

# IMMEDIATELY AVAILABLE FUNDS PROCEDURE AGREEMENT

This Agreement is made by and among the signatories below on the dates set forth opposite their respective signatures and is effective on and after the date signed by the last party to execute a counterpart of this Agreement.

## Definitions.

**Financial institution:** the mortgage company or financial institution making mortgage loans whose signature appears below as a party to this Agreement.

**Title Company:** the person or entity licensed as a title insurance agent, direct operation or title insurance company in the State of Texas which is a party to this Agreement.

**Federally-insured Lender:** the entity authorized under the laws of the State of Texas, another state, or the United States to make loans and receive deposits whose deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund and which is a party to this agreement.

**Mortgage Documents:** the promissory note payable to the order of Financial Institution to evidence a loan by Financial Institution to a borrower or borrowers closed by the Title Company, the deed of trust securing such note, and any other documents delivered by Financial Institution or its agents to Title Company with the Instructions (as defined below) to evidence or secure the loan.

Financial Institution, Title Company and Federally-insured Lender, for and in consideration of the mutual covenants set forth herein and other good and valuable consideration, the receipt and sufficiency of which is expressly acknowledged, each severally agree with each other party to this Agreement as follows:

### 1. Closing and Notice of Closing.

Financial Institution anticipates that it will, from time to time, transmit to Title Company forms of Mortgage Documents to be used and administered by Title Company in closing loans to borrowers, Financial Institution shall, concurrently with transmission to Title Company of Mortgage Documents, transmit to Title Company written closing instructions ("Instructions") concerning the particular loan to be closed and to be evidenced by and secured by the Mortgage Documents so transmitted.

Prior to the scheduled closing of the loan covered by the Instructions, Financial Institution shall also deliver to Title Company a check (the "Net Proceeds Check") drawn by Financial Institution on Federally-insured Lender and payable to the order of Title Company in an amount equal to the net proceeds of the mortgage loan to be evidenced and secured by the Mortgage Documents. After the Mortgage Documents have been executed but before closing of the mortgage loan covered by the Instructions, Title Company will contact one of the duly authorized employees of Federally-insured Lender listed on Exhibit A attached to this Agreement (an "Employee Contact") and shall provide the following:

- (i) Title Company shall report, as shown by the Mortgage Documents, the borrower(s), the amount of the mortgage loan, and the Guaranty File number (and other identifying information) of the applicable commitment, if any.
- (ii) Title Company shall confirm to the Employee Contact that Title Company has received and agreed to the Instructions.
- (iii) Title Company shall state to the Employee Contact that the Title Company has obtained execution of the Mortgage Documents by the borrower(s).
- (iv) Title Company shall state to the Employee Contact the amount of the Net Proceeds Check and any identifiable account number on which the Net Proceeds Check is drawn.

To the extent any law prohibits Title Company from making a report, confirmation, or statement required by (i) through (iv), above, such report, confirmation, or statement shall be deemed not to have been made.

No provision in this agreement, specifically, but not limited to, (i) through (iv) above shall be construed to expand the rights of the Federally-insured Lender to dishonor the Net Proceeds Check beyond those rights which the

Federally-insured Lender has by law to dishonor any ordinary certified check which is not subject to this or any other special agreement. Likewise, no such provision shall limit the Title Company's rights to collect on the Net Proceeds Check to less than that provided by law to a holder of an ordinary certified check which is not subject to this or any other special agreement.

Upon providing the report, confirmation and statements in items (i) through (iv) above to an Employee Contact of Federally-insured Lender, title Company shall be deemed to have made the same warranties to Federally-insured Lender as if Title Company had obtained an acceptance as to the Net Proceeds Check from Federally-insured Lender pursuant to Section 3.417 of the Texas Business and Commerce Code.

Pursuant to Section 9.313(c) of the Texas Business and Commerce Code, Title Company agrees to hold for the benefit of Federally-insured Lender the Mortgage Documents for each mortgage loan for whose Net Proceeds check Federally-insured Lender issues a transaction code pursuant hereto from the date such transaction code is issued.

## **2. Agreements of Federally-Insured Lender.**

Federally-insured Lender shall have no obligation under this Agreement or otherwise to issue a transaction code for any Net Proceeds Check as to any mortgage loan under any circumstances. If Federally-insured Lender through its Employee Contact(s) issues to Title Company a particularized transaction code in the format shown by Federally-insured Lender's signature block below for manual notation by the title Company on the face of a particular Net Proceeds Check, such issuance of such transaction code shall constitute the warranty by and unconditional agreement of Federally-insured Lender with Title Company that:

- (i) Federally-insured Lender shall pay the Net Proceeds Check upon presentment without reference to amounts on deposit in any account,
- (ii) Such notation, when made on the face of the Net Proceeds Check constitutes an acceptance or certification of the Net Proceeds Check by Federally-insured Lender pursuant to 3.410 and/or 3.411 of the Texas Business and Commerce Code,
- (iii) Federally-insured Lender undertakes the same obligations with respect to the Net Proceeds Check as if certified or accepted in writing by Federally-insured Lender, and
- (iv) Funds represented by the Net Proceeds Check are not subject to offset by Federally-insured Lender.

After issuance of the transaction code Federally-insured Lender shall not honor any stop-payment order or direction from Financial Institution with respect to the Net Proceeds Check. For the limited purpose of making such notation of a transaction code on the face of a particular Net Proceeds Check on behalf of Federally-insured Lender as Federally-insured Lender's signature, Title Company is hereby authorized by Federally-insured Lender to make such notation. However, Title Company neither assumes nor shall have any liability as a consequence of acting pursuant to the authorization with respect to making such notation of transaction code. The transaction code is hereby adopted by Federally-insured Lender to have the same effect as its written signature pursuant to Section 3.401 of the Texas Business and Commerce Code, and the issuance of said transaction code shall evidence Federally-insured Lender's then-present intention to authenticate its certification of a particular Net Proceeds Check.

Federally-insured Lender agrees that this Agreement and any Net Proceeds Check which noted with the transaction code issued by Federally-insured Lender as to such check is an independent and primary undertaking of Federally-insured Lender for the benefit of Title Company, on which Title Company will rely and for which Federally-insured Lender is receiving adequate consideration. If Federally-insured Lender does not issue a transaction code to Title Company as to any Net Proceeds Check, then Federally-insured Lender does not accept the Net Proceeds Check or certify to Title Company that funds are available for immediate withdrawal with respect to the applicable Net Proceeds Check.

## **3. Agreements of Financial Institution.**

To induce Title Company and Federally-insured Lender to enter into this Agreement and to undertake transactions pursuant to this Agreement, Financial Institution agrees (without limiting any other agreement or undertaking in this Agreement or otherwise) as follows:

- (i) Issuance of a transaction code by Federally-insured Lender with respect to a Net Proceeds Check shall, with respect to the rights of financial Institution, constitute certification of such Net Proceeds Check by

Federally-insured Lender, and Financial Institution shall not issue any stop-payment order or direction with respect to the Net Proceeds check after a transaction code is issued for that check.

- (ii) Financial Institution shall remain liable on the Net proceeds Check as drawer for payment to Title Company or to any other holder of the Net Proceeds Check, even though a transaction code is issued as to such check by Federally-insured Lender and certain agreements and undertakings thereby arise as to Federally-insured Lender, and the certification by Federally-insured Lender of such Net Proceeds Check shall under all circumstances be deemed procured by the Financial Institution.
- (iii) Financial Institution has received an insured closing services letter ("Insured Closing Letter") from the underwriter for whom Title company is to issue title policies pursuant to Instructions and Financial Institution will not issue any Net Proceeds Check unless such Insured Closing Letter is in effect.

#### **4. Termination.**

Any party may terminate this Agreement at any time by notice given under this Paragraph. Termination shall be effective from and after the time notice of termination is given to each other party by the terminating party, but termination shall not effect, impair or release any party from any warranty made pursuant hereto, any liability or obligation then accrued or arising out of transactions in which a transaction code has been issued to Title Company pursuant to Section 2 hereof prior to the time of termination. Notice of termination shall be in writing, which shall include (i) letter sent by first class or express mail, postage prepaid, or by private courier or delivery service if such courier or delivery service obtains a signed delivery receipt, or (ii) written communication sent by telex, telegram, telecopy or similar form of rapid transmission for which verbal or written confirmation or receipt is obtained, or (iii) other form of hand delivery. Notice of termination shall be effective upon receipt by the last party receiving such notice. All notices under this Agreement for any purpose shall be given to the persons or officers and sent to the addresses designated in the signature blocks of this Agreement, and to any person, office, or address subsequently designated by written instrument given to each other party.

#### **5. Counterparts.**

This agreement may be executed in counterparts, with all executed counterparts considered as a single agreement effective from the date signed by the last party executing this Agreement, and each being enforceable against each party who signed it. Subject to the provisions hereof, this Agreement shall be effective as to checks drawn on Federally-insured Lender and signed by Financial Institution which are made and dated after \_\_\_\_\_, 20\_\_\_\_\_.

#### **6. Miscellaneous.**

The parties to this Agreement acknowledge that this Agreement is for the purpose, among other things, of satisfying the requirements of Article 9.39A of the Texas Insurance Code and related regulations issued by the Commissioner of Insurance. This Agreement shall inure to the benefit of and may be enforced by Financial Institution, Federally-insured Lender, Title Company, Title Company's underwriter, and their respective successors and assigns and by the Texas title Insurance Guaranty Association, as third party beneficiary. This Agreement shall not be replaced or amended by any other agreement unless such replacement or amendment is in writing, is executed by each party hereto, and specifically refers to this Agreement and is upon a form duly promulgated by the Commissioner of Insurance.

Federally-insured Lender and Financial Institution each severally agree with Title Company that Title Company, shall be subrogated to all rights of either Federally-insured Lender or Financial Institution under or concerning the Mortgage Documents and loan evidenced thereby if the Net Proceeds Check is not paid by Federally-insured Lender upon presentment and the funds of Title Company (or any successor or affiliate) or the Texas Title Insurance Guaranty Association are used to fund the loan. These subrogation rights cannot be waived by the Title Company, Federally-insured Lender and Financial Institution shall take any reasonable action requested by Title Company to evidence such subrogation and in any such event shall deliver the Mortgage Documents to Title company, endorsed to its order, without recourse. Furthermore, Financial Institution does hereby agree to indemnify Title Company for losses sustained as a result of dishonor of the Net Proceeds Check.

The rights and remedies of each party under this Agreement shall be cumulative, both as to other rights or remedies under this Agreement and as to rights and remedies otherwise provided or available under other agreements or at law, by statute or in equity. The exercise or partial exercise of any such right or remedy shall not preclude the exercise of any other right or remedy.

No Title Company, Financial Institution, or Federally-insured Lender shall be required to enter into this Agreement.

The board of directors or loan committee of Federally-insured Lender and the boards of directors of the Title Company and Financial Institution have approved their respective companies' entry into and performance of either this specific agreement or generally of agreements of this nature and have authorized execution of such agreement or agreements by their undersigned officers or representatives, as reflected in the minutes of said boards or committees. The approval by the Board or Committee of Federally-insured Lender and any subsequent provision of the transaction code shall continuously be an official record of Federally-insured Lender.

Exhibit A is incorporated herein.

Signed: \_\_\_\_\_ (Financial Institution)  
Date: \_\_\_\_\_  
\_\_\_\_\_  
(Signature) \_\_\_\_\_  
By: \_\_\_\_\_ (Print Name) \_\_\_\_\_  
\_\_\_\_\_  
(Print Title) \_\_\_\_\_  
\_\_\_\_\_

Signed: \_\_\_\_\_ (Federally-insured Lender)  
Date: \_\_\_\_\_  
\_\_\_\_\_  
Address: \_\_\_\_\_  
By: \_\_\_\_\_ (Signature) \_\_\_\_\_  
\_\_\_\_\_  
(Print Name) \_\_\_\_\_  
\_\_\_\_\_  
(Print Title) \_\_\_\_\_  
Transaction Code Format (in which x = any letter and n = any number)  
\_\_\_\_\_

Signed: \_\_\_\_\_ (Name of Title Company)  
Date: \_\_\_\_\_  
\_\_\_\_\_  
Address: \_\_\_\_\_  
By: \_\_\_\_\_ (Signature) \_\_\_\_\_  
\_\_\_\_\_  
(Print Name) \_\_\_\_\_  
\_\_\_\_\_  
(Print Title) \_\_\_\_\_