Purpose: To provide guidance to First American agents faced with governmental office closings due to COVID-19, as it pertains to Commercial Transactions. This Standard supersedes NA-2020-002 and any other communications previously published regarding Closures of Recording Offices in commercial transactions.

Background: First American has been advised that some state or county offices have closed in response to public health concerns related to the COVID-19 outbreak. This information is rapidly developing, and local operations must be alert to changes in recording availability. In addition, the closure may take different forms and more changes may be forthcoming after an initial change. It may be the recorder’s office, it may be the treasurer or tax collector, or it may be both. It may be state or federal offices necessary to provide lien payoffs. When the issue is that the recorder's office is closed, it may be completely closed, or it may continue to process documents for recording submitted electronically, by mail, or by drop-off.

Standard: Considering the risk associated with closing a commercial transaction affected by closure of the recording office and other government offices, a requirement should be placed in the commitment advising the parties that additional requirements may apply based upon the circumstances. Special exceptions have been promulgated for inclusion in all title commitments and policies related to property in affected counties and where applicable to recording, municipalities. When preparing for closing a transaction involving property in an affected county or municipality, and after the parties have (a) been informed of the recording office closure and (b) have confirmed in writing that they still will proceed to closing, one of the following exceptions must be raised, as appropriate, in both commitments and policies:

Requirement – Owner’s and Loan Commitments:
Prior to closing, the company must have information whether the real property recording office for the county in which the Land is located is closed due to the COVID-19 emergency. If recording has been restricted, specific underwriting approval is required; and, additional requirements may be made.

Exception - Owner’s Commitment and Policy:
“Any defect, lien, encumbrance, adverse claim, or other matter created by or arising out of the inaccessibility of the [applicable recording office], including, but not limited to, (i) an inability to search the Public Records after [last effective date of the commitment], or (ii) any delay in recordation of [the documents vesting Title] in the Public Records.”

Exception - Loan Commitment and Policy:
“Any invalidity, unenforceability, lack of priority, defect, lien, encumbrance, adverse claim, or other matter created by or arising out of the inaccessibility of the [applicable recording office], including, but not limited to, (i) an inability to search the Public Records after [last effective date of the commitment], (ii) any delay in recordation of the documents [vesting Title or] creating the lien of the Insured Mortgage
in the Public Records, or (iii) any claim based on an assertion that the recording of the Insured Mortgage failed to be timely."

We are aware that the exceptions set forth above are significant limitations to our typical policy coverage. Your commercial customers may ask if it is possible to issue a policy without the applicable exception. When presented with such a request, we understand the importance of managing your customer’s expectations proactively, and to establish that the ability to do so will only be approved by us, under very limited circumstances. If you are presented with a request to eliminate the applicable exception, you may not do so without written authorization from a First American Underwriter. As part of their determination whether to remove the exception, the Underwriter will need information concerning not only the transaction, but the type of use of the property (e.g. vacant, office, retail, etc.), our prior experience with the parties, financial strength of the Indemnitor, potential issues that my result in the filing of involuntary liens or litigation and other matters. This rule applies for all commercial transactions, regardless of the liability amount of the policy.

To the extent that a First American Underwriter provides such approval, you will be required to obtain a gap indemnity as provided to you by a First American Underwriter. The form of gap indemnity is not the same for commercial transactions as it is for residential transactions. Please make certain that any lender or customer instructions do not commit you to recording the title documents within a specified time period.

This Standard regarding Commercial Transactions will remain in effect for each County that remains closed for recordings, unless superseded by a new Underwriting Communication.

Given the fluid nature of this situation, please watch for follow-up communications that might revise the above requirements.

NOTE: This Underwriting Communication is confidential and intended solely for use by First American Title Insurance Company’s (“First American”) title issuing offices, policy issuing agents (“Agents”), and approved attorneys. This Communication may not be shared with third parties and no other person or entity is authorized to rely upon it. While the scope of agency for Agents is limited to the functions of underwriting and issuing title insurance policies on First American’s behalf, and does not include closing or escrow services, First American sometimes provides information and recommendations with regard to Agents’ ancillary closing or escrow business as a courtesy. Moreover, this Communication should be considered a directive if noncompliance could impact liability under First American’s title insurance policies or closing protection letters. This Communication is being provided to Agents with those considerations in mind, and should become a permanent part of your records to assure compliance with the requirements set forth herein.

First American routinely issues Underwriting Communications through the Underwriting Workbench, AgentNet®, and other means. Communications are typically classified as one of the following types: Standard, Guideline, Advisory, Caveat, Fraud Alert, or Transaction Alert. Generally, Standards establish mandatory procedures and protocols that must be followed when issuing a First American policy; Guidelines establish best practices that are encouraged, but not required; and Advisories simply provide information. Caveats, Fraud Alerts, and Transaction Alerts generally provide information and instructions related to specific parties, properties, or other matters.

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