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DOL Earnest Money FAQ's[1]

"Please keep in mind that real estate offices throughout the state use different purchase and sale forms. Answers to the questions, may be different depending upon the form and addenda used. The answers below are the department's interpretation of the generic questions in relation to the current laws and rules. Specific situations may affect the precise answers. The answers are not to be taken or construed as legal advice. We recommend that all licensees obtain legal advice. If you have any questions please call me (Jerry McDonald) at 360-664-6514."

Question 1: Is the Selling Licensee/Broker required to give the Buyer a receipt for the earnest money? Is the answer the same whether or not the Broker has a trust account?

Answer: Yes.

Any broker (Selling or Listing) who receives funds is required to receipt for funds by maintaining a duplicate receipt book or a cash receipts journal. 18.85.310(1) (2) requires the broker have an itemization of receipts.... WAC 308-124C-020 requires the broker to maintain a duplicate receipt book or cash receipts journal recording all receipts. WAC 308-124E-012(3) states the broker is required to maintain a system of records to provide an audit trail accounting for all funds received and disbursed.

Previous versions of the purchase and sale agreement included earnest money receipt language so the department accepted the purchase and sale agreement as the receipt. If an earnest money receipt check box was included on the new purchase and sale agreements it would help in reducing the broker's workload and assist both buyers and sellers in acknowledging whether the broker actually obtained the funds.

Question 2: Is the Selling Licensee/Broker required to notify the Buyer or Seller when the earnest money is deposited into the Broker's trust account?

Answer: No, because all parties to a transaction have a right to rely on the terms of the contract and the expeditious performance of the licensees.

Question 3: Is the Selling Licensee/Broker required to obtain a receipt from the closing agent when the earnest money check is transferred to the closing agent for deposit? If yes, is the Selling Licensee/Broker required to provide a copy of the receipt to any of the parties?

Answer: The broker is required to have a receipt for all earnest money checks delivered to closing agents. Who actually obtains the receipt for the broker is a matter of office policy. WAC 308-124E-013(9).

The Selling Licensee/Broker is not required to provide a copy of the receipt to any of the parties, unless the purchase and sale agreement requires the selling broker to do so. All parties to the transaction have a right to rely on the terms of the contract as negotiated by the licensees.

Question 4: Is the Selling Licensee/Broker obligated to inform the Seller of any dishonor of the earnest money check or may the Selling Licensee/Broker first redeposit the check and see if it clears?

Answer: This is a two-part question. Is the Selling Licensee/Broker obligated to inform the Seller of any dishonor of the earnest money check? Yes. May the Selling Licensee/Broker first redeposit the check and see if it clears? No. The licensee must contact the parties to the transaction. We recommend this contact be in writing or confirmed in writing. The check may be re-deposited per the instructions of the parties and as allowed by banking regulations.

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[1] Prepared by Jerry McDonald, Audit Manger for the Department of Licensing

If the deposit or delivery is late or never made then the parties should be notified of the potential default in the agreement. RCW 18.85230(2) & (3). RCW 18.86.030(1)(a),(b),(d),(e). RCW 18.86.030(1)(d) requires material facts known by the licensee to be disclosed. Material facts as defined in 18.86.010(9) "means information that substantially adversely affects ... a party's ability to perform its obligations ..., or operates to materially impair or defeat the purpose of the transaction."

If the department receives a complaint wherein the licensee failed to disclose or concealed a material fact in a transaction the department will review for possible disciplinary action.

Some listing agents are now insisting that the earnest money be deposited into their broker's trust account or that there is authorization in the purchase and sale agreement to release information to them regarding the status of earnest money funds. An option on the purchase and sale agreement allowing the listing agent to hold the deposit may be useful to the licensees and offer more protection for the seller.

Question 5: When the deposit of the earnest money is deferred until removal of the inspection contingency by agreement, may the Selling Licensee (not the broker) hold the check until it is to be deposited?

Answer: No. It is the broker's duty to hold all funds/properties in trust for the purposes of the transaction.

WAC 308-124D-020(9) states "...the broker first receiving such funds shall retain custody thereof and be accountable therefor…." WAC 308-124E-012 requires the **broker** to hold the funds in trust for the purposes of the transaction.

Please remember that "cash" always must be deposited into the brokers trust account not later than the next banking day, no exceptions. If the broker does not have a trust account he/she must open one. WAC 308-124E-012(5)(a). If the transaction requires the broker to later deliver the funds to a closing agent then the broker must write a check from his/her trust. "Cash" cannot be held by the broker (or any licensee) pending the satisfaction of a contingency.

A common misconception among industry practitioners is that it is acceptable to hold the earnest money after mutual acceptance until contract contingencies are satisfied. Unless the earnest money deposit or delivery is subject to the contingencies being satisfied, the earnest money check must be deposited or delivered according to the terms of the mutual accepted agreement. Mutual acceptance of a contract and the satisfaction or removal of the contingencies are frequently independent events.

Complaints regarding deferred earnest money deposits are increasing. Some purchase and sale agreements dictate in several places and under several conditions when the deposit or delivery is to be made. It appears that there is a lot of confusion regarding the deposit or delivery timelines. Sellers are negotiating agreements believing the agent has the funds in hand and they sometimes do not realize they are contracting for the sale of their property without full consideration in hand.

Question 6: May a Broker instruct its licensees not to turn in transactions until removal of the inspection contingency when the deposit of the earnest money is also deferred until removal of the inspection contingency by agreement? If the transaction fails on inspection, the transaction would never be turned in.

Answer: No. Brokers records must be accurate and up to date. All records shall be kept at an address where the real estate broker is licensed. WAC 308-124C-030. As stated above, mutual acceptance of a contract and the satisfaction or removal of the contingencies are frequently independent events.

Question 7: If a broker has a written policy requiring a Selling Licensee to notify the Broker when deferred earnest money can be deposited, would that satisfy the requirement for reasonable procedures under WAC 308-124D-061(2)(b).

Answer: This relates to two different issues, the broker's record keeping responsibilities and the broker's supervision responsibilities. If the broker maintained their records then the broker would know when the funds would need to be deposited or delivered. Record keeping and trust responsibilities are for the broker. While tasks might be delegated responsibilities cannot be assigned.

Question 8: If a transaction fails to close and the earnest money is returned to the Buyer, is the Broker required to retain records of the transaction (in addition to trust account records) for 3 years?

Answer: Yes. WAC 308-124C-020(2)(a) & WAC 308-124C-030.

Question 9: Is a Broker required to keep ledger entries for non-cash earnest money items such as deferred deposit earnest money checks, earnest money promissory notes, car titles or valuable gemstones?

Answer: Ledger is not necessarily the place to record the transaction. However, there must be an accounting, recording and audit trail of all properties received. RCW 18.85.230(12) requires items other than cash or its equivalent to be shown on the earnest money receipt. RCW 18.85.310(1) requires the broker to maintain a copy of the earnest money receipt and an itemization of the broker's receipts.... RCW 18.86.030(1)(e) requires the broker to account for all money and property received.

Question 10: If a transaction fails, can the broker transfer the earnest money from one transaction to another for the buyer instead of paying the earnest money to the buyer and then re-depositing the earnest money?

Answer: The department cannot fully answer the question, as there are too many legal variables. The real estate firm's attorney would need to review. On a purely record keeping or accounting procedure the answer would be "yes," assuming there are no contractual obligations or disagreements from the first transaction. When the funds have already been deposited in the selling brokers trust bank account, the transfer is usually done by annotating on the second Purchase and Sale that the funds are transferred from a previous sale. This way there is an audit trail of the funds.

Question 11: Must the selling licensee give the buyer a receipt or may the selling licensee/broker simply maintain a cash receipts journal as long as it is accurate and up to date?

Answer: Yes, the agent receiving the funds must give a receipt, and no, the broker receiving the funds cannot simply maintain a cash receipts journal.

WAC 308-124C-020(1)(a) states the minimum required records include a "Duplicate deposit book or a cash receipts journal recording all receipts." A definition of a receipt is to give a written acknowledgement for money or goods. Until a couple of years ago, the purchase and sale agreement was a receipt for earnest money. The department accepted the purchase and sale agreement as the receipt because it was given to the purchasers as an acknowledgement of part of the consideration of the contract. RCW 18.85.310(2) states, "Every real estate broker shall also deliver or cause to be delivered to all parties signing the same, at the time of signing, conformed copies of all earnest money receipts...." Therefore merely recording the transaction and not giving a receipt, would not meet the receipt requirement.

In the scope of an audit, the auditor cannot always confirm if a receipt was given to the purchasers without contacting each purchaser. Thus the scope of a routine audit will not normally include the confirmation that a purchaser received a receipt. If there is reason for further inquiry/investigation or a consumer complaint is received this aspect of the transaction may be reviewed.