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General Disclaimer: Title insurance underwriting is an especially complex endeavor with many factors which may affect a decision. This outline simply attempts to provide a basic framework of the issues it addresses. It does not specify every position on the outlined topics. This information is provided for educational use only and may not be relied upon for legal advice or tax advice.

TRUSTS

General

- The Mississippi Uniform Trust Code, § 91-8-101 et. seq., was adopted effective July 1, 2014.
 - The Trust Code applies to all trusts created before, on, or after July 1, 2014. § 91-8-1106(a)(1).
 - However, an act done before July 1, 2014, is not affected by the changes. § 91-8-1106(a)(5).
- Article 5, which deals with creditor's claims, was adopted effective July 1, 2020. § 91-8-501 through § 91-8-509.

Underwriting Guidelines

When insuring property being conveyed to a Trust, or conveyed or encumbered by a Trust, or where title is dependent upon a conveyance by a Trust:

- Confirm that the Trust Agreement, or a Memorandum of Trust, has been recorded in the County in which the property is located.
 - A Trust in real property must be in writing and filed in the county in which the real property is located. § 91-8-407(b)(1).
 - In lieu of filing the entire Trust Instrument, a Memorandum of Trust may be filed. § 91-8-407(b)(2).
 - * A Certificate of Trust under § 91-9-7 (the previous act) filed before July 1, 2014, is deemed to comply with this requirement. § 91-8-407(b)(6).
 - For filing in the land records, the Trust Agreement and Memorandum of Trust are subject to the document formatting standards in § 85-5-24 and § 89-5-33. § 91-8-407(b)(4).
 - Memorandum of Trust.
 - Required contents of the Memorandum of Trust are set out in § 91-8-407(b)(2).
 - * A sample Memorandum of Trust is attached as Exhibit A.

- Even if you are provided a full copy of the Trust Agreement, obtain a Certification of Trust to obtain the additional defenses.
- Determine the identity of the Settlor(s).
 - “Settlor” means a person, including a testator, who creates or contributes property to a trust. § 91-8-103(25).
- Determine if the Trust is Revocable or Irrevocable.
 - A trust is Revocable unless the terms of the trust expressly provide that it is Irrevocable. § 91-8-602
- Determine the identity of the Trustee(s) or Successor Trustee(s).
 - If there is a Successor Trustee acting for the Trust, confirm that the Trustee has been properly replaced.
 - If the Trustee is the spouse of the Settlor, or a relative of the spouse who is not related to the Settlor, confirm that the Settlor and spouse are not divorced.
 - * Instruments Executed Prior to Dissolution of Marriage, § 91-29-1 et. seq., was adopted July 1, 2020. It automatically revises the terms of certain instruments, including Trust Agreements, executed before a divorce. See § 91-29-1 and § 91-29-7.
 - If the Trust has Co-Trustees, confirm that all Co-Trustees will be executing the documents.
 - * Except in certain circumstances, Co-Trustees are required to participate in the performance of a Trustee’s function and consult with other Co-Trustees. § 91-8-703(c).
 - * Co-Trustees who are unable to reach a unanimous decision after consultation among all the Co-Trustees may act by majority decision. § 91-8-703(a).
 - * Even though Co-Trustees may act by majority decision, all Co-Trustees must execute the transaction documents unless the Trust Agreement provides otherwise.
 - A dissenting Trustee who joins the action at the direction of the majority of Trustees and who notified any Co-Trustee of the dissent is not liable for the action. § 91-8-703(h).

- Confirm that the title is vested correctly.
 - Real property may be acquired in the name of the trust, and can be conveyed in the trust name or by the trustees as trustees of the trust. § 91-8-407(c)(3).
- Confirm the Trustee has the power to engage in the contemplated transaction.
 - By default, the Trustee has the powers set forth in § 91-8-815 (which lists general powers) and § 91-8-816 (which lists specific powers).
 - The Trustee also has the powers conferred by the terms of the Trust Agreement. § 91-8-105 and § 91-8-815.
 - * The Trust Agreement can expand or limit the default powers of the Trustee established by statute.
- Confirm that the transaction does not involve a potential conflict of interest with the Trustee.
 - A sale, encumbrance, or other transaction involving Trust Property which is affected by a conflict between the Trustee's fiduciary duties and personal interest is voidable unless:
 - The transaction was authorized by the terms of the Trust;
 - The transaction was approved by the court;
 - The beneficiary did not commence a judicial proceeding within the time allowed in § 91-8-1005; or
 - The beneficiary consented to the Trustee's conduct, ratified the transaction, or released the trustee. § 91-8-802(b).
 - A sale, encumbrance, or other transaction involving the Trust Property is presumed to be affected by a conflict if it is entered into by the Trustee with:
 - the Trustee's spouse;
 - the Trustee's descendants, siblings, parents, or their spouses;
 - an agent or attorney of the Trustee; or
 - a corporation or other person or enterprise in which the Trustee, or a person that owns a significant interest in the Trustee, has an interest that might affect the Trustee's best judgment. § 91-8-802(c).
- Confirm that there are no liens against the Settlor of the Trust.
 - During the lifetime of the Settlor, the property of a revocable trust is subject to the claims of the Settlor's creditors. § 91-8-504(a)(1).

- After the death of the Settlor, the property of a trust that was revocable immediately preceding the Settlor's death is subject to the claims of Settlor's creditors, costs of administration of the Settlor's estate, and the expenses of funeral and disposal of remains. § 91-8-504(a)(6).
 - Claims of creditors of the deceased Settlor may be cleared through an Administration or Probate of the Estate of the Settlor.
 - Article 5 creates an alternative procedure for the Trustee to provide notice to creditors of the Settlor without the necessity of an Administration or Probate. § 91-8-504(a)(6).
 - * Claims not filed within 90 days of notice are barred against Trust Property. § 91-8-504(a)(6)(B) and (C).
 - * NOTE: The Trustee of the Trust provides these notices. No formal administration or probate is required.
- Except for certain limitations, a creditor of a Settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the Settlor's benefit. § 91-8-504(a)(2).
- The Trust Agreement, Memorandum of Trust, and the Certification of Trust will all state the name(s) of the Settlor(s). Be sure your abstractor runs the Settlor's name for judgments.
- NOTE: Trust Property is not subject to personal obligations of the Trustee. § 91-8-506.

Exhibit A

Space Above Line For Official Use Only _____

Instrument Prepared By and Return To: _____ _____ Phone: _____	Indexing Instructions: _____ of _____ County, Mississippi
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MEMORANDUM OF TRUST

Pursuant to Ms. Code Ann. § 91-8-407(b)

This Memorandum of Trust is made by the undersigned Trustee(s) of _____
dated _____ (the "Trust") and I(we) declare on this the ____ day of _____, 20__:

(A) The name of the Trust is: _____

(B) The street and mailing address of the Trust office is: _____

The name(s) and street and mailing address(es) and telephone number(s) of the Trustee(s)
is(are): _____

(C) The name(s) and street and mailing address(es) of the Settlor(s) of the Trust is(are):

(D) The legal description of all interests in real property owned by or conveyed to the Trust:

(E) The anticipated date of termination of the Trust or the event upon which the Trust will be
terminated is: _____

(F) The general powers granted to the Trustee(s) (which may be by reference to the statutory powers granted to the Trustee under the terms of the Trust):

This Memorandum of Trust is made pursuant to Miss. Code Ann. § 91-8-407(b).

SETTLOR:

TRUSTEE:

Print/Type Name

Print/Type Name

STATE OF _____

COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this _____ day of _____, 20_____, within my jurisdiction, the within named _____, who acknowledged that (he) (she) (they) executed the above and foregoing instrument.

(Signature of notarial officer)

(Title of office)

My commission expires:

(Affix official seal, if applicable)

Exhibit B

CERTIFICATION OF TRUST

Pursuant to Ms. Code Ann. § 91-8-1013

This Certification of Trust is made by the undersigned Trustee(s) of _____ dated _____ (the "Trust") and I(we) declare on this the ____ day of _____, 20__:

- (1) The Trust came into existence on _____ and is currently in existence.
- (2) The name(s) of the Settlor(s) of the Trust is(are): _____
- (3) The name(s) and address(es) of the currently acting Trustee(s) is(are):

The name(s) and address(es) of the successor Trustee(s) is/are *(If no successor trustee(s) are names, so state)*:

- (4) The administrative or managerial powers of the trustee in the pending transaction for which this Certification is being presented are:

- (5) The Trust is ____ irrevocable / ____ revocable. If revocable, the name(s) of the person(s) with the power to revoke the Trust is(are): _____

- (6) If Co-Trustees, the signature authority of the Trustees and whether all or less than all of the currently acting trustees are required to sign in order to exercise the various powers of the Trustee:

- (7) If Successor Trustees are designated, detail the conditions for their succession or insert a statement that a third party may rely on the authority of one or more Successors without proof of their succession:

- (8) The trust's Taxpayer Identification Number is: _____
Note: Only required if the trust's identification number is essential to the transaction for which the request for the trust document is made.

- (9) The name in which title to trust property may be taken: _____

(10) To the best of the trustee's knowledge, the Trust has not been revoked, modified, or amended in any manner that would cause the representations contained in this Certification of Trust to be incorrect.

This Certification of Trust is made pursuant to Miss. Code Ann. § 91-8-1013 and intending that it be relied upon by all parties to the transaction relevant to this Certification and for the purpose of inducing the title company to insure the title to the property in reliance upon the accuracy of the facts stated herein.

TRUSTEE(S):

Print/Type Name

Print/Type Name

STATE OF _____

COUNTY OF _____

Signed and sworn to (or affirmed) before me on _____ (date) by _____
_____ (name(s) of individual(s) making statement).

(Signature of notarial officer)

(Title of office)

My commission expires:

(Affix official seal, if applicable)

CONSERVATORS AND GUARDIANS

General

- Mississippi Guardianship and Conservatorship Act, § 93-20-101 et. seq., was adopted effective January 1, 2020.
- Terminology:
 - A “Conservator” is a person appointed by a court to make decisions with respect to the property or financial affairs of a Ward. § 93-20-102(c).
 - A “Guardian” is a person appointed by a court to make decisions with respect to the personal affairs of the Ward. § 93-20-102(g).
 - A “Ward” is an adult or minor for whom a Conservator or Guardian has been appointed. § 93-20-102(w).
- Conservators are more commonly involved in a real estate transaction when the real estate is owned by a Minor or Incompetent.
 - Minors:
 - A person must be 21 years of age or older to convey or encumber real property. § 1-3-27.
 - Exception: A married 18 year old may purchase, convey, or encumber real property used, or to be used, as the married couple’s actual residence. § 93-3-11.
 - Incompetents:
 - To execute a deed, the grantor must have sufficient mental capacity to understand the nature of the transaction, its consequences, and its effect upon his rights. Moore v. Stone, 208 So.2d 585 (Miss. 1968).
 - If the owner or borrower is a minor or incompetent and no Conservator has been appointed on his or her behalf, a Conservator should be appointed before proceeding with the transaction.

Underwriting Guidelines

When insuring a conveyance or encumbrance where the record owner is under a Conservatorship, or insuring a title which is dependent upon execution by a Conservator on behalf of the Ward:

- Review the Letters of Conservatorship and any amendments.
 - The Court may limit the powers of the Conservator and those limitations on the power of the Conservator must be stated in the Letters of Conservatorship. § 93-20-108.
 - A Court order establishing a limited conservatorship must state the specific property placed under the control of the conservator and the powers granted to the conservator. § 93-20-411(4).
 - NOTE: The interest of a Ward in property included in the Conservatorship Estate is not transferrable or assignable by the Ward. § 93-20-424(1).
- Review the Court Order authorizing the contemplated transaction.
 - The Conservator must give notice to certain persons and receive specific authorization by the Court before the Conservator may exercise the power to:
 - Acquire or dispose of real property. § 93-20-414(k).
 - Borrow funds, with or without security. § 93-20-414(p).
- Confirm that the transaction does not involve a conflict of interest with the Conservator.
 - A transaction affected by a substantial conflict of interest between the Conservator's fiduciary duties and personal interest is voidable. § 93-20-425.
 - Exception: The transaction will not be voidable if the transaction is authorized by Court Order after notice to the persons entitled to notice under § 93-20-411(5). § 93-20-425.
 - A transaction affected by a substantial conflict of interest includes a sale, encumbrance, or other transaction involving:
 - the Conservator;
 - an individual with whom the Conservator resides;
 - the spouse, descendant, sibling, or attorney of the Conservator; or
 - a corporation or other enterprise in which the Conservator has a substantial beneficial interest. § 93-20-425.

Out of State Conservatorships

- In order to convey or encumber property in Mississippi, the Guardian or Conservator appointed in another state must Register the Guardianship/Conservatorship in Mississippi pursuant to § 93-20-124.
 - Once registered, the Guardian/Conservator will have the power to act in Mississippi.

ALTA 2021 FORMS

Dates

- The Effective Date of the new forms is July 1, 2021.
 - Copies of the forms, including redlines versus prior versions, are available at: www.alta.org/policy-forms/
- ALTA Decertification Date for the 2006 Policies is December 31, 2022.

Revised Forms

- Commitments
 - ALTA Commitment for Title Insurance
- Policies
 - ALTA Loan Policy
 - ALTA Short Form Residential Loan Policy
 - ALTA Owner's Policy
 - ALTA Homeowner's Policy
- Endorsements
 - See list below.

Commitment – Highlighted Changes

Schedules

- Item 2 of Schedule A, which lists the Policies to be issued, Amount of Insurance, and name of Proposed Insured, has been amended to include a statement of the estate or interest to be insured.
 - As in the 2016 Commitment, Item 3 of Schedule A continues to include the estate or interest held at the commitment date.
 - This will be useful where a purchaser is buying a lesser interest than what is held by the owner (e.g., X owns in fee and is conveying to Y a leasehold).
- The Commitment contains minor wording changes to the Transaction Identification Data, footer, and other Items in Schedule A.

- The 2016 Commitment added a Preamble to the Exceptions in Schedule B-II which states that any Discriminatory Covenants referenced in Schedule B are removed and not republished.
 - The 2021 Commitment amends this wording to conform to the wording used in the 2021 Owner's Policy and Loan Policy forms.

Policies – Highlighted Changes

Schedules – Standard Owner's and Loan Policies

- Both the Owner's Policy and Loan Policy have added an optional section of Transaction Identification Data to the header before Schedule A.
 - Similar to the header added to the Commitment when it was revised in 2016.
 - The information contained in the Transaction Identification Data is not insured but serves as reference information only. Condition 9.d. of OP and 9.e. of LP.
- Both the Owner's Policy and Loan Policy make minor wording revisions to some of the Items in Schedule A.
- Both the Owner's Policy and Loan Policy include an optional Item in Schedule A that allows the incorporation of Endorsements by reference. Item 5 of Schedule A of the OP and Item 6 of Schedule A of LP.
 - The 2006 Loan Policy included a similar provision, but provided a list of Endorsements that could be incorporated by reference. The 2021 Loan Policy removes the list and allows any Endorsement to be incorporated by reference.
 - NOTE: If this Item is used, do not incorporate by reference an Endorsement that requires transaction specific information to be added to the Endorsement since there is no place for that information to be included (for example: ALTA 17-06 Access Endorsement).
- Both the Owner's Policy and Loan Policy add a Preamble to the Exceptions in Schedule B which states that any Discriminatory Covenants contained in instruments referenced in Schedule B are removed and not republished.
 - This language removes the need to add a specific exception for any covenants or restrictions that contain unenforceable discriminatory provisions.
 - Similar language was added to the Commitment when it was revised in 2016.

- Both the Owner’s Policy and Loan Policy revise the existing Preamble to the Exceptions in Schedule B to except for the terms and conditions of any lease or easement that is insured in Schedule A.
 - This language removes the need to add a specific exception for the terms and conditions of any lease or easement that is insured.
 - NOTE: Exceptions for leases and easement that burden the property must still be included.
 - Similar language was added to the Commitment when it was revised in 2016.
- The Loan Policy revises the existing Preamble to the Subordinate Matters in Schedule B-II to reference Covered Risk 10 and except for the terms and conditions of any subordination provision.
 - Covered Risk 10 is the provision which insures the priority of the various components of the lien of the insured mortgage.
 - The blanket exception for terms and conditions of any subordination provision removes the need to add a specific exception for the terms and conditions of any subordination provision that is used to subordinate a previous lien to the insured mortgage.

Schedules – Short Form Loan Policy

- There are two versions of the Schedules of the 2021 Short Form Loan Policy.
 - ALTA Short Form Residential Loan Policy – Assessments Priority replaces the ALTA Short Form Residential Loan Policy (12-03-2012).
 - ALTA Short Form Residential Loan Policy – Current Assessments replaces the ALTA Short Form Residential Loan Policy – Current Violations (04-02-2015).
- Short Form Loan Policy – Assessments Priority
 - As in the Owner’s Policy and Loan Policy, an optional section of Transaction Identification Data is added to the header before Schedule A.
 - The Short Form Loan Policy makes minor wording revisions to some of the Items in Schedule A and updates the names for the Endorsements which may be incorporated by reference.

- The ALTA 4.1 Condominium Endorsement and the ALTA 5.1 Planned Unit Development Endorsement are removed as Endorsements which may be incorporated by reference.
 - The ALTA 9.6 Private Rights Endorsement is added as an Endorsement which may be incorporated by reference.
- As in the Owner's Policy and Loan Policy, the Short Form Loan Policy adds a Preamble to the Exceptions in Schedule B which states that any Discriminatory Covenants included in instruments referenced in Schedule B are removed and not republished.
 - NOTE: Unlike the new Loan Policy, the new Short Form Loan Policy does not include built-in exceptions for terms and conditions of the insured Lease or Easement, or the terms and conditions of any Subordination Provisions.
- The Short Form Loan Policy makes minor wording revisions to the Exceptions contained in Schedule B.
- The Short Form Loan Policy makes minor wording revisions to the Addendum.

Covered Risks

- Both the Owner's Policy and Loan Policy provide that as long as the Policy has a Policy Number and Policy Date, the Policy is valid even if it is issued electronically or without any signatures. Preamble to Covered Risks.
 - This effectively incorporates the coverage provided by the ALTA 39-06 Policy Authentication Endorsement.
- Both the Owner's Policy and Loan Policy now explicitly include coverage for a boundary line overlap if it would have been shown on an accurate survey. Covered Risk 2(c).
- Both the Owner's Policy and Loan Policy add coverage against a PACA-PSA Trust but only to the extent of an Enforcement Notice in the Public Records. Covered Risk 8.
 - The Perishable Agricultural Commodities Act ("PACA") is a federal act that imposes a trust for unpaid suppliers, sellers and agents of fresh fruits and fresh vegetables.
 - The Packers and Stockyards Act ("PSA") is a federal act that imposes a trust for unpaid packers to protect livestock producers.
 - Both trusts are silent liens that can exist in unrecordable form. The Policy only provides coverage against any recorded notices.

Exclusions

- Both the Owner's Policy and Loan Policy now exclude loss caused by a discrepancy in the quantity of the area, square footage, or acreage of the Land. Exclusion 9 of LP and Exclusion 7 of OP.
 - This language removes the need to add a specific exception for the acreage or quantity of land.

Conditions

- The Owner's Policy expands the definition of "Insured" to include a grantee of the Insured if the grantee is:
 - An Entity that is wholly owned by the Insured; that wholly owns the Insured; or if the Entity and the Insured are wholly owned by the same owner;
 - A spouse who receives Title because of a divorce;
 - A Transferee in a Transfer on Death Deed; or
 - Another Insured named in Item 1 of Schedule A (e.g., one co-tenant buys out another co-tenant). Condition 1.g.i.e. of the OP.
- The Loan Policy is revised to specify the date for determining a loss under the Policy.
 - General Rule: The date for determining the loss is either:
 - The date the Insured acquires the Title as a result of foreclosure of the Insured Mortgage; or
 - The date the lien of the Insured Mortgage is extinguished or rendered unenforceable. Condition 8.b. of LP.
 - Exception: If the Insurer attempts to cure the Title but is unsuccessful, the Insured may choose to have the date for calculating the loss either be:
 - the date of settlement, or
 - the date of notice of the claim. Condition 8.c. of LP.
- The Owner's Policy is revised to specify the date for determining a loss under the Policy.
 - General Rule: the date for determining in the loss is the date the Insured discovers the defect. Condition 8.b. of OP.
 - Exception:
 - If, at the Date of Policy, the Title is void, then the Insured may elect to use Date of Policy for the date used in calculating the loss. Condition 8.c. of OP.

- If the Insurer attempts to cure the defect and is unsuccessful, the Insured may elect to use either of the following as the date used in calculating the loss:
 - * the date of settlement; or
 - * the date of notice of the claim. Condition 8.d.ii. of OP.
- In both the Owner’s Policy and Loan Policy, if the Insurer attempts to cure the defect and is unsuccessful, the Amount of Insurance is increased by 15%. Condition 8.c.i. of LP and Condition 8.d.i. of OP.
 - The 2006 Owner’s Policy and Loan Policy included this provision, but limited the increase to 10%.

Endorsements

- Naming:
 - In 2006, all Endorsements added the “-06” suffix to the Endorsement number to identify that they were to be issued with the 2006 policies.
 - Certain Endorsements have been revised, primarily to conform to the 2021 policy language or incorporate new defined terms.
 - The “-06” suffix has been removed from the Endorsements which were revised.
 - The Endorsements which were not revised continue to have the “-06” suffix.
 - These Endorsements can be issued with the 2021 Policies.
- The Endorsements which have been revised for 2021 are:
 - ALTA 3 – Zoning
 - ALTA 3.1 – Zoning - Completed Structure
 - ALTA 3.2 – Zoning - Land Under Development
 - ALTA 3.3 – Zoning - Completed Improvement - Non-Conforming Use
 - ALTA 3.4 – Zoning - No Zoning Classification
 - ALTA 4 – Condominium - Assessments Priority
 - ALTA 4.1 – Condominium - Current Assessments
 - ALTA 6 – Variable Rate Mortgage
 - ALTA 6.2 – Variable Rate Mortgage - Negative Amortization
 - ALTA 7.1 – Manufactured Housing - Conversion - Loan Policy
 - ALTA 7.2 – Manufactured Housing - Conversion - Owner's Policy
 - ALTA 8.1 – Environmental Protection Lien
 - ALTA 10 – Assignment
 - ALTA 10.1 – Assignment and Date Down

- ALTA 11 – Mortgage Modification
 - ALTA 11.1 – Mortgage Modification with Subordination
 - ALTA 11.2 – Mortgage Modification with Additional Amount of Insurance
 - ALTA 12 – Aggregation - Loan Policy
 - ALTA 12.1 – Aggregation - State Limits - Loan Policy
 - ALTA 14 – Future Advance - Priority
 - ALTA 14.1 – Future Advance - Knowledge
 - ALTA 14.2 – Future Advance - Letter of Credit
 - ALTA 14.3 – Future Advance - Reverse Mortgage Endorsement
 - ALTA 26 – Subdivision
 - ALTA 27 – Usury
 - ALTA 28.1 – Encroachment - Boundaries and Easements
 - ALTA 30 – One-to-Four Family Shared Appreciation Mortgage
 - ALTA 30.1 – Commercial Participation Interest
 - ALTA 32 – Construction Loan
 - ALTA 32.1 – Construction Loan - Direct Payment
 - ALTA 32.2 – Construction Loan - Insured's Direct Payment
- New Endorsements:
 - ALTA 34.1 – Identified Exception & Identified Risk Coverage
 - The ALTA 34.1 is a variation of the ALTA 34-06 that provides more flexibility in identifying a specific risk within a document to insure over.
 - ALTA 47 Series – Addresses operative law issues arising out of the *McGirt* case. They are only to be issued with the 2006 policies.