



Washington Underwriting Memo 2014-1

Date: September 12, 2014

From: Gretchen L. Valentine
Vice President/Pacific NW Regional Underwriting Counsel

To: All Washington Issuing Agents

Re: **Transfer on Death Deeds – Examining, Underwriting, and Excise Tax**

The Washington Uniform Real Property Transfer on Death Act, [RCW 64.80 et seq.](#), effective June 12, 2014, allows individuals to transfer property at the transferor's death by a transfer on death deed. Transfer on death deeds transfer real property without covenants or warranties of title, even if the deed states otherwise, RCW 64.80.100(5), and transfer on death deeds are contingent and revocable and may lapse or be disclaimed. RCW 64.80.030, .100 & .110. Under the Act, if property is being transferred pursuant to a transfer on death deed, a certified copy of the death certificate is recorded to perfect title, and the transfer on death deed is deemed to have been recorded at the transferor's death. RCW 64.80.100(2). In many cases, no excise tax will be due. RCW 82.45.197(7).

Examining

In addition to the usual search requirements, please add the following exception to every commitment in which a transfer on death deed appears in the chain of title:

- XV. TRANSFER ON DEATH DEED AND THE TERMS AND CONDITIONS THEREOF:
- | | |
|-----------------------------|---|
| TRANSFEROR/S: | [Person/s making the transfer on death deed] |
| DESIGNATED BENEFICIARY/IES: | [Person/s designated to receive property in a transfer on death deed] |
| RECORDED: | [Date of recording] |
| RECORDING NUMBER: | |

TRANSFER TO THE DESIGNATED BENEFICIARY/IES IS TO OCCUR AT THE TRANSFEROR'S/S' DEATH, BUT A TRANSFER ON DEATH DEED IS REVOCABLE AND MAY LAPSE UPON THE DEATH OF A DESIGNATED BENEFICIARY. THE TITLE COMPANY MUST BE INFORMED IF THE TRANSFEROR/S AND/OR DESIGNATED BENEFICIARY/IES ARE DECEASED OR DIE BEFORE THE CLOSING OF THE CONTEMPLATED TRANSACTION.

If the transfer on death deed was revoked, please set up the following exception as a subparagraph to the above exception:

- XW. REVOCATION OF TRANSFER ON DEATH DEED AND THE TERMS AND CONDITIONS THEREOF:
- | | |
|---|--|
| TRANSFEROR/S: | [Person/s making the transfer on death deed] |
| NEW DESIGNATED BENEFICIARY/IES, IF ANY: | [New person/s, <i>if any</i> , designated to receive property] |

RECORDED: [Date of recording]
RECORDING NUMBER:

If the transfer on death deed was invalidated by inter vivos transfer, please set up the following as a subparagraph to the above exception:

XX. INTER VIVOS TRANSFER INCONSISTENT WITH TRANSFER ON DEATH DEED, AND THE TERMS AND CONDITIONS THEREOF:
GRANTOR/S: [Person/s making the inter vivos transfer]
GRANTEE/S:
RECORDED: [Date of recording]
RECORDING NUMBER:

If the transfer on death deed is followed by one or more recorded death certificates, for each death certificate please add the following as a subparagraph to the above exception:

XY. DEATH CERTIFICATE FOR TRANSFEROR OF TRANSFER ON DEATH DEED:
DECEASED TRANSFEROR:
DATE OF DEATH:
RECORDED: [Date of recording]
RECORDING NUMBER:

Finally, after the transfer on death deed exception or the last subparagraph, *if any*, add the following NOTE:

XZ. PLEASE CONTACT YOUR TITLE OFFICER FOR A DISCUSSION OF THIS EXCEPTION.

Underwriting Guidelines

The checklist on Exhibit "A", attached, may aid the underwriter or title officer in understanding whether title may have transferred to a transferor's designated beneficiaries. However, all transactions involving transfer on death deeds must be submitted to an underwriter for review before vesting title in the commitment through a transfer on death deed and a corresponding recorded death certificate.

If the transfer on death deed was executed by an attorney-in-fact, the underwriter must review the power of attorney to confirm that the principal granted the attorney-in-fact the power to make a transfer on death deed. Although an attorney-in-fact has all powers of absolute ownership of the principal, the attorney-in-fact does not have the power to make amend, alter or revoke the principal's transfer on death deeds, unless those powers are specifically provided in the instrument granting the power of attorney. RCW 11.94.050(1).

If the underwriter approves vesting title in the designated beneficiary/ies, the examiner must still set up the following matters in the preliminary commitment for title insurance:

1. Evidence of the capacity of the grantor upon the date of execution of the transfer on death deed. RCW 64.80.050.
2. Conveyances, encumbrances, assignments, contracts, mortgages, deeds of trust, liens and other interests to which the property is subject at the transferor's death. RCW 64.80.100(2).

3. Medicaid liens under RCW 41.05A.090 and RCW 43.20B.080 that may be recorded *within 24 months* after the transferor's death. *The filing of a probate with notice to creditors does not shorten the time for recording a Medicaid lien under the Washington Uniform Real Property Transfer on Death Act.*
4. Terms and conditions of the will, if any, to identify other potential parties in interest.
5. Terms and conditions of a completed Lack of Probate Affidavit, if there is no probate.
6. Estate taxes. RCW 11.18.200(2)(d).
7. Creditor's claims. RCW 11.18.200(2)(d).
8. Expenses of administration for the decedent's estate. RCW 11.18.200(2)(d).
9. Statutory rights of spouses and children under RCW 11.18.200, RCW 11.42.085 and RCW 11.54 *et seq.*; and
10. Real estate excise tax due, if any, upon the recording of a certified copy of the death certificate associated with a transfer on death deed. WAC 458-61A-202(7) & (8)(f).

Excise Tax

Transfer on death deeds are generally exempt from the Real Estate Excise Tax ("REET"), and a REET Affidavit is neither required nor accepted for the recording of a transfer on death deed. WAC 458-61A-303(3)(j). The REET, if any, is paid upon the recording of a certified copy of the death certificate to perfect title. RCW 82.45.197(7); WAC 458-61A-202(8)(f). An affidavit given in connection with the recording of certified copy of the death certificate need only be signed by the designated beneficiary/ies named in the transfer on death deed. WAC 458-61A-303(8). Please call the Auditor's or Recorder's Office in your county to see how they handle the REET affidavit or other form prepared by the department for use upon the recording of a certified copy of the death certificate.

Remember that a transfer by a recorded transfer on death deed and the associated death certificate does not, by itself, result in the removal of a current use classification. RCW 84.34.108(1)(c). When a real estate excise tax affidavit or other form prepared by the department is signed by the new owner at the time a certified copy of the transferor's death certificate is recorded, the new owner should identify whether the new owner intends to continue the transferor's current use classification.

Be sure to watch for changes in how the real estate excise tax applies to transfer on death deeds. Changes may be proposed in upcoming legislative sessions to clarify how the real estate excise tax applies in transfer on death deed situations.

Conclusion

In Washington State, transfer on death deeds will likely be used to fund revocable living trusts or to transfer residential property in small estates with no minor beneficiaries. The Washington Uniform Real Property Transfer on Death Act, SESH Bill 1117 is available online at:

[SESH Bill 1117](#)

See the statute at:

[Chapter 64.80 RCW](#)

If you have any questions or to request sample forms, please contact Gretchen Valentine at 425-896-3836 or by e-mail at Gretchen.Valentine@TitleResources.com.

Exhibit "A"

Yes or No?	Section One: Question: Did the transfer on death deed ("TODD") comply with the statute?
	1. <u>Date of death</u> - Did the transferor/s die on or after June 12, 2014? RCW 64.80.901. If 'no', STOP; the TODD is ineffective. If 'yes', go to 2.
	2. <u>Capacity</u> - Did the transferor/s have the capacity to make the TODD? RCW 64.80.050. If 'no', STOP; the TODD is ineffective. If 'yes', go to 3.
	3. <u>Deed validity</u> - Does the TODD contain the essential elements of a properly recordable deed? (A TODD is effective without consideration.) RCW 64.80.060(1), -.070. If 'no', STOP; the TODD is ineffective. If 'yes', to go 4.
	4. <u>Transfer at death</u> - Does the TODD state that the transfer to the designated beneficiary is to occur at the transferor's death? If 'no', STOP; the TODD is ineffective. If 'yes', go to 5.
	5. <u>Deed recorded before death</u> - Was the TODD recorded before the transferor's death in the county where the property is located? RCW 64.80.060(2) & (3). If 'no', STOP; the TODD is ineffective. <i>If 'yes', the TODD complied with the statute.</i> Go to Section Two.
Yes or No?	Section Two: Question: Was the TODD revoked? RCW 64.80.080.
	6. <u>Revocation</u> - Was the transfer on death deed revoked by: a. a TODD that revokes all/part of the deed expressly or by inconsistency; <u>or</u> b. an instrument of revocation that expressly revokes all/part of the TODD; <u>or</u> c. an <i>inter vivos</i> deed that expressly revokes all or part of the TODD? If 'yes', the TODD <i>may</i> be revoked; go to 7. If 'no', go to Section Three.
	7. <u>Timing of Revocation</u> - Was the instrument identified in 6. above: a. acknowledged by the transferor <i>after</i> the acknowledgment of the deed being revoked; <u>and</u> b. recorded <i>before</i> the transferor's death in the county where the TODD was recorded? RCW 64.80.080(1). If 'yes', the TODD may be revoked; go to 8. If 'no', go to Section Three.
	8. <u>Revocation - Multiple transferors</u> – Does <u>the TODD</u> have multiple transferors? If 'no', STOP; the revocation was effective. If 'yes', were the multiple transferors: a. <i>Tenants in common?</i> – Was the revocation signed by all tenant-in-common transferors? If 'yes', the revocation revokes the TODD. If 'no', a revocation by one transferor does not affect the TODD as to the interest of another transferor. <i>Vesting may be split between one transferor and another transferor's designated beneficiaries.</i> b. <i>Joint tenants (with right of survivorship)?</i> – Was the revocation signed by all joint owners living at the time the revocation was recorded? If 'yes', the revocation was effective. c. <i>Community property</i> – Was the revocation signed by both spouses or domestic partners, if both were then living? RCW 60.80.080(2). If 'yes', the revocation was effective. If revocation was not fully effective, go to Section Three.
Yes or No?	Section Three: Question: Was the TODD invalidated by inter vivos transfer?
	9. <u>Inter vivos transfer</u> – Did the transferor/s deed the property subject to the TODD <i>to another</i> before the transferor's/s' death? RCW 60.80.080(4). If 'yes', STOP; the TODD is ineffective. If 'no', go to Section Four.

Yes or No?	<p align="center">Section Four: Question: Was the transferor's death certificate recorded?</p>
	<p>10. <u>Death Certificate Recorded</u> – Was a certified copy of the transferor's death certificate recorded? If 'no', STOP; the TODD is ineffective. If 'yes', the TODD may be effective to pass title. Go to Section Five.</p>
Yes or No?	<p align="center">Section Five: Question: When the transferor's death certificate was recorded, did title pass to other transferors or to the designated beneficiary/ies?</p>
	<p>11. <u>Multiple transferors</u> – Did the TODD have multiple transferors? If no, go to Section Six. If 'yes', were the multiple transferors:</p> <p>a. <i>Joint tenants with right of survivorship?</i> – If 'yes', the property transfers to joint owners with right of survivorship until the last surviving joint tenant with right of survivorship dies. RCW 64.80.100(3).</p> <p>b. <i>Holding title as community property?</i> – If 'yes':</p> <p>i. If the spouse or domestic partner <u>did not</u> join in the TODD, the <i>single</i> transferor's interest is transferred to the designated beneficiary upon the transferor's death. <i>Vesting will be split between the designated beneficiary and the surviving spouse or domestic partner.</i></p> <p>ii. If the spouse or domestic partner <u>did</u> join in the TODD, the <i>two</i> transferors' interests are transferred to the designated beneficiary only upon <u>both</u> transferors' deaths. <i>Vesting remains in the surviving spouse or domestic partner until the surviving party's death, unless the surviving spouse or domestic partner earlier revokes the TODD or conveys the property by inter vivos transfer.</i> RCW 64.80.100(4).</p> <p>Go to Section Six.</p>
Yes or No?	<p align="center">Section Six: Question: Did a designated beneficiary's interest lapse? RCW 64.80.100(1).</p>
	<p>12. <u>Single designated beneficiary - Lapse</u> - Did the single designated beneficiary die before the transferor? If 'yes', the interest of the designated beneficiary lapses and the TODD is ineffective. If 'no', go to 13.</p>
	<p>13. <u>Multiple designed beneficiaries - Lapse</u> – Did any of the multiple designated beneficiaries die before the transferor? If 'yes', the interest of the deceased designated beneficiary lapses and is transferred to the other designated beneficiaries. If 'no', go to Section Seven.</p>
Yes or No?	<p align="center">Section Seven: Question: Was a designated beneficiary's interest disclaimed? RCW 64.80.110.</p>
	<p>14. <u>Disclaimer – Benefits</u> - Did a designated beneficiary receive the benefits of the property (i.e. accept rents, profits or other benefits)? RCW 11.86.051(1). If 'yes', STOP; the designated beneficiary may not disclaim. If 'no', go to 15.</p> <p>15. <u>Disclaimer – Within 9 Months?</u> - Did a designated beneficiary disclaim all or part of the beneficiary's interest within 9 months of the transferor's death? RCW 11.86.031(2). If 'yes', the disclaimed interest does not pass to the disclaiming designated beneficiary. If 'no', the interest passes to the designated beneficiary.</p>