to show the proposed regulation is necessary

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. The primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability. The proposed regulation is both convenient and reasonably necessary to govern the business of title insurance. The Insurance Commissioner believes the proposed rulemaking is reasonably necessary and that the rulemaking record

in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

237. Courts will review an agency regulation to determine whether its action is reasonable or is "arbitrary, capricious, or lacking in evidentiary support." *Pitts v. Perluss*, (1962) 58 C.2d. 824, 833, 27 C.R. 19; *California Hotel and Motel Assn v. Industrial Welfare Commission*, (1979) 25 C.3d 200, 212, 157 C.R. 840; *California Assn. of Nursing Homes v. Williams,* (1970) 4 C.A. 3d 800, 810, 84 C.R. 590, regulations of Medi-Cal administrator were invalid, lacking evidentiary support.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

238. Government Code section 11350, subdivision (b), as amended in 1982, permits a court to declare a regulation invalid if "the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law which is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence."

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section

12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

239. The Department's regulation lacks evidentiary support in multiple areas and a court or reviewing agency is bound to invalidate it on that basis.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title

companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

240. $5,000 level

The Department has not established any factual basis for setting the liability limit at $5,000. The Department refers to fact that it wants to require that UTCs retain some level of responsibility for their own acts presumably to retain an incentive not to commit negligence: "This regulation will create an incentive for underwritten title companies to perform their functions carefully and diligently." Initial Statement of Reasons at 2. But the Department has not offered any evidence as to why a low level such as $5,000 in particular would be an adequate incentive to motivate a UTC against committing negligence. The fact that $5,000 was the level established more than twenty years ago, and the Department is not even proposing that it be adjusted for inflation over the years suggests it is arbitrary and not designed to ward off negligence at all. If it were designed to combat negligence, then why is the level not set as a percentage of the total claim or as a percentage of the revenue received for the work on the particular property at issue? As proposed, the limit bears no relationship to the risk of UTC's exposure and carries little or no weight as an economic incentive for the UTCs to carefully and diligently perform its functions.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389

including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. We agree with the comment to the extent that the five thousand dollar amount is a long standing rule and was the contemporaneous agency interpretation. A fixed dollar amount clarifies the limitation and correlates to the fixed dollar amounts for net worth and working capital set forth in Insurance Code section 12389. There has been no adjustment for inflation as to the statutory minimum requirements set forth in Insurance Code section 12389. The Commissioner rejects the comment to the extent the comment implies that the dollar amount should be a percentage or otherwise not going forward with the rulemaking.

241. The Department states that in proposing the adoption of the regulation it has relied upon the Government Accountability Office's report to the House Committee on Financial Services which discusses actions needed to improve oversight of the title industry.3 Notice of Proposed Action at 3. Significantly, the report did not recommend a liability limitation rule as one of the measures to improve oversight of the industry. In fact, the Department identifies seven different sources upon which it relied in adopting the regulation and not one of them recommends the adoption of a liability limitation rule.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389

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3 "Title Insurance Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers," United States Government Accountability Office (GAO) Report to the Ranking Member, Committee on Financial Services, House of Representatives, April, 2007.

including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The comment suggests that a portion of the rulemaking record does not expressly request the proposed rulemaking. Actually the commentator himself prompted the proposed rulemaking. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

242. The GAO report is the only source that even mentions a liability limitation rule. But the report lends no support whatsoever to the Department's proposed rule. The report asserts that underwriters said that a "deductible" of $5,000 gave agents on incentive to perform their work more diligently. GAO report at 43-44. The article did not suggest, however, that a liability limit of $5,000 gave agents an incentive to perform their work more diligently. The difference is that even after an agent satisfies the $5,000 deductible, the agent can still be held liable for its own errors and/or negligence beyond that level. With a liability limit, the agents are insulated from further exposure so their incentive to perform diligently evaporates.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The comment suggests that a portion of the rulemaking record does not expressly request the proposed rulemaking, but acknowledges the existence of the rule and some of its benefits. The Insurance Commissioner also believes the proposed rulemaking is

reasonably necessary and that the rulemaking record in its entirety supports its necessity. We agree with some of the comment, however not that the rulemaking record should be parsed and not to the extent the comment implies not going forward with the rulemaking.

243. Rationale to redress "inequities" caused by title insurers' allegedly superior bargaining position

The problem that the Department cites as the reason for the regulation is purely hypothetical.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The comment suggests that the proposed rulemaking is not necessary. The Insurance Commissioner believes the proposed rulemaking is convenient and reasonably necessary and that the rulemaking record in its entirety supports its necessity. We disagree with the comment to the extent the comment implies not going forward with the rulemaking.

244. The Department essentially argues that title insurers have such an overwhelming bargaining advantage over UTCs that the Department needs to override freedom of contract and mandate by regulatory fiat the transfer of all liability for loss above $5,000 on to title insurers in order to preserve the solvency of UTCs.

Response: The Comment is 231 days late. The CDI notice states that any

comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted at that time the reverse competition and captive market as being part of the concern of the then Insurance Commissioner's rulemaking and found those regulations valid. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

245. The Department characterizes the title insurers' bargaining advantage as superior: "These title insurers are in superior economic position to their agent underwritten title companies and, given the unequal bargaining power between these entities, provisions

in underwriting agreements are often not the result of arms length negotiations and may financially disfavor and disadvantage the underwritten title companies." Notice of Proposed Action at p. 3.

However, the Department does not provide any support for its claim that title insurers are in a superior economic position – no economic studies, no analysis of the respective financial conditions of the industries, no reports of any kind.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted at that time the reverse competition and captive market as being part of the concern of the then Insurance Commissioner's rulemaking and found those regulations valid. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance

Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

246. The GAO report mentions that "the industry is moving toward more risk borne by agents." GAO report at 44. What is noteworthy is that the report does not object to that trend whatsoever or suggest that it is the result of unequal bargaining positions between agents and insurers or call for limits on the ability of the parties to negotiate agreements to reverse that trend.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

247. The Department cites the GAO testimony to Congress on title insurance issues as a source upon which it relied in proposing the liability limitation,4 but it provides no support for the regulation itself. The testimony asserts that oversight over agents is "usually negotiated between the insurer and the agent by contract." Testimony at 45. One such contract provision is risk allocation at issue here. Contrary to CDI's assertions, the report suggests that contract provisions in the underwriting agreement add to consumer protection because they provide additional oversight over agents. Moreover, the report suggests that agents have ample bargaining power against insurers – so much so that the agents are able to prevent some insurer attempts to oversee wayward agents: "Industry participants told us that *contractual stipulations* and questions of unfair competitive practices were among the reasons that prevented insurers from looking into independent agents' operating accounts." Testimony at 45.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted at that time the reverse competition and captive market as being part of the concern of the then

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4 "Title Insurance Preliminary Views and Issues for Further Study," Statement of Orice M. Williams, Director of Markets and Community Investment, United States Government Accountability Office (GAO) Testimony Before the Subcommittee on Housing and Community Opportunity, Committee on Financial Services, House of Representatives, April 26, 2006.

Insurance Commissioner's rulemaking and found those regulations valid. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

248. In fact, the California Supreme Court's view of the economic relationship between title insurers and UTCs is very salutary and stands in marked contrast to the Department's view of an institutional, systemic disadvantage for UTCs who are relegated to an inferior position in the relationship. In *Title Insurance Company of Minnesota v. State Board of Equalization*, (1992) 4 Cal.4th 715 in analyzing the indemnification provisions in title underwriting agreements in California, the court characterized the underwriting agreement as "arms-length" and suggested that the risk transfer provisions in the contract allocate risk efficiently and proportionately between the parties.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered.

The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the contracts have not been subject to the longstanding regulatory rule and that the agreements are subject to arms length negotiations. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

249. “The title insurer and the title company, through the underwriting agreement, have agreed to allocate the labor, risk, liability, and premium involved in the preparation and issuance of a contract of title insurance. The underwriting agreement is an arm's-length contract; each party has presumably agreed that the values of the performances are

equal, and each has promised consideration in return for the other's promised performance. Under the agreement, the underwritten title company retains a portion of the premiums and undertakes certain obligations, among them searching title and paying a share of certain claims arising under the policy. The title insurer forgoes the portion of the premium attributable to the portion of the risk that is allocated to the underwritten title company. Nevertheless, the insurer remains liable to the insured and must pay the full amount of the claims if the underwritten title company fails to perform in accordance with its obligation under the underwriting agreement." *Title Insurance Company of Minnesota* at 725.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the contracts have not been subject to the longstanding regulatory rule and that the agreements are subject to arms length negotiations. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital

requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

250. The court noted that there is a great variety of indemnification provisions in underwriting agreements which suggests that negotiation is robust, which counters the Department's view that the provisions are often to the disadvantage of UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the contracts have not been subject to the longstanding regulatory rule and that the agreements are subject to arms length negotiations. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section

12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

251. "As noted earlier, all of the underwriting agreements at issue in this case allocate to the underwritten title companies the obligation to pay a portion of certain title insurance claims. The provisions for payment of claims in the underwriting agreements vary; some contemplate that the underwritten title company will pay claims up to a certain sum, while others provide that the underwritten title company will pay some or all of the claims due to its negligence in searching title." *Title Insurance Company of Minnesota* at 722.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the contracts have not been subject to the longstanding regulatory rule and that the agreements are subject to arms length negotiations. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct

of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

252. What is the evidence to support the Department's claim to the contrary that "underwriting agreements are **often** not the result of arms length negotiations"? (Emphasis added)

The Department has offered no evidence to corroborate its view that title insurers and UTCs cannot negotiate risk transfer provisions fairly in a free market.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the contracts have not been subject to the longstanding regulatory rule and that the agreements are subject to arms length negotiations. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license

unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

253. The Department has not offered any evidence to explain why the Department believes that the parties cannot fairly negotiate risk transfer provisions but apparently can fairly negotiate all of the other provisions in an underwriting agreement, including revenue splits, without the need for intervention by the Department.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the contracts have not been subject to the longstanding regulatory rule and that the agreements are subject to arms length negotiations. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins.*

***Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.**

254. With all of this conjecture, still the most that the Department can say is that the underwriting agreements *"may* disfavor and disadvantage the underwritten title companies." Notice of Proposed Action at p. 3. This is a very revealing statement as it amounts to a tacit acknowledgment that the Department does not have any evidence to conclude that UTCs are in fact disadvantaged in the final analysis.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the contracts have not been subject to the longstanding regulatory rule and that the agreements are subject to arms length negotiations. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to

implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

255. The Department tautologically asserts that "inequities in the underwriting provisions pertaining to indemnification and risk transfer between the insurers and underwritten title companies are not consistent with regulatory efforts to limit such transfers of liability to the smaller, less capitalized underwritten title companies." Notice of Proposed Action at 3. The Department's assertion has no effect because it amounts to saying that the problem they cite is inconsistent with the solution they offer.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the extent it implies the longstanding regulatory rule is inconsistent with the statutes pertaining to UTCs and title insurers. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title

companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

256. But the Department does not so much as cite any specific inequities in the underwriting provisions. By the Department's own admission, "for at least the past twenty years," CDI has been forcing title insurers to assume all risk over $5,000. So the inequities of which they complain do not exist and have not for at least the last twenty years. Does the Department consider it inequitable to hold UTC's liable for their own negligence?

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We agree that shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. We disagree with the statement to the

extent it implies the longstanding regulatory rule is inequitable. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. This longstanding rule is reasonably necessary to effectuate the statutory licensing requirements. The proposed regulation is a longstanding rule of the Department which has existed at least since 1986, and that after the SafeCo memorandum submitted by this very same Commentator was submitted in 1986, the Commissioner continued to implement the rule. We note there has been no judicial challenge of the rule by the Commentators or any other interested party. This proposed regulation is designed to aid statutory objectives, including the promotion of the solvency of UTCs. The California Supreme Court in the more recent decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) has held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

257. Threat to solvency of UTCs

The Department has not offered any evidence to suggest that liability issues uniquely threaten the solvency of UTCs.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California

Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

258. CDI has not conducted an economic analysis or even pointed to a market study that concludes that the solvency of UTCs is threatened in California due to the specter of liability for its own errors and negligence in conducting title searches.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The UTC's negligence in conducting the title search is the nature of the title risk insured by the title insurer. To the extent the commentator is suggesting that this risk should be borne by the title agency rather than the title insurer, the comment is

rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

259. The GAO testimony that the Department cites suggests that California is one of the most aggressive states, if not the most, in regulating and providing oversight over UTCs. Testimony at 45. CDI has made no showing why the litany of requirements that California imposes on UTCs are not already adequate to maintain the solvency of UTCs – why is it not enough in California when apparently all other jurisdictions are doing less?

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment

assumes that the GAO was not endorsing California's regulation of UTCs, including the five thousand dollar rule, which the GAO was aware of as the Commentator notes in other comments. In comments submitted by the same Commentator, it was noted that other states have similar rules by statute. To the extent the commentator is suggesting that the five thousand dollar rule should be eliminated, the comment is rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

260. What is the aggregate outstanding monetary liability attributable to UTC errors and negligence in the California market today?

The GAO testimony estimates that loss and loss expense represent only 5% of total industry costs as a percentage of premiums written. GAO testimony at 4. How could a

small fraction of the total cost represent such a huge threat to threaten the solvency of the UTC industry?

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment assumes that the GAO was not endorsing California's regulation of UTCs, including the five thousand dollar rule, which the GAO was aware of as the Commentator notes in other comments. In comments submitted by the same Commentator, it was noted that other states have similar rules by statute. To the extent the commentator is suggesting that the five thousand dollar rule should be eliminated, the comment is rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

261. How many UTCs are specifically threatened with insolvency due to their own negligence? How could insolvency be a problem at all since nearly all UTCs maintain errors and omissions insurance coverage? Is the Department suggesting that the real problem then is the high cost of E&O coverage? The Department has offered no evidence to support that proposition.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The UTC's negligence in conducting the title search is the nature of the title risk insured by the title insurer. To the extent the commentator is suggesting that this risk should be borne by the title agency rather than the title insurer, the comment is rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The

Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

262. What steps has CDI taken to prevent or curb the problem of UTC negligence if it is such a colossal problem threatening to take down the industry? Is it reasonable to allow the problem of UTC negligence to persist unabated and instead to shift liability for UTC negligence to another party? Won't immunizing UTCs from liability for their own negligence just undercut their incentive to prevent committing negligence in the first place?

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The UTC's negligence in conducting the title search is the nature of the title risk insured by the title insurer. To the extent the commentator is suggesting that this risk should be borne by the title agency rather than the title insurer, the comment is rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the

proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

263. The Department has made no showing that shifting liability to title insurers would alleviate any UTC solvency concerns.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The UTC's negligence in conducting the title search is the nature of the title risk insured by the title insurer. To the extent the commentator is suggesting that this risk should be borne by the title agency rather than the title insurer, the comment is rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in

its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

264. Has CDI considered the ramifications of the policy? Will the solvency of UTCs be more threatened by the liability limitation due to the likely reaction by insurers to reduce the revenue split to UTCs to price in the added liability cost insurers would otherwise be forced to bear? If the insurers do not adjust the revenue splits, will the solvency of insurers be threatened? Which business is more threatened with insolvency in the California market -- the insurers or the UTCs?

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The UTC's negligence in conducting the title search is the nature of the title risk insured by the title insurer. To the extent the commentator is suggesting that this risk should be borne by the title agency rather than the title insurer, the comment is rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title

companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

265. Alternatives to the liability limitation

The Department has not explained why it believes that the many provisions currently available to aggrieved parties under California law to invalidate inequitable contract provisions are not sufficient to address any problems that may occur, e.g., the doctrines of unconscionability,5 adhesion,6 void as against public policy, etc.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The UTC's

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5 For a discussion of the rules pertaining to procedural and substantive unconscionability, see *Wayne v. Staples, Inc.*, (2006) 135 Cal.App.4th 466.

6 *Gray v. Zurich Insurance Company*, (1966) 65 Cal.2d 263, 269-271. The California Supreme Court outlined the doctrine of adhesion for insurance contracts as follows:

"In interpreting an insurance policy we apply the general principle that doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.

These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract. As this court has held, a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it" basis carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.

Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect. Thus as Kessler stated in his classic article on adhesion contracts: "In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's `calling', and to what extent the stronger party disappointed reasonable expectations based on the typical life situation." (Kessler, *Contracts of Adhesion* (1943) 43 Colum.L.Rev. 629, 637.)

Professor Patterson, in describing one characteristic consequence of "the conception of adhesion, whether that term is used or not," writes: "The court interprets the form contract to mean what a reasonable buyer would expect it to mean, and thus protects the weaker party's expectation at the expense of the stronger's. This process of interpretation was used many years ago in interpreting (or construing) insurance contracts...." (Fn. omitted; Patterson, *The Interpretation and Construction of Contracts* (1964) 64 Colum.L.Rev. 833, 858.)"

negligence in conducting the title search is the nature of the title risk insured by the title insurer. To the extent the commentator is suggesting that this risk should be borne by the title agency rather than the title insurer, the comment is rejected. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth"are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

266. OAL or a reviewing court should accord no deference to CDI's flawed interpretation of its authority to adopt the liability limitation rule

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment.

267. When reviewing a challenge to the authority of an administrative agency to adopt a regulation, a reviewing court does not accord any deference to the agency's contention that it is so empowered. The different circumstance when a reviewing court does give deference to the agency's view is the separate and secondary inquiry into whether the agency's proposed rule is reasonable to accomplish the purposes of the statute. The threshold inquiry to determine the scope of authority is strictly a legal analysis where the agency has no claim to greater expertise than a reviewing court whereas the subsequent process of evaluating the reasonableness of the regulation implicates the special expertise of the agency in the subject matter at hand.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in

capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

268. The California Supreme Court discussed this distinction in *California Association of Psychology Providers v. Peter Rank*, (1990) 51 Cal.3d 1, 11-12: "When a court inquires into the validity of an administrative regulation to determine whether its adoption was an abuse of discretion, the scope of review is limited. As we said in *Pitts v. Perluss (1962) 58 Cal.2d 824 [27 Cal. Rptr. 19, 377 P.2d 83]*, "[a]s to quasi-legislative acts of administrative agencies, 'judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law.'" (P. 833; see *Culligan Water Conditioning v. State Bd. of Equalization (1976) 17 Cal.3d 86, 92-93 [130 Cal. Rptr. 321, 550 P.2d 593]*.) [5]

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the

purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

269. When, however, a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute. Thus, *Morris v. Williams (1967) 67 Cal.2d 733 [63 Cal. Rptr. 689, 433 P.2d 697]*, in finding that the challenged regulations contravened legislative intent, rejected the agency's claim that the only issue for review was whether the regulations were arbitrary or capricious. Our opinion explained that "[w]hile the construction of a statute by officials charged with its administration . . . is entitled to great weight, nevertheless, '[w]hatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts.' [Citation.] Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (P. 748; see *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1388-1389 [241 Cal. Rptr. 67, 743 P.2d 1323]*; *Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 Cal.3d 374, 387 [216 Cal. Rptr. 733, 703 P.2d 73]*.) Although in determining whether the regulations are reasonably necessary to effectuate the statutory purpose we will not intervene in the absence of an arbitrary or capricious decision, "we need not make such a determination if the regulations transgress statutory power." (*67 Cal.2d at p. 749*.)" *Rank* at 11-12.

Response: The Comment is 231 days late. The CDI notice states that any

comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

270. Courts have consistently held that an agency's determination that it is authorized to adopt a particular regulation is entitled to no deference. *Kaiser Foundation Health Plan v. Daniel Zingale*, (2002) 99 Cal.App.4th 1018, 1028: " 'Quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has final responsibility for the interpretation of the law under which the regulation was issued.'" *Kaiser Foundation* at 1028 citing *Yamaha Corp of America*, supra,19 Cal.4th at p. 11, fn 4; see also *Environmental Protection Information Center v. Department of Forestry and Fire Protection*, (1996) 43 Cal.4th 1011, 1022 [standard of review of challenges to "fundamental legitimacy of quasi-legislative regulation is "respectful non-deference"].

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and

12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

271. *Hermelinda Aguiar v. The Superior Court of Los Angeles County*, (2009) 170 Cal.App.4th 313: "In deciding whether the regulation conflicts with its legislative mandate, the court does not defer to the agency's interpretation of the law under which the regulation issued, but rather exercises its own independent judgment. (See *Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1106, fn. 7 [56 Cal. Rptr. 3d 880, 155 P.3d 284].*" *Aguiar* at 323.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section

12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

272. Thus, the Department's view that it has authority to adopt the liability limitation regulation is entitled to no deference and should be reviewed under the independent judgment standard. The Department's regulation cannot survive scrutiny under the independent judgment standard.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability

and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

273. Even if the Department's interpretation were correct, any such delegation would be invalid as an impermissible delegation of legislative power.

Only the legislature has the power to abrogate the right of title insurers and UTC's to enter into indemnity agreements

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department

reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

274. It is a well-settled principle of law that only the legislature can repeal or impair an existing right. "The power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it . . . ." (*Dougherty* v. *Austin* (1892) 94 Cal. 601, 606-607 [28 P. 834, 29 P. 1092, 16 L.R.A. 161]; see also *People* v. *Johnson* (1892) 95 Cal. 471, 475 [31 P. 611]; *People* v. *Wheeler* (1902) 136 Cal. 652, 655 [69 P. 435]; *Coulter* v. *Pool* (1921) 187 Cal. 181, 190 [201 P. 120]; *Duskin* v. *State Board of Dry Cleaners* (1962) 58 Cal.2d 155, 161-162 [23 Cal.Rptr. 404, 373 P.2d 468].)

Response: The Comment is 231 days late. The CDI notice states that any

comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

275. In *Cleveland Chiropractic College v. State Board of Chiropractic Examiners*, (1970) 11 Cal.App.3d 25, the appellate court invalidated the Board's requirement for chiropractic schools to maintain non-profit status. The Board asserted that the regulation was necessary for the Board to perform its work regulating chiropractic schools and that the tax benefits associated with non-profit status would facilitate the solvency of the schools. *Cleveland* at 33. The court rejected the Board's claim of authority and found that the regulation violated the colleges' statutory right under the Education Code to organize themselves as a profit-making corporation: "Laws passed by the Legislature under its general police power will prevail over regulations with regard to matters which are not expressly the agency's affairs .. . Even if these rules would otherwise be reasonable, we find that, in light of certain general constitutional and statutory provisions, these administrative regulations are beyond the Board's power and are therefore invalid." *Cleveland* at 33.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain

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276. The limitation of liability provision at issue here similarly deprives the parties of a statutory right; here, the right to enter into indemnity agreements. It also absolves UTCs of liability for their own negligence which liability would be imposed under current law but for the regulation. It further prevents title insurers from bringing recovery actions against UTCs to which they are otherwise entitled to bring under current law. In all of these respects, the limitation of liability provision changes the law of the state. Thus, it can only be adopted by statute, not by regulation. CDI has no authority to limit liability by regulation – the agency has no power to abridge these existing rights.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing

the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

277. The decision to enact a measure that discriminates for one business and against another business is a fundamental policy call which can only be made by the Legislature, if at all

It is the Legislature's role to set the policy of the law. Courts have struck down administrative regulations when agencies attempt to usurp the Legislature's prerogative to set policy and substitute their judgment for that of the Legislature.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department

reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with relevant statutory authority and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

278. For example, in *Malcolm Harris v. Alcoholic Beverage Control Appeals Board*, (1964) 228 Cal.App.2d 1, the appellate court invalidated an Alcoholic Beverage Control regulation that prohibited the issuance of a liquor license to any location within one mile of a university because it conflicted with an earlier-enacted statute whereby the Legislature exempted from restrictions any "bona fide eating place." The owner of an Italian-style restaurant located 200 feet from the University of Southern California successfully sued to overturn the regulation. The ABC attempted to adopt the regulation citing the "exclusive power" the Legislature conferred on it to regulate liquor licenses and its power to deny licenses if it determines granting a license "would be

contrary to public welfare or morals." *Harris* at 4.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates the facts and holding in *Malcolm Harris v. Alcoholic Beverage Control Appeals Board*, (1964) 228 Cal.App.2d 1. In *Malcolm Harris v. Alcoholic Beverage Control Appeals Board, supra,* the court of appeal found that the Department of Alcoholic Beverage Control was attempting to overturn a statute (new Penal Code section 172e) by regulation. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving

the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

279. The court of appeal distinguished between the authority of the Legislature to set policy and the authority of a regulatory agency to implement that policy: "Clearly, the legislative body must declare the policy of the law and fix some kind of legal principles which are to control in given cases." *Harris* at 7 citing *People v. Kuder*, 93 Cal.App. 42, 51.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates the facts and holding in *Malcolm Harris v. Alcoholic Beverage Control Appeals Board*, (1964) 228 Cal.App.2d 1. In *Malcolm Harris v. Alcoholic Beverage Control Appeals Board, supra,* the court of appeal found that the Department of Alcoholic Beverage Control was attempting to overturn a statute (new Penal Code section 172e) by regulation. Unlike the agency in that case, there is no administrative action here. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency

includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

280. When an agency pursues its own policy that lacks a statutory basis, its regulation is invalid. "In the absence of valid statutory authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature. It may not exercise its sublegislative powers to modify, alter or enlarge the provisions of the legislative act which is being administered. Administrative regulations in conflict with the Constitution or statutes are generally declared to be null and void." *Harris* at 6 citing *Hammond v. McDonald*, 49 Cal.App.2d 671, 679; *Hodge v. McCall*, 185 Cal. 330, 334. The court found that the ABC was pursuing its own policy and thus invalidated the regulation.

Under the reasoning in *Harris*, the Department's proposed regulation would in all likelihood be invalidated as well. The Legislature has not set a policy to force title insurers to subsidize UTCs or otherwise promote the solvency of UTCs. The Department has usurped the Legislature's role.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates the facts and holding in *Malcolm Harris v. Alcoholic Beverage Control Appeals Board*, (1964) 228 Cal.App.2d 1, 39 CalRptr 192. In *Malcolm Harris v. Alcoholic Beverage Control Appeals Board, supra,* the court of appeal found that

the Department of Alcoholic Beverage Control was attempting to overturn a statute (new Penal Code section 172e) by regulation. Unlike the agency in that case, there is no administrative action here. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner

rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

281. Even more to the point is *California Association of Psychology Providers v. Peter Rank*, (1990) 51 Cal.3d 1. In *Rank,* the California Supreme Court struck down a Department of Health Services regulation to impose a physician supervision requirement over psychologists in hospitals. The Court found that the agency read a requirement into the legislative scheme when there were insufficient indicia of legislative intent to do so. One of the principal arguments on which the court relied for its decision was that since there was no supervision requirement over psychologists in an outpatient setting, it would "radically re-write the statutes" to find one in the hospital setting. *Rank* at 13.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates the facts and holding in *California Association of Psychology Providers v. Peter Rank*, (1990) 51 Cal.3d 1. 270 Cal.Rptr 796. In *California Association of Psychology Providers v. Peter Rank,, supra,* the supreme court found that the Department of Health Services was attempting to overturn a statute (new Health and Safety Code section 1316.5) by regulation. The statutes in question pertained to the scope of the licenses of psychologists and psychiatrists, which scope changed with the new statute. The regulation in question followed the old statute, not the new one. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency

includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

282. The court recognized that the supervision question raised serious policy concerns. On the one hand, the Department of Health promoted the need for a supervision requirement in its regulations out of concern that "to give responsibility for diagnosis and treatment to a professional who has received less training in the detection of organic illness and in the use of drugs will endanger hospitalized patients." Rank at 9. On the other hand, the Association of Psychology Providers "dispute the implication that their training and experience leaves them less qualified than psychiatrists to treat hospitalized mental patients." *Rank* at 21.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment misstates the facts and holding in *California Association of Psychology Providers v. Peter Rank*, (1990) 51 Cal.3d 1. 270 Cal.Rptr 796. In *California Association of Psychology Providers v. Peter Rank,, supra,* the supreme court found that the Department of Health Services was attempting to overturn a statute (new Health and Safety Code section 1316.5) by regulation. The statutes in question pertained to the scope of the licenses of psychologists and psychiatrists, which scope changed with the new statute. The regulation in question followed the old statute, not the new one. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court

in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

283. The court stepped back and declared that "such disputes over the competence of the professions must be decided by the Legislature, not the courts." *Rank* at 21. It

found insufficient evidence to suggest the Legislature endorsed a supervision requirement. The Court found that the Legislature "determined that psychologists are generally competent to practice within the scope of that licensure" and "has not placed restrictions on that practice in a hospital setting, apart from the requirement in Section 1316.5 (c) that the psychologist must have a doctoral degree and at least two years of clinical experience. Instead, it has chosen to prohibit practices that discriminate against psychologists, while permitting the hospitals to establish nondiscriminatory rules regulating hospital practice of psychologists.7 We recognize appellants' concern about the wisdom of the legislative decision, but we cannot sustain regulations that would effectively nullify that decision and continue unchanged practices that the Legislature sought to modify." *Rank* at 21.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. In *California Association of Psychology Providers v. Peter Rank,, supra,* the supreme court found that the Department of Health Services was attempting to overturn a statute (new Health and Safety Code section 1316.5) by regulation. The statutes in question pertained to the scope of the licenses of psychologists and psychiatrists, which scope changed with the new statute. The regulation in question followed the old statute, not the new one. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to

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7 While the lack of legislative intent to support the supervision requirement is an independent basis to invalidate the regulation, the Court also found the regulation to be inconsistent with the authorizing statute's anti-discrimination clause. This is an additional basis the Court cited for invalidating the regulation. *Rank* at 21.

carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

284. The court found the legislative intent insufficient to support a supervision requirement even though the legislative history reflected that the Legislature had expressly rejected an amendment to Section 1316.5 to prohibit a supervision requirement and authorize psychologists to have primary responsibility for patients in a hospital setting. *Rank* at 28-29.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. It appears the commentator is citing the dissenting opinion without so noting. In *California Association of Psychology Providers v. Peter Rank,, supra,* the supreme court found that the Department of Health Services was attempting to overturn a statute (new Health and Safety Code section 1316.5) by regulation. The statutes in question pertained to the scope of the licenses of psychologists and psychiatrists, which scope changed with the new statute. The regulation in question followed the old statute, not the new one. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to

promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

285. The court rejected appellants' contention that hospital practice is different because hospitalized patients generally have more serious disorders. "It is up to the Legislature, however, to decide whether and how to distinguish between outpatient and hospital

practice, and whether any restrictions on the psychologist's hospital practice should take the form of law, administrative regulation, or hospital rule. The Legislature here has chosen to leave the matter to the discretion of each hospital. By authorizing hospitals to permit psychologists to carry responsibilities consistent with their licensure, it has given hospitals discretion to allow psychologists to assume the same responsibilities vis-a-vis their hospitalized patients as in an outpatient setting." *Rank* at 19.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. In *California Association of Psychology Providers v. Peter Rank,, supra,* the supreme court found that the Department of Health Services was attempting to overturn a statute (new Health and Safety Code section 1316.5) by regulation. The statutes in question pertained to the scope of the licenses of psychologists and psychiatrists, which scope changed with the new statute. The regulation in question followed the old statute, not the new one. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain

basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

286. Just as the Department of Health Services did in *Rank*, CDI is attempting to read in a requirement that would radically re-write the statute. Here, there is no evidence to suggest that the Legislature embraced a requirement for title insurers to assume liability for UTCs' negligence or otherwise subsidize UTCs. The Legislature has not imposed any requirements on title insurers to promote the solvency of UTCs. Analogous to the Court's determination in *Rank,* the policy decision whether and how to shift liability for UTCs' errors and omissions is up to the Legislature. To date, in the absence of any contrary directive, the Legislature has chosen to leave the matter to the discretion of the parties to set by contract. The Department cannot substitute its judgment for that of the Legislature.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. We disagree with the comment. In *California Association of Psychology Providers v. Peter Rank,, supra,* the supreme court found that the Department of Health Services was attempting to overturn a statute (new Health and Safety Code section 1316.5) by regulation. The statutes in question pertained to the scope of the licenses of psychologists and psychiatrists, which scope changed with the new statute. The regulation in question followed the old statute, not the new one. This case is not controlling here in regards to the Department of Insurance's proposed rulemaking. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of*

***California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.**

287. Note that even the Legislature is limited in its authority to enact a policy that favors one business sector to the detriment of another. The Legislature has enacted statutes that place burdens on one class of business and not on another but those measures must pass constitutional muster and must not violate the ban on special legislation.8

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8 The rules are set forth in *Escrow Institute of California v. Anthony Pierno*, (1972) 24 Cal.App.3d 361 wherein the escrow institute unsuccessfully

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The proposed regulation bears reasonable relationship to proper legislative objectives and is valid. The proposed regulation does not unlawfully discriminate between title insurers and UTCs; there are reasonable and substantial differences between the licenses of title insurers and UTCs. The proposed regulation is appropriate and designed for the business types to which it applies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations

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challenged Financial Code Section 17006 that established regulatory and licensing requirements for independent escrow agents under the supervision of the Department of Corporations but exempted other entities that perform escrow services, such as banks, attorneys, abstractors, and real estate agents that are regulated by other agencies. "The law applicable to the resolution of the question presented by the plaintiffs' basic contention that the Escrow Law embodies an unconstitutional classification is stated in O'Kane v. Catuira, 212 Cal. App.2d 131, at page 137 [27 Cal. Rptr. 818, 94 A.L.R.2d 487], as follows: "In resolving this question, we are governed by several well settled principles in the law. (3) `[T]he test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the federal Constitution.' (*County of Los Angeles* v. *Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 389 [196 P.2d 773].) In either case, a statute cannot be deemed in conflict with the constitutional provisions unless the discrimination or inequality produced by the particular legislative classification is `"`actually and palpably unreasonable and arbitrary'"' (*People* v. *Western Fruit Growers, Inc.* (1943) 22 Cal.2d 494, 506 [140 P.2d 13].) (4) `"`When a legislative classification is questioned, if any state of facts reasonably can be conceived that would 370*370 sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification.'"' (*Blumenthal* v. *Board of Medical Examiners* (1962) 57 Cal.2d 228, 233 [18 Cal. Rptr. 501, 368 P.2d 101].) [¶] It is also the rule, however, that a discrimination which bears no reasonable relation to a proper legislative objective is invalid. (*Accounting Corp.* v. *State Board of Accountancy* (1949) 34 Cal.2d 186, 190 [208 P.2d 984]; *Blumenthal* v. *Board of Medical Examiners, supra,* at p. 233.) (5) A legislative classification which is purely arbitrary and capricious and based upon no reasonable or substantial difference between the classes is clearly unconstitutional. (*Del Mar Canning Co.* v. *Payne* (1946) 29 Cal.2d 380, 382-383 [175 P.2d 231].)" *Escrow Institute* at 369-370.

involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

288. It is doubtful that the Legislature could force one business sector to subsidize another separate business sector.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The proposed regulation bears reasonable relationship to proper legislative objectives and is valid. The proposed regulation does not unlawfully discriminate between title insurers and UTCs; there are reasonable and substantial differences between the licenses of title insurers and UTCs. The proposed regulation is appropriate and designed for the business types to which it applies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by

the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

289. Be that as it may, the important point is that the Legislature is the body that has a

claim on the authority to make these policy calls, not a regulatory agency.9
The record in California reflects that the Legislature is the body that enacts limitation of liability provisions, not regulatory agencies

The record reflects that California adopts limitation of liability provisions by statute; there is no record of any regulation ever having been promulgated to adopt a liability limitation provision.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and

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9 *Kugler v. Yocum,* (1968) 69 Cal.2d 371, 376: "The essentials of the legislative function are the determination and formulation of legislative policy . . . We have said that the purpose of the doctrine that the legislative power cannot be delegated is to assure that 'truly fundamental issues [will] be resolved by the Legislature' and that a 'grant of authority [is] accompanied by safeguards adequate to prevent its abuse."

revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

290. The Legislature has adopted numerous liability limitation statutes over the years. The following statutes are illustrative examples of such codified provisions. Upon the declaration of a shelter crisis emergency, government entities are immune from liability in the provision of emergency housing.10 A property owner who gives permission to another for entry to the property for a recreational purpose does not assume liability for any injury caused by the act of such person except for a willful failure to warn of a dangerous condition, for consideration, or for invitees.11 A property owner is immune from liability for injuries a felon sustains on the owner's property in the commission of specified felonies.12 A partner in a registered limited liability partnership is not liable for the debts, obligations, or liabilities chargeable to the partnership or another partner in the partnership.13

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In

10 Government Code Section 8698.1.
11 Civil Code Section 846.
12 Civil Code Section 847(c).
13 Corporations Code Section 16306.

***Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.**

291. The fact that no liability limitation regulations appear to exist lends support to the contention that it is a legislative prerogative to make this policy decision.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered.

The comment is included in the rulemaking file as a late comment. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

292. The Department's contention that an agency relationship exists between title insurers and UTCs is spurious. The Department exempts escrow services from the ambit of the regulation but not title services. CDI exempts escrow from the liability limitation regulation presumably because the Department made a legal determination that the title insurer is not liable for the UTC's actions as a matter of law, i.e., an agency relationship does not exist where the title insurer is as a matter of law the principal and the UTC is the agent.14

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. To the extent the comment pertains to escrow liability, which is excepted from the proposed rulemaking, the comment is irrelevant. The Commentator's presumption is legally and factually incorrect. Title insurers responsibility for their agent UTC's escrow losses are addressed in different statutes. *See* Insurance Code sections 12376 and 12389.6. In other comments the Commentator admitted that the UTC is the agent of the title insurer. The proposed regulation deals with indemnification of the principal by the agent for performance of title work, which is the risk the title insurer is insuring. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved."

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14 CDI General Counsel Adam Cole, Senior Staff Counsel Jill Jacobi, and Staff Counsel Arnold Kessler conveyed this conclusion to Stewart Title Guaranty representatives Sid Israels, Peter Laufenberg, and Patrick Shannon in a meeting relating to the legal liability for closing protection letters, September 18, 2008 in San Francisco, California.

Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

293. However, in promulgating the current regulation, CDI implies that an agency relationship exists in the context of title whereas it does not exist in the context of escrow.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. To the extent the comment pertains to escrow liability, which is excepted from the proposed rulemaking, the comment is irrelevant. The Commentator's stated implication is legally and factually incorrect. Title insurers responsibility for their agent UTC's escrow losses are addressed in different statutes. *See* Insurance Code sections 12376 and 12389.6. In other comments the Commentator admitted that the UTC is the agent of the title insurer. The proposed regulation deals with indemnification of the principal by the agent for performance of title work, which is the risk the title insurer is insuring. California Civil Code section 2338 states that the

principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that

the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

294. But the Department offers no authority to support this conclusion. The one case that CDI cites for that proposition, *Title Insurance Company of Minnesota v. State Board of Equalization,* 4 Cal.4th 715, does not in fact stand for it at all. CDI lifts out of context a passing reference in the opinion to the *stipulated facts* in the case reflecting that the parties agreed to a limited agency between them where the UTC issues the title insurance policy, determines the premium from the insurer's rate schedule, and collects the premium on behalf of the title insurer. *Title Insurance Company of Minnesota* at 723. The opinion did not so much as discuss, much less conclude, that an agency relationship exists for liability purposes between title insurers and UTCs as a matter of law.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. In other comments the Commentator admitted that the UTC is the agent of the title insurer. The proposed regulation deals with indemnification of the principal by the agent for performance of title work, which is the risk the title insurer is insuring. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license

unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

295. Absent authority that an agency relationship exists as a matter of law, California courts decide whether agency pertains based on a facts and circumstances test in each individual case. It is common for a title insurer to include provisions in the underwriting agreement to make the UTC an agent of the title insurer for certain limited purposes, such as for service of process, to remit funds for claims, etc. But the Department has not cited, and we are not aware of, any California case that has concluded that an agency relationship exists for liability purposes as a matter of law.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. In other comments the Commentator admitted that the UTC is the agent of the title insurer. The proposed regulation deals with indemnification of the principal by the agent for performance of title work, which is the risk the title insurer is insuring. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill

the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the

statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

296. Even if such an agency relationship were to be found to exist as a matter of law, that would not save the regulation. Agency means that the principal is liable for the actions of its agent to a third party; it does not mean that the principal cannot recover from the agent for any losses the principal sustained for the agent's actions. In the business of title insurance, the title insurer is already fully responsible to the third party, i.e., the consumer, for any losses under the title policy. What is at issue here is the title insurer's authority to recover from the UTC for the UTC's actions, and that authority would not be removed even if an agency relationship were found to exist.

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. In other comments the Commentator admitted that the UTC is the agent of the title insurer. The proposed regulation deals with indemnification of the principal by the agent for performance of title work, which is the risk the title insurer is insuring. California Civil Code section 2338 states that the principal is responsible for the negligent acts of its agents, even the willful omission to fulfill the obligation of the principal. The proposed regulation does not shift responsibility from the agent to the principal, that responsibility is established by statute, rather it prohibits that principal title insurer from shifting responsibility back to the agent (UTC) by contract. The proposed regulation promulgates a long standing regulatory rule governing the business of title insurance involving the liability for loss as contracted for between title insurers and underwritten title companies. The Insurance Commissioner's authority to promulgate the proposed regulation is authorized by the Legislature. The California Supreme Court in the decision *CalFarm Ins. Co. v. Deukmejian* 48 Cal.3d 805 (1989) held that the Insurance Commissioner has implied authority to promulgate regulations. *See also Credit Ins. Gen. Ass'n of California v. Payne* (1976) 16 Cal 3d 651, 128 Cal Rptr 881, 885-886 and *Assoc. of California Ins. Cos. v. Poizner* (2009) 180 CalApp4th 1029, 103 CalRptr3d 458. In *Credit Ins. Gen. Ass'n of California v. Payne*, the California Supreme court noted that "[i]n determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate. (citation omitted) In so doing, a court may not substitute its independent judgment for that of the administrative agency on the facts or on the policy considerations involved." Insurance Code section 12389.1 provides in part that an underwritten title company shall be issued a license unless the Insurance Commissioner finds a material deficiency in any of the 12389.1 criteria set forth, including (a) minimum net worth and working capital (b) reasonableness of its plan of operation (c) financial stability and (i) hazard to the

public. Insurance Code section 12389 provides authority to the Insurance Commissioner to make reasonable rules and regulations governing the conduct of business of underwritten title companies, to carry out the purposes of section 12389 including the maintenance of company solvency. Financial solvency includes liabilities; "capital and surplus" and "net worth" are defined basically as assets minus liabilities. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. Insurance Code section 720 provides authority to the Insurance Commissioner to promulgate reasonable rules and regulations as are necessary or convenient to carry out the purposes and provisions of the Insurance Code governing the issuance, suspension and revocation of certificates of authority to title insurers. Insurance Code section 12389, 12389.1 and 12389.2 provide certain basic license requirements for underwritten title companies, including net worth and working capital requirements. Insurance Code sections 717, 12359 and 12370 set forth certain basic certificate of authority requirements for paid-in capital and surplus. Insurance Code section 12921 authorizes the faithful execution of the insurance laws by the Insurance Commissioner. The proposed regulation is consistent with the relevant statutes and well within the Insurance Commissioners authority to promulgate. The insurance industry is a highly regulated industry. The proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

297. Thank you for considering our comments in your proceedings.

Sincerely,

Patrick Shannon
Outside Counsel for Stewart Title

Response: The Comment is 231 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is of a general nature and does not call for a specific response.

298. From: pshannon@grcounsel.com
To: Slpoizner@aol.com
Sent: 4/16/2010 5:08:07 P.M. Pacific Daylight Time

Subj: Meeting request on title insurer liability

Steve,

I hope you are doing well. I know that you are extremely busy so I will be brief.

I wanted to request a meeting with you to discuss a regulation that the Legal Department is currently pursuing to shift liability from underwritten title companies and on to title insurers. Proposed regulation 134810 would force title insurers to pay for any liability over $5,000 for errors and even negligence committed by underwritten title companies in the title search process. The proposed regulation is invalid because the Department lacks authority to shift liability – that is the prerogative of the legislature, and even its authority is dubious with respect to negligence.

The issue has a long history. Since 1986, CDI has been forcing title insurers to assume UTC liability as a condition of applying to operate as a title insurer in the state, over the objections of title insurers. Last year, we objected to the Department's rule as an underground regulation. Thereafter CDI legal staff removed references to the $5,000 rule in the UTC and title insurer applications (but reportedly is still enforcing the rule) and then proceeded to initiate a rulemaking to adopt the rule formally.

Stewart Title's recollection of the original rationale for the $5,000 limit is as follows. The $5,000 limit to UTC liability was not intended to allow a UTC to escape liability for its own negligence or escrow defects, rather it was intended to allow a UTC to assume liability for the ordinary risk of loss of an underwriter and even though the UTC is not licensed as an underwriter. It was intended to overcome the prohibition against an entity not licensed as a title insurer assuming title insurance risk. It was intended as a way to facilitate the payment of claims to a consumer in an expeditious way for de minimus claims; it was limited to $5,000 to prohibit the practice of underwriters who were trying to get an agent to accept liability for large amounts (for example, $200,000 - $300,000) of a claim against an underwriter. The intent was to protect the solvency of UTC's so that they would not take on too much of the underwriter's liability in exchange for an underwriter placing business with them, which could threaten the viability of UTC's in the marketplace. Over the years, CDI turned the concept upside down and had been requiring the reverse – capping UTC liability for their *own* negligence and shifting any liability over $5,000 on to title insurers.

CDI has claimed it has authority to impose a $5,000 cap on UTC liability by virtue of Ins. Code Section 12389 which empowers the Commissioner to make reasonable rules and regulations to maintain the solvency of UTCs. But nowhere in Section 12389 or elsewhere does the Legislature authorize limits on UTC liability, much less the authority for CDI to shift liability on to a different party.

Back in 2008, the Legal Department similarly took the position that title insurers were to be held liable for escrow errors committed by UTC's, but the Department ultimately relented in all good faith when it came to appreciate it did not have authority to shift

liability. The same legal reasoning applies here in the context of title search errors.

I have tried unsuccessfully to resolve this for over a year now, so I wanted to bring this to your attention now in the hopes that we could resolve the issue without a costly and protracted regulation process and possible appeal process.

I should be able to make myself available at just about any time you can find the time to meet, if you were willing to do so.

Thanks in advance.

Regards,

Patrick

PATRICK SHANNON, Esq.

Government Relations Counsel

1215 K Street, 17th Floor

Sacramento, CA 95814

(916) 503-1530 (w)

(650) 274-9951 (m)

(916) 209-9428 (f)

pshannon@grcounsel.com

Response: The Comment is 193 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is some evidence that the five thousand liability limit long standing rule has been implemented. The CDI website currently reflects the following: "Please note that subsection 7d (or 6d or 10d or 4) of the form has been removed as the $5000 limitation is the subject of a proposed regulation filed by the California Department of Insurance, CDI # REG-2009-00019, OAL Z-2009-0811-03." We agree with the commentator that the long standing rule was originally developed to allow UTC's to assume liability for the ordinary risk of loss of an underwriter and even though the UTC is not licensed as an underwriter, that it was intended to overcome the prohibition against an entity not licensed as a title insurer assuming title insurance risk, to facilitate the payment of claims to a consumer in an expeditious way for de minimus claims

and is often referred to as a deductible. We also agree with the commentator that the rule was limited to $5,000 to prohibit the practice of underwriters who were trying to get an agent to accept liability for large amounts (for example, $200,000 - $300,000) of a claim against an underwriter. We also agree with the commentator that the intent was to protect the solvency of UTC's so that they would not take on too much of the underwriter's liability in exchange for an underwriter placing business with them, which could threaten the viability of UTC's in the marketplace. We disagree with the commentator's statement that "Over the years, CDI turned the concept upside down and had been requiring the reverse – capping UTC liability for their *own* negligence and shifting any liability over $5,000 on to title insurers." The UTC's negligence is the ordinary risk that the title insurer covers. See Insurance Code section 104, as it is the UTC that performs the title search, the errors for which are covered by the title insurer. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; it encourages the UTC to hold to a standard of care through the bearing of a reasonably appropriate amount of risk; secondary purposes are to require fair dealing between title insurers and UTCs. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. To the extent the Commentator addresses escrow authority, the comment is irrelevant as the proposed rule specifically excludes escrow losses. To the extent the Commentator asserts that the Department has excluded escrow authority because of lack of authority, we disagree with the comment. California statutes that address escrow liability, see for example Insurance Code sections 12376 which addresses title insurer responsibility for escrow shortages in the event of a bankruptcy, receivership or conservation of a UTC and Insurance Code section 12389.6, which provides for provisions to be included in the underwriting agreement between title insurers and UTCs to reasonably limit escrow losses, are different but not inconsistent with the statutes that are the authority for the proposed rulemaking. The proposed regulation is well within the Insurance Commissioner's implied authority to promulgate. The Insurance Commissioner also believes the proposed rulemaking is reasonably necessary and that the rulemaking record in its entirety supports its necessity and that the proposed rulemaking is consistent with the statutory framework and long standing regulatory practices. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking.

299. *Henry J. Blankenheim et al v. E.F. Hutton & Co.* 217 CalApp 3d 1463, 266 CalRptr

593 (1990). Court of Appeal reversed the lower court's summary judgment ruling that plaintiffs investors reliance on defendant's representations was unjustified as a matter of law and that plaintiffs investors had waived their alleged claims, ruling certain contracts to be void as against public policy. For the purposes of the summary judgment motion, the defendants conceded that misrepresentations were in fact made. The Court of Appeal reviewed the finding of sophistication in the investors in certain IT limited partnerships delving into the facts regarding the background of the investors as well as the three forms of representations (the private placement memoranda, subscription agreements and tax shelter purchase agreements) which the court found, read together, appear to immunize the defendants from liability. Plaintiffs contended that the particular hold harmless agreements they signed, are contrary to law, specifically Civil Code section 1668, which provides in pertinent part "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." The court construed the statute (Civil Code section 1668) determining that it "does not provide a clear answer." The court summarized the controlling rule regarding statutory construction as "the controlling rule is that statutes are to be construed as a whole, with each part supplying meaning to the other." The court considered whether the misrepresentations that were made were negligently made, *i.e.* ordinary negligence, which may be contracted away, or fall within the rubric of fraud, for which there can no exemption from liability. The court noted there were contrary appellate opinions on the matter. It determined under the facts presented, Civil Code section 1668 applied in a "consumer context" where the agreements provided for exculpation. After comparing statutory definitions of fraud and negligent misrepresentations, the court concluded that the private placement memoranda, subscription agreements and tax shelter purchase agreements could not properly exculpate the parties from liability for positive assertions, made in a manner not warranted by the information, which are untrue, finding the contracts to be void, thus abrogating the contracts. The court went on to observe that such exculpations in the contract would be void also because plaintiffs were induced to enter into them based on the false statements.

Response: The Comment is 310 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is irrelevant to the extent it addresses consumer contracts that investors have been induced to enter into by misrepresentations *i.e.* fraud. The proposed regulation addresses business contracts that have been entered into between title insurers and underwritten title companies that are entered into as necessary to address their business arrangements. The contracts are subject to regulatory review and approval. The negligence of the UTC agent that is the subject of the regulations is title insurance as defined in Insurance Code section 104 (c), that is to be covered by the title insurer pursuant to California law. See Insurance Code sections 700, 12340.1 and 12340.4. Further, intentional and willful acts by the

UTC are specifically excluded from the proposed rule. To the extent the comment implies that negligence should further be excluded from the rule, the comment is rejected. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement. The proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; secondary purposes are to require fair dealing between title insurers and UTCs. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Insurance Code section 12389 expressly permits the promulgation of regulations that govern the business of UTCs, which is the business of title insurance. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability.

300. *City of Santa Barbara v. The Superior Court of Santa Barbara* 41 Cal 4th 747, 161 P. 3d 1095, 62 Cal Rptr 3d 527 (2007). Appeal from Court of Appeal decision holding release of liability of the City of Santa Barbara executed by mother of fourteen year old disabled child who later drowned while attending camp, as valid and enforceable as to ordinary negligence but not as to gross negligence, was reviewed as to the issue of gross negligence. California Supreme Court affirmed that release of gross negligence is generally unenforceable as a matter of public policy. The release language provided in relevant part (in very small type) "CITY OF SANTA BARBARA RELEASE AGREEMENT [.] IN CONSIDERATION OF BEING PERMITTED TO PARTICIPATE IN THIS CITY ACTIVITY OR USE OF ANY CITY FACILITIES IN CONNECTION WITH THIS ACTIVITY, THE UNDERSIGNED AGREES TO THE FOLLOWING: 1. THE UNDERSIGNED HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE THE CITY OF SANTA BARBARA, ITS EMPLOYEES, OFFICERS AND AGENTS (hereinafter referred to as 'releasees') from all liability to the undersigned, his or her personal representative, assigns, heirs and next of kin for any loss, damage, or

claim therefore on account of injury to the person or property of the undersigned, whether caused by any negligent act or omission of the releasees or otherwise while the undersigned is participating in the City activity…2. THE UNDERSIGNED HEREBY AGREES TO INDEMNITY AND HOLD HARMLESS the releasees from all liability, claims, demands, causes of action, charges, expense and attorneys fees…3. THE UNDERSIGNED HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE while upon City property or participating in the activity…IF THE PARTICIAPNT IS A MINOR, his or her custodial parent or legal guardian must read and execute this agreement…" Mother had disclosed child's disabilities and medical problems, specifically informing that she was seizure prone, often occurring in water and that she needed supervision while swimming, and that she had previously suffered a seizure while attending another camp. Mother also advised that daughter was a good swimmer, and that she did not place restrictions on her daughter swimming. The court reviewed the facts surrounding the child's death, and the definitions of ordinary negligence and gross negligence. Court discussed general law development as a conflict between contract and tort law, on the one hand individuals are free to agree to limit future liability, balanced against the public policy of the tort system that wrong doers provide appropriate recompense to injured parties, citing cases and Civil Code section 1668. Citing *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 32 CalRptr 33, 383 P.2d 441, the court concluded that as a general rule "an exculpatory clause which affects the public interest cannot stand." The court will review the circumstances when public policy considerations provide for such invalidity, including the adhesive nature of certain agreements, whether the business is subject to *public regulation*, whether *for an additional fee there can be additional protection* against negligence and "whether the person or property [sold]…is placed under the control of the seller, *subject to the risk of carelessness by the seller or his agents*." Public policy, however, did not bar all contracts releasing liability under *Tunkl.* "In this regard we also observed that "*The public policy of this state has been, in substance, to posit the risk of negligence upon the actor…has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer."* The court reviewed legal case and other authorities that conclude the release of gross liability as void against public policy. The court concluded that public policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a minimal standard of care, that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable. The court specifically noted that the Legislature was "free to enact…legislation limiting, as necessary, the liability of specific recreational service providers." The holding is expressly limited to the provision of a release and the burden on the defendant in establishing the validity of a release as applied to the case at hand. *Id.* at ft nt 58. The court went on to distinguish *Continental Ins. Co. v. American Protection Industries* (1987) 197 CalApp.3d 322, 242 Cal. Rptr. 784, since it concerned not a release but a contractual provision for liquidated damages, which the insurer tried to avoid, noting that California courts have allowed gross negligence in these types of

contexts, and subsequent dicta that California does not allow for a distinct cause of action for gross negligence.

Response: The Comment is 310 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is irrelevant to the extent it addresses exculpatory releases that are used in defense of tort lawsuits. The case holding is limited as such, and specifically recognizes that the state legislature is free to enact legislation limiting liability, as necessary, of certain entities. Here the legislature has delegated authority that is the subject of this rulemaking to the Commissioner, to develop rules and regulations governing the business of UTCs to protect solvency and promote fair dealing. The proposed regulation addresses business contracts that have been entered into between title insurers and underwritten title companies that are entered into as necessary to address their business arrangements. The proposed regulation is more akin to the cited cased in the comment, *Continental Ins. Co. v. American Protection Industries* (1987) 197 CalApp.3d 322, 242 Cal. Rptr. 784, dealing with liquidated damage provisions. The contracts are subject to public regulation. The negligence of the UTC agent that is the subject of the regulations is title insurance as defined in Insurance Code section 104 (c), and the title insurance risk exposure is to be covered by the title insurer pursuant to California law. See Insurance Code sections 700, 12340.1 and 12340.4. Public policy supports the principal title insurer being responsible for the acts of its agents. Further, intentional and willful acts by the UTC are specifically excluded from the proposed rule. To the extent the comment implies that gross negligence should further be excluded from the rule, the comment is rejected. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement. The proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Public policy also supports the title insurer, which is better able to bear the risk, being responsible for these losses. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; it encourages the UTC to hold to a standard of care through the bearing of a reasonably appropriate amount of risk; secondary purposes are to require fair dealing between title insurers and UTCs. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We disagree to the extent the comment implies that

California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Insurance Code section 12389 expressly permits the promulgation of regulations that govern the business of UTCs, which is the business of title insurance. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability.

301. Please find attached the following supplemental information:

1) A sample quote for title and escrow coverage (combined in one policy) for a small UTC ($3,000/yr policy for $400k revenue), medium UTC ($6,700/yr policy for $1.2 million in revenue), and a large UTC ($16,000/yr policy $10 million in revenue). The quote was provided by Max Specialty, one of the ten listed carriers that write E&O for title agent services in California.
2) I will forward under separate cover a spreadsheet detailing the estimated losses that Stewart Title Guaranty has suffered due to the $5,000 rule over the last five years and the last year in specific. The calculation is an estimate of the losses (over $5,000) due to the error/negligence of agents Stewart used over the period in California.
3) Two cases I mentioned and earlier furnished to Adam and Jill (who were kind enough to meet with us) which held that there is a California state policy against sheltering a party from his/her own fraud (applicable to negligent misrepresentations, not just intentional fraud) and gross negligence. While the proposed regulation exempts intentional/willful/escrow acts from the liability limitation, it does not exempt fraud or gross negligence.

Please let me know if you have any more questions or desire further information. Thanks for your consideration.

Regards,

Patrick

PATRICK SHANNON, Esq.
Government Relations Counsel
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 503-1530 (w)
(650) 274-9951 (m)
(916) 209-9428 (f)

pshannon@grcounsel.com

Product and Distribution Summary
Title Agents - California Errors & Omissions Insurance (E&O)

Stewart Specialty Insurance Services (SSIS) is an independent insurance broker operating in all 50 states. SSIS markets E&O insurance to independent title agents, consumer finance companies, real estate brokers, mortgage brokers, attorneys, and multi-line independent insurance agents.

SSIS markets E&O to independent title agents in states where Stewart Title agents are located. Specifically, SSIS writes E&O coverage in California through the following carriers:

Westchester Fire
National Union
Chubb
Axis Pro
Scottsdale
RSUI Group
Houston Casualty Company
Max Specialty
Evanston
Diamond State
Protective Specialty
Lexington

Standard Programs and Pricing Available through California Markets

Agency Revenue	Per Claim Limit	Aggregate Limit	Deductible	Average Premium
$400k	$1 Million	$1 Million	$5,000	$3,000
$1.2 Million	$1 Million	$1 Million	$5,000	$6,700
$10 Million	$1 Million	$1 Million	$5,000	$16,000

Pricing above is based on insured with no loss history

City of Santa Barbara v. The Superior Court of Santa Barbara 41 Cal 4th 747, 161 P. 3d 1095, 62 Cal Rptr 3d 527 (2007) previously provided and summarized.

Henry J. Blankenheim et al v. E.F. Hutton & Co. 217 CalApp 3d 1463, 266 CalRptr 593 (1990) previously provided and summarized.

Response: The Comment is 317 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is somewhat general in nature; it reflects some evidence of the availability of errors & omissions coverage. UTCs are permitted to obtain errors and omissions coverage in California for escrow related losses (see Insurance Code section 12389.6 (a) (1), which the rulemaking does not address. Escrow losses are specifically excluded from the proposed rule. Our public website reflects Stewart Specialty Insurance Services, LLC is currently not licensed (inactive):

Name: SIFS, LLC **License#: 0E70941**

DBA: STEWART SPECIALTY INSURANCE SERVICES, LLC

Comments:
"STEWART OF CALIFORNIA INSURANCE AND FINANCIAL SERVICES, LLC" MUST BE USED FOR ALL INSURANCE BUSINESS CONDUCTED IN CALIFORNIA.

Comments:
"STEWART SPECIALTY INSURANCE SERVICES, LLC" MUST BE USED FOR ALL INSURANCE BUSINESS CONDUCTED IN CALIFORNIA.

License type: Accident and Health	**Status: Inactive**	**Status Date: 04/30/2009**	**Exp Date: 04/30/2009**
License type: Fire and Casualty Broker-Agent	**Status: Inactive**	**Status Date: 04/30/2009**	**Exp Date: 04/30/2009**
License type: Life-Only	**Status: Inactive**	**Status Date: 04/30/2009**	**Exp Date: 04/30/2009**

Business Address: 7111 NORTH FRESNO STREET, #260 FRESNO, CA 93720

The comment is irrelevant (citation to *City of Santa Barbara v. The Superior Court of Santa Barbara*) to the extent it addresses consumer contracts that investors have been induced to enter into by misrepresentations *i.e.* fraud. The comment is irrelevant (citation to *Henry J. Blankenheim et al v. E.F. Hutton & Co.*) to the extent it addresses exculpatory releases that are used in defense of tort lawsuits.

That case holding is limited as such, and specifically recognizes that the state legislature is free to enact legislation limiting liability, as necessary, of certain entities. Here the legislature has delegated authority that is the subject of this rulemaking to the Commissioner, to develop rules and regulations governing the business of UTCs to protect solvency and promote fair dealing. The proposed regulation addresses business contracts that have been entered into between title insurers and underwritten title companies that are entered into as necessary to address their business arrangements. The proposed regulation is more akin to the cited cased in the comment, *Continental Ins. Co. v. American Protection Industries* (1987) 197 CalApp.3d 322, 242 Cal. Rptr. 784, dealing with liquidated damage provisions. The contracts are subject to public regulation. The negligence of the UTC agent that is the subject of the regulations is title insurance as defined in Insurance Code section 104 (c), and the title insurance risk exposure is to be covered by the title insurer pursuant to California law. See Insurance Code sections 700, 12340.1 and 12340.4. Public policy supports the principal title insurer being responsible for the acts of its agents. Further, intentional and willful acts by the UTC are specifically excluded from the proposed rule. To the extent the comment implies that gross negligence should further be excluded from the rule, the comment is rejected. Shifting of liability is permissible by contract between the UTC and the title insurer, subject to regulatory limitations. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement. The proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action is not permitted. Public policy also supports the title insurer, which is better able to bear the risk, being responsible for these losses. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; it encourages the UTC to hold to a standard of care through the bearing of a reasonably appropriate amount of risk; secondary purposes are to require fair dealing between title insurers and UTCs. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed. We disagree to the extent the comment implies that California statutes do not permit the proposed regulatory action. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. Insurance Code section 12389 expressly permits the promulgation of regulations that govern the business of UTCs, which is the business of title insurance. Further, Insurance Code section 12389 permits the Insurance Commissioner to define

liabilities of UTCs by regulation. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; to prevent the UTC from taking too much of the underwriter's liability and threatening the UTC's viability.

302. Here is the supplemental information on estimated losses Stewart suffered due to agent error/negligence over five years ($29,288,907) and over the last year ($9,170,460).

Regards,

Patrick

PATRICK SHANNON, Esq.
Government Relations Counsel
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 503-1530 (w)
(650) 274-9951 (m)
(916) 209-9428 (f)
pshannon@grcounsel.com

From: Catheryn Oakland [mailto:coakland@stewart.com]
Sent: Wednesday, August 18, 2010 12:19 PM
To: Patrick Shannon
Subject: FW: CA Claims Loss & Agency Billing
Importance: High

CALIFORNIA: POLICY LOSS & AGENT LIABILITY

A total of 1,481 reserved claims made on policies issued in the state of California were closed between 7/1/2005-10, on which the total reserves produced policy losses of $67,524,926. Of those claims, 838 with a total reserve of $45,702,222 were marked as Billable: Y, indicating agent liability on the facts giving rise to the claim as applied to the division of loss provisions contained in the Underwriting Agreement. The balance were closed as not billable or unknown. An overview follows:

7/1/05-10	**Claims**	**Total Reserves**	**ALTA Code**
Billable: ALL	1,481	67,524,926	ALL
Billable: Y	838	45,702,222	Samples sorted below
C3A	115	5,842,784	Missed Mtg
C3B	44	3,143,380	Missed Ownership

C3C	56	3,132,657	Missed Easement
C3F	92	2,969,376	Search-Other
E2	30	1,451,415	Incorrect description
F1-5	118	9,396,208	Instructions Not Followed/Fraud series^
H1	14	148,020	Property taxes
H6	82	225,660	Special Assessments

Assuming deductibles billed at $5,000 and paid on 838 files, Stewart would have recovered a maximum of $4,190,000 on the $45,702,222 in losses potentially owed. Based on a review by ALTA Code, it appear that at least $29,288,907 of the losses suffered were due to agent error and would have been billable to the agent on an ordinary negligence contract. For the period of time 7/1/09-10 a total of 470 claims were closed in the state of California with total policy losses of $19,309,580. Of those, 213 were closed as billable to the agent, with total reserves of $12,093,833. Based on a review by ALTA Code, it appear that at least $9,170,460 of the losses suffered were due to agent error and would have been billable to the agent on an ordinary negligence contract. Assuming each claim was billed and paid at $5,000 pursuant to the mandate of the DOI, the total recovery would have been capped at $1,065,000, or $8,105,460 less than may have been otherwise billable to the agent for that 12 month period.

A determination of agent error is not firmly captured by closing a claim in CA with an affirmative billing designation, since due to the deductibles the claim may be billable for $5000 without regard to fault. A review of ALTA Codes provides an indication of agent error giving rise to the claim. In parameters reviewed of the general experience of STGC, the following is suggested as a reasonable reference to ALTA Codes as indicating agent error. The percentage referenced regards the frequency of which agent error gave rise to the individual claims.

ATLA Series	Percentage
A-1,2 Fraud/Forgery	30%
A3-7 Basic Risk	10%
B Aff Ins	50%
C Search/Plant Error	85%+
D Omission/Procedure	90%+
E Survey	10%
F 3B Agent Fraud	100% Intentional Act
F Improper Escrow	90%
G Policy Typing	90%
H Taxes/Assessments	90%+

A review of UAs with current agents reflects that 11 of 29 contracts were negotiated and entered into by the agents to assume liability for policy loss caused by agent error. Representative damages suffered by Stewart Title imposed by the DOI $5,000 Rule are found in reviewing a sample of the historic claims experience for agents contractually

liable for policy loss due to negligence.

Agent	Claims:	Total Reserve	$5000 Rule Max*
American Coast (C)	27	2,133,591	120,000
Cal Sierra	9	158,714	31,700
Modoc County	5	64,250	12,800
Calaveras	4	54,900	15,825
TransInterCounty	7	189,500	31,432
TransCounty	11	392,800	52,500
Trinity County	11	68,921	18,800
Bidwell	5	134,712	25,000
Humboldt	1	17,478	5,000
Integrated	1	275	275
Netco	1	7,853	5,000
		3,222,994	318,332

= $3,014,894 loss of contractual recovery potential+

*includes losses under $5,000
+individual claims not reviewed for agent error by this author

Requests for further information are welcome.

Respectfully submitted,

M. Catheryn Oakland
National Salvage Counsel
Stewart Title Guaranty Company
330 Madison Avenue S., Suite 201
Bainbridge Island, WA 98110

PH: 206-802-1071
FAX: 206-802-9181

Response: The Comment is 317 days late. The CDI notice states that any comments received after 5:00 p.m. on October 5, 2009 may not be considered. The comment is included in the rulemaking file as a late comment. The comment is somewhat general in nature; it reflects some evidence that the five thousand liability limit long standing rule has been implemented. The comment provides some evidence as to the amount of claims risk borne by title insurers, and the potential impact on the solvency of the UTCs which the proposed rule addresses. The negligence of the UTC agent that is the subject of the regulations is title insurance as defined in Insurance Code section 104 (c), and the title insurance

risk exposure is to be covered by the title insurer pursuant to California law. See Insurance Code sections 700, 12340.1 and 12340.4. Public policy supports the principal title insurer being responsible for the acts of its agents. In the business of title insurance, the shifting of liability between title insurers and UTCs is generally contracted for in the underwriting agreement. The proposed regulation is a longstanding rule of the Department that limits those contractual provisions. We disagree to the extent the comment implies that the proposed regulatory action should not go forward. Public policy supports the title insurer, which is better able to bear the risk, being responsible for these losses. Insurance Code section 12389 permits regulations that address the governance of the business of title insurance by UTCs and section 12389.1 (a) (d) and (i) include the liability of UTCs within the continuing license requirements, see section 12389.2. A primary purpose of the longstanding rule and the proposed regulation is to protect the solvency of the UTC; it encourages the UTC to hold to a standard of care through the bearing of a reasonably appropriate amount of risk; secondary purposes are to require fair dealing between title insurers and UTCs. Further, Insurance Code section 12389 permits the Insurance Commissioner to define liabilities of UTCs by regulation. The Commissioner rejects the comment to the extent the comment implies not going forward with the rulemaking as proposed.

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