

DEPARTMENT OF REGULATORY AGENCIES
DIVISION OF REAL ESTATE
REAL ESTATE COMMISSION
4 CCR 725-1

NOTICE OF PROPOSED PERMANENT RULEMAKING HEARING
August 5, 2019

CHAPTER 5. SEPARATE ACCOUNTS AND ACCOUNTING

Pursuant to and in compliance with Title 12, Article 61 and Title 24, Article 4, C.R.S., as amended, notice of proposed rulemaking is hereby given, including notice to the Attorney General of the State of Colorado and to all persons who have requested to be advised of the intention of the Colorado Real Estate Commission (the "Commission") to promulgate rules, or to amend, repeal, or repeal and re-enact the present rules of the Commission.

STATEMENT OF BASIS

The statutory basis for the rules titled Rules of the Colorado Real Estate Commission is Part 1 of Title 12, Article 61, Colorado Revised Statutes, as amended by House Bill 19-1172 which becomes effective October 1, 2019.

STATEMENT OF PURPOSE

The purpose of this rule is to effectuate the legislative directive pursuant to section 24-4-103.3., C.R.S. (Senate Bill 14-063) and House Bill 19-1172 along with promulgating the necessary and appropriate rules in conformity with the state statutes of the real estate practice act.

SPECIFIC PURPOSE OF RULEMAKING

The specific purpose of this rulemaking is to add, modify and amend the trust and escrow account requirements and accounting methods for real estate brokers as a result of the mandatory rule review required by section 24-4-103.3., C.R.S. The Division of Real Estate conducted a review of all of its rules relating to the real estate practice act to assess the continuing need for and the appropriateness and cost-effectiveness of its rules. The review also determined whether the rules should be continued in their current form, modified, or repealed. After consultation with stakeholders, the proposed rules have been re-organized, re-indexed, and correctly categorized. As a result, Chapter 5 sets forth the trust and escrow account requirements for real estate brokers. This rulemaking also revises the statutory citations as a result of the passage of House Bill 19-1172.

PROPOSED NEW, AMENDED AND REPEALED RULES

Deleted material shown ~~struck through~~; new material is indicated by underline. Rules, or portions of rules, which are unaffected are reproduced. Readers are advised to obtain a copy of the complete rules of the Commission at www.dora.colorado.gov/dre.

Chapter 5: Separate Accounts and Accounting

5.1. Establishment of Internal Accounting Controls

Any Brokerage Firm or Broker who receives Money Belonging to Others must establish written accounting control policies and procedures, which must include adequate checks

and balances over the financial activities of the Broker, Brokerage Firm, and unlicensed persons, as well as manage the risk of fraud or illegal acts.

5.2. Trust or Escrow Accounts

All Money Belonging to Others accepted by a Brokerage Firm must be deposited in one or more accounts separate from other money belonging to the Broker or Brokerage Firm. The Brokerage Firm must identify the fiduciary nature of each separate account in deposit agreements with a Recognized Depository by the use of the word “trust” or “escrow” and a label identifying the purpose of such account, such as “sales escrow”, “rental escrow”, “security deposit escrow”, or other abbreviated form defined in the deposit agreement. The Brokerage Firm must retain a copy of each executed account deposit agreement for inspection by the Commission.

5.3. Accounts in the Name of the Brokerage Firm or Broker

- A. Brokerage Firms acting in the name of the Employing Broker or Independent Broker as a sole-proprietor must maintain separate Trust or Escrow Accounts in the name of the Employing Broker or Independent Broker.
- B. Brokerage Firms licensed as a partnership, corporation, or limited liability company must maintain separate Trust or Escrow Accounts in the name of the licensed partnership, corporation, or limited liability company.
- C. The Employing Broker or Independent Broker are responsible for, must maintain and be able to withdraw money from each separate account, but may authorize other licensed or unlicensed cosigners. However, such authorization will not relieve the Employing Broker or Independent Broker of any responsibility under the Commission statutes and these Rules.

5.4. Number of Separate Trust or Escrow Accounts may vary from Zero to Unlimited

A Brokerage Firm is not limited as to the number of separate accounts, which may be maintained for Money Belonging to Others. If the Brokerage Firm is not in possession of Money Belonging to Others, there is no obligation to maintain a separate Trust or Escrow Account.

5.5. Separate Trust or Escrow Accounts Required for Rental Receipts and Security Deposits

A Brokerage Firm who engages in Property Management must deposit rental receipts and security deposits and disburse money collected for such purposes in separate Trust or Escrow Accounts, a minimum of one for rental receipts and a minimum of one for security deposits.

5.6. Trust or Escrow Funds must be Available Immediately without Penalty

Unless otherwise agreed to in writing by the parties, Money Belonging to Others must not be invested in any type of account, security, or certificate of deposit that has a fixed term for maturity or imposes any fee or penalty for withdrawal prior to maturity.

5.7. Time Limits for Deposit of Money Belonging to Others

All Money Belonging to Others received by a Brokerage Firm for Property Management must be deposited in the Brokerage Firm's appropriate Trust or Escrow Account no later than five (5) business days following receipt of funds or mutual execution of a lease, whichever is later.

All other Money Belonging to Others which is received by a Brokerage Firm must be deposited in the Brokerage Firm's Trust or Escrow Account no later than three (3) business days following receipt of funds or mutual execution of contract, whichever is later.

5.8. Transfer of Security Deposits

A. Owner-Held

A Brokerage Firm receipting for security deposits will not deliver such security deposits to an owner without the tenant's written authorization in a lease or unless written notice has been given to the tenant. Such notice must be given in a manner so the tenant will know who is holding the security deposit and the specific requirements for the procedure in which the tenant may request return of the security deposit. If a security deposit is delivered to the owner, the Management Agreement should place financial responsibility on the owner for its return, and in the event of a dispute over ownership of the security deposit, must authorize disclosure to the tenant of the owner's true name and current mailing address.

B. New Property Management Company

A Brokerage Firm which begins management of a property most recently managed by another Brokerage Firm must disclose to the owner and the current tenant, in writing, and within thirty (30) days after execution of a Management Agreement, the status of any security deposit held by the previous Brokerage Firm, including the amount of the security deposit and confirmation of receipt of the funds. The Brokerage Firm must verify that each security deposit transferred to them matches the amount listed in the current lease and disclose any discrepancy to the owner and current tenant. The Brokerage Firm must inform the tenant, in writing, if the owner is holding the security deposit.

5.9. Diversions and Conversion Prohibited

Money Belonging to Others belonging to one beneficiary must not be used for the benefit of another beneficiary. Money Belonging to Others must not be used for the benefit of the Brokerage Firm or Broker.

5.10. Commingling Prohibited

A Broker's or Brokerage Firm's personal or business operating funds must not be commingled with Money Belonging to Others. One or more separate Trust or Escrow Accounts may be maintained by a Brokerage Firm pursuant to the following duties and limitations:

A. Money held in a Trust or Escrow Account which becomes due and payable to the Brokerage Firm must be withdrawn monthly.

B. Money advanced by a Brokerage Firm for the benefit of another may be placed in the Trust or Escrow Account and identified as an advance but may be withdrawn by the Brokerage Firm only on behalf of such person. Any amount advanced to a Trust or Escrow Account must be identified and recorded in the journal and the ledger and disclosed in accounting to the beneficiary as set forth in Rule 5.15.

- C. In the absence of a specific written agreement to the contrary, commissions, fees, and other charges collected by a Brokerage Firm for performing any service on behalf of another are considered “earned” and available for use by the Brokerage Firm only after all contracted services have been performed and there is no remaining right of recall by others for such money. The Brokerage Firm must identify and record all commissions, fees, or other charges withdrawn from a Trust or Escrow Account on the account journal and individual ledgers of those against whom the fees or commissions are charged. If a single disbursement of fees or commissions includes more than one (1) transaction, rental period or occupancy or includes withdrawals from the account of more than one (1) Trust or Escrow Account beneficiary, the Brokerage Firm, upon request, must produce for inspection by the Commission a schedule which details:
1. The individual components of all amounts included in the sum of such disbursement; and
 2. Specifically identifies the affected beneficiary or property ledgers as set forth in Rule 5.14.B.
- D. Funds received by a Broker for managing Broker’s own properties through the Broker’s Brokerage Firm, including properties held in partnership with others, joint ventures, or syndications must be deposited in an account separate from any other Trust or Escrow Accounts maintained for Money Belonging to Others. Such funds are not subject to Trust or Escrow Accounts and record keeping requirements as set forth in Rules 5.2. and 5.14.

5.11. Earnest Money on New Construction

If a Broker is acting as a builder in a transaction, all deposit money received from a buyer must be placed in a Trust or Escrow Account and not used by the Broker for any purpose, including construction, unless the Broker receives written consent from the buyer.

5.12. Earnest Money

- A. Any Broker receiving earnest money must deliver such earnest money to the earnest money holder to be deposited in accordance with the contract. The Broker must obtain a dated and signed receipt from the person or entity to whom the Broker has been instructed to deliver the deposit.
- B. If the Brokerage Firm will be holding the earnest money in a transaction, the earnest money must be deposited as set forth in Rule 5.7.B. The Brokerage Firm may transfer the earnest money from the Brokerage Firm’s Trust or Escrow Account to a lawyer or a closing entity closing the transaction. The Brokerage Firm delivering the earnest money deposit to a lawyer or a closing entity providing settlement services must obtain a dated and signed receipt from the person or entity providing settlement services.

5.13. Promissory Note for Earnest Money

If a promissory note is received as earnest money pursuant to an executed contract, the seller must be informed of the date such promissory note becomes due. If payment is not made by the due date of the promissory note, the Broker must promptly notify the seller and deliver the original promissory note.

5.14. Recordkeeping Requirements

An Employing Broker or Independent Broker must maintain, at the Brokerage Firm's licensed place of business, a record keeping system as set forth in Rule 5.16., consisting of at least the following elements for each required Trust or Escrow Account:

A. A "journal" or an equivalent accounting system which records, in chronological order, all Money Belonging to Others which is received or disbursed by the Brokerage Firm.

1. For funds received, each journal record must include:

- a. The date of receipt and deposit;
- b. The name of the person who is giving the money;
- c. The name of the person and property for which the money was received;
- d. The purpose of the receipt;
- e. The amount; and
- f. A resulting cash balance for the account.

2. For funds disbursed, each journal record must include:

- a. The date of payment;
- b. The check number or electronic transfer record;
- c. The name of the payee;
- d. A reference to vendor documentation or other physical records verifying purpose for payment;
- e. The amount paid; and
- f. Resulting cash balance for the account.

B. A "ledger" or an equivalent component of an accounting system which records, in chronological order, all money which is received or disbursed by the Broker on behalf of each particular beneficiary of a Trust or Escrow Account. The ledger record must show the monetary transactions affecting each individual beneficiary and must segregate such transactions from those pertaining to other beneficiaries of the Trust or Escrow Account. The ledger record for each beneficiary must contain the same transactional information as set forth in subsection A of this Rule. No ledger may ever be allowed to have a negative cash balance. The sum of all ledger balances must agree at all times with the corresponding journal after each transaction has been posted.

C. Three-way reconciliation must be performed monthly to show that on the same date the cash balance shown in the journal, the sum of the cash balances for all ledgers, and the reconciled bank balance are the same. A three-way reconciliation report must be completed and maintained monthly to show such three-way reconciliation. The Broker is not required to

maintain records or reconcile any Trust or Escrow Account when such account does not contain Money Belonging to Others.

- D. A Brokerage Firm may deposit personal funds as may be required to pay any bank charges incurred in connection with maintaining a Trust or Escrow Account without violating Rule 5.10. An entry showing such money must be made in the journal and on the ledger as set forth in subsections A and B of this Rule.
- E. The three-way reconciliation reports, ledgers, journals, and bank account statements may be kept electronically.

5.15. Maintenance and Production of Reports to Beneficiaries

- A. Brokerage Firms holding Money Belonging to Others must provide detailed reports to each beneficiary. Any accounting report furnished to beneficiaries must be prepared and delivered according to the terms of the Management Agreement. In the absence of a provision in the Management Agreement to the contrary, Brokerage Firms must deliver these reports within thirty (30) days after the end of the month in which funds were either received or disbursed.
- B. The Brokerage Firm must maintain supporting records, which accurately detail all cash received and disbursed under the terms of any Management Agreement.
 - 1. All deposits of funds into a Trust or Escrow Account must identify each person tendering funds, the amount of funds tendered, types of funds received from each person, and the property address affected.
 - 2. All disbursements of funds from a Trust or Escrow Account must be supported by documents such as bids, invoices, contracts, etc. Ledger and journal records must identify the payees, property addresses affected and amount of funds transferred for each property.

5.16. Method of Accounting

In the absence of a written agreement to the contrary, the "cash basis" of accounting must be used for maintaining all required Trust or Escrow Accounts and corresponding records. A Brokerage Firm may use another method of accounting if it is agreed upon in writing by the Brokerage Firm and the beneficiary. The Brokerage Firm must maintain separate Trust and Escrow Accounts and corresponding records for each beneficiary using a different accounting method.

5.17. Mark-Ups

Pursuant to sections 12-10-217(1)(d) and (t) and 6-1-105, C.R.S., the Broker and Brokerage Firm must obtain prior written consent from the owner to assess and receive mark-ups and/or other compensation for services performed. The Broker and Brokerage Firm must retain accurate on-going records, which verify disclosure and consent and which fully account for the amounts or percentages of compensation assessed or received.

5.18. Items in Lieu of Cash

Any instrument, equity, or Thing of Value taken in lieu of cash must be held by the Brokerage Firm, except as otherwise agreed.

5.19. Branch Office Trust or Escrow Accounts Require Branch Office Recordkeeping

In the event a branch office of a Brokerage Firm maintains a Trust or Escrow Account separate from the Trust or Escrow Account(s) maintained by the Brokerage Firm's main office, a separate record keeping system must be maintained in the branch office. The responsibility of maintaining separate record keeping systems will be the responsibility of the Employing Broker.

5.20. Money Collected by Brokerage Firm

- A. When money is collected by a Brokerage Firm for the performance of specific services or for the expenses of performing such services, or for any other expense, and such money is collected before the services have been performed, the Brokerage Firm must deposit such money in a Trust or Escrow Account pursuant to section 12-10-217(1)(i), C.R.S. No money may be withdrawn from the Trust or Escrow Account, except for authorized expenses for performing such services. A full and itemized accounting must be furnished as set forth in Rule 5.15.
- B. Nothing in this Rule will prohibit a Brokerage Firm from taking a non-refundable retainer that need not be deposited into a Trust or Escrow Account provided this be specifically agreed to in writing between the Brokerage Firm and the person paying the retainer.

5.21. Production of Documents and Records

A Broker and Brokerage Firm must produce for inspection by the Commission any document or record as may be reasonably necessary for investigation or audit in the enforcement of the Commission statutes and these Rules. Failure to submit such documents or records within the time set by the Commission in its notification will be grounds for disciplinary action unless the Commission has granted an extension of time for such production.

A hearing on the above subject matter will be held on Monday, August 5, 2019 at the Colorado Division of Real Estate, 1560 Broadway, Suite 110-D, Denver, Colorado 80202 beginning at 9:00 a.m.

Any interested person may participate in the rule making through submission of written data, views and arguments to the Division of Real Estate. Persons are requested to submit data, views and arguments to the Division of Real Estate in writing no less than ten (10) days prior to the hearing date and time set forth above. However, all data, views and arguments submitted prior to or at the rulemaking hearing or prior to the closure of the rulemaking record (if different from the date and time of hearing), shall be considered.

Please be advised that the rule being considered is subject to further changes and modifications after public comment and formal hearing.