

STATE OF WISCONSIN
REAL ESTATE EXAMINING BOARD

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IN THE MATTER OF RULEMAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : REAL ESTATE EXAMINING BOARD
REAL ESTATE EXAMINING BOARD : ADOPTING RULES
: (CR 13-072)

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PROPOSED ORDER

An order of the Real Estate Examining Board to repeal REEB 18.08, 18.11 (2), and 18.12 and (Note); to renumber and amend REEB 18.11 (1); to amend REEB 18.01 (title), 18.02 (5) (intro.), (a), and (b) and (6) (intro.) and (a) to (g), 18.031 (1) (intro.), (a), and (b), 18.033 (title) and (2), 18.035 (2), 18.037 (intro.) and (Note), 18.06, 18.09 (1) (intro.) and (a) to (f), and 18.13 (1) (intro.) and (a) to (d), (2) to (4), and (6) (e); to repeal and recreate REEB 18.02 (1) and 18.10; and to create REEB 18.02 (intro.) (Note), (1e) and (Note), and (4) (Note) and 18.034 (1) (title), relating to real estate trust accounts.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted: s. 452.13, Stats.

Statutory authority: ss. 15.08 (5), 227.11 (2), 452.07 (1m) and 452.07, Stats.

Explanation of agency authority:

Examining boards are generally authorized by ss. 15.08 (5) (b) and 227.11 (2) (a), Stats., to promulgate rules for its own guidance and for guidance within the profession and to promulgate rules interpreting any statute enforced or administered by it. Under ss. 452.07 and 452.07, Stats., the board shall promulgate rules for the guidance of the real estate profession.

Related statute or rule: s. 452.13 (2), Stats.

Plain language analysis:

This proposed rule-making order clarifies the rules relating to real estate trust accounts by correcting internal inconsistencies, reflecting current practices and removing antiquated

provisions. In addition, format changes and typographical/punctuation errors are being corrected.

SECTION 1: The proposed rules modify the section title to be consistent with section titles in other chapters within this series, REEB 11 to 26. For example, the statutory authority provided to the board is now separated from the definitions subsection.

SECTIONS 2 to 6: The proposed rules add or update definitions commonly used in the real estate industry. When applicable, the statutory definition is cited. In addition, the proposed rules update formatting now in use since the last chapter revision and use terms consistent with those used in ch. 452, Stats. As an example; in lists such as SECTION 6., s. REEB 18.02 (6), colons are no longer in use and have been replaced by periods; the use of and is deleted as the introductory clause is amended to indicate all of the items in the list apply.

SECTION 7: The proposed rules correct minor typos, grammatical and punctuation errors, and utilize the new rule-making format required since the last revision of this chapter.

SECTIONS 8 to 10: The intent of the proposed changes is to clarify when a trust account can be opened and the naming of such accounts; no substantive changes are proposed.

SECTION 11: The proposed rules move existing text to a more appropriate subsection and provide information to access forms via the department webpage.

SECTION 12: The proposed rules clarify designating responsibilities as to who holds escrow funds.

SECTION 13: The proposal repeals a section relating to cooperating brokers, a practice that has ceased.

SECTION 14: Proposed changes are for clarification purposes only.

SECTION 15: The proposed rules clarify when comingling of funds are prohibited; in addition, subsection titles are created to assist the reader.

SECTIONS 16 and 17: The proposed rules renumber the subsection as an introductory clause due to the repeal of sub. (2). The proposed rules repeal sections that are determined to be no longer in use or antiquated to the real estate industry—promissory notes and branch offices.

SECTIONS 18, 19 and 20: The proposed rules relate to recordkeeping, specifically ledgers, journals and trial balances. Clarification of terms and designating responsibilities are also proposed.

SECTION 21. This section establishes an effective date of July 1, 2014, which is timely for upcoming training and examinations.

Summary of, and comparison with, existing or proposed federal regulation:

There are no existing or proposed federal regulations addressing real estate trust accounts with respect to licensees.

Comparison with rules in adjacent states: An Internet-based search revealed the following:

Illinois: In Illinois, the Bureau of Real Estate Professions administers and enforces the Illinois Real Estate License Act of 2000, the Real Estate Timeshare Act, the Land Sales Registration Act, the Real Estate Appraiser Licensing Act of 2002, Provisions and Rules of the Uniform Standards of Professional Appraisal Practice, the Auction License Act, and the Home Inspector License Act. The Bureau has responsibility for licensing and regulating real estate brokers, managing brokers, leasing agents, real estate firms, real estate appraisers, auctioneers, auction firms, home inspectors, and home inspector entities. An internet search did not reveal details relating to any Illinois codes and statutes pertaining to real estate trust accounts.

Iowa: In Iowa, the Professional Licensing Division (IPLD) oversees the real estate industry through the following rules: Iowa Code ch. 543B, Real Estate Brokers and Salespersons; ch. 543C, Sales of Subdivided Land Outside of Iowa; and ch. 557A, Iowa Time-Share Act. These rules are published in the Iowa Administrative Code ch. 193E. Under the jurisdiction of the IPLD, the Iowa Real Estate Commission regulates and administers the real estate laws in Iowa. Notification of opening, closing and transferring accounts, naming the accounts, as well as submitting interest to a designated state agency is similar to rules and statutes in Wisconsin.

Michigan: In Michigan Article 25 of Public Act 299 of 1980, licenses and regulates the real estate industry through the Board of Real Estate Brokers and Salespersons. In Michigan, R339.22313, rule 313, real estate trust accounts are held in non-interest bearing, demand-checking accounts. Received funds must be deposited within two banking days, with some exceptions. A third party may manage the funds if interest is being sought. Disbursement, co-mingling and recordkeeping are detailed in the state guidelines for trust accounts.

Minnesota: The Minnesota statutes are similar to Wisconsin and require all real estate trust accounts to pool interest from interest bearing accounts. The commissioner of management and budget shall deposit such funds into the housing trust fund account. Chapter 82.75, subd. 5, Trust accounts, outline the state requirements, which include: maintaining and retaining records, timeliness of transaction including deposits within three business days.

Summary of factual data and analytical methodologies:

The Board relied upon their knowledge of processes and procedures currently in place in the industry and made determinations on modifying or eliminating out-dated practices and terms when found in their review. Practices relating to bookkeeping and keeping ledgers have changed with the introduction of computer software, for example.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact analysis:

Data was obtained from the Division of Professional Credential Processing regarding the number of licensees that would be affected by this regulatory change. As of 4/15/2013, there are 6,139 active licensed real estate salespersons and 10,373 active licensed real estate brokers. There are 1,051 licensed real estate business entities. The majority of real estate licensees work in small business environments; however, the proposed rules do not include any policy changes that would impact licensees or small business.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business:

These proposed rules do not have an economic impact on small businesses, as defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted by email at Tom.Engels@wisconsin.gov, or by calling (608) 266-8608.

Agency contact person:

Jean MacCubbin, Program Manager, Department of Safety and Professional Services, Division of Policy Development, 1400 East Washington Avenue, Room 151, P.O. Box 8935, Madison, Wisconsin 53708; telephone (608) 266-0955; email at Jean.MacCubbin@wisconsin.gov; or by telecommunications relay services at 711.

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TEXT OF RULE

SECTION 1. REEB 18.01 (title) is amended to read:

REEB 18.01 ~~Authorization~~ Authority. The following rules are adopted pursuant to ss. 227.11, 452.07 and 452.13, Stats.

SECTION 2. REEB 18.02 (intro.) (Note) is created to read:

REEB 18.02 Definitions. In this chapter:

Note: See also definitions in s. REEB 11.02.

SECTION 3. REEB 18.02 (1) is repealed and recreated to read:

REEB 18.02 (1) “Business day” means any day excluding Saturdays, Sundays, any legal public holiday under Wisconsin or Federal law, and any other day designated by the President of the United States such that the U.S. postal service does not receive registered mail or make regular deliveries on that day.

SECTION 4. REEB 18.02 (1e) and (Note) and (4) and (Note) are created to read:

REEB 18.02 (1e) “Client funds” has that meaning given in s. 452.13 (1) (a), Stats.

Note: Section 452.13 (1) (a), Stats., reads: ““Client funds” means all downpayments, earnest money deposits or other money related to a conveyance of real estate that is received by a broker, salesperson or time-share salesperson on behalf of the broker's, salesperson's or time-share salesperson's principal or any other person. “Client funds” does not include promissory notes.”

(4) “Depository institution” has that meaning given in s. 452.13 (1) (b), Stats.

Note: Section 452.13 (1) (b) , Stats., reads: ““Depository institution” means a bank, savings bank, savings and loan association or credit union that is authorized by federal or state law to do business in this state and that is insured by the federal deposit insurance corporation or by the national credit union share insurance fund.”

SECTION 5. REEB 18.02 (5) (intro.), (a) and (b) are amended to read:

REEB 18.02 (5) “Real estate trust account” means an account for real estate trust funds maintained at a depository institution from which withdrawals or transfers can be made without delay, subject to any notice period that the depository institution is required to observe by law, and includes all of the following:

(a) Interest-bearing common trust accounts established for client funds;

(b) Non-interest bearing real estate trust accounts maintained for real estate trust funds other than client funds; ~~and.~~

SECTION 6. REEB 18.02 (6) (intro.) and (a) to (g) are amended to read:

REEB 18.02 (6) “Real estate trust funds” means any cash, checks, share drafts, drafts or notes, ~~other than promissory notes,~~ received by a broker or a broker’s salespersons salesperson or time-share salespersons on behalf of a principal or any other person including, ~~but not limited to~~ any of the following:

(a) Payments on land contracts, mortgage payments and any other receipts pertaining to mortgages;.

(b) Tax and insurance payments held in escrow;.

(c) Advance fees and finder’s fees, unless non-refundable;.

(d) Rental application deposits and rents, but only when received while acting as an agent for another;.

(e) Payments received for subsequent repayment to a third party;.

(f) Security deposits on rental property, except as provided in s. REEB 18.031 (4); ~~and.~~

(g) Initial and additional earnest money downpayments and other ~~monies funds~~ received in connection with offers to purchase, options and exchanges, even if the broker, salesperson or time-share salesperson receives the downpayments or ~~monies funds~~ when negotiating the sale of real estate or a business opportunity which the broker, salesperson or time-share salesperson owns in whole or in part, or when negotiating the purchase of real estate or a business opportunity for ownership in whole or in part by the broker, salesperson or time-share salesperson.

SECTION 7. REEB 18.031 (1) (intro.), (a) and (b) are amended to read:

REEB 18.031 Deposits and types of accounts. (1) TIME OF DEPOSIT. A broker shall deposit all real estate trust funds received by the broker or broker’s salespersons or time-share salespersons in a real estate trust account within 48 hours of receipt of the trust funds. If funds are received on a day prior to a holiday or other day when the depository institution is closed, the broker shall deposit the funds within the next 2 business days ~~of the depository institution.~~ If a broker receives funds which cannot be deposited by the broker, the broker shall, no later than one business day after receipt, either:

- (a) Forward the funds to the payee, if someone other than the broker; ~~or.~~
- (b) Return the funds to the ~~payor~~ payer.

SECTION 8. REEB 18.033 (title) and (2) are amended to read:

REEB 18.033 ~~Time when real estate trust account shall be opened or may be closed~~ Opening and closing real estate trust accounts.

(2) CLOSING AN ACCOUNT. A broker may close a real estate trust account if no real estate trust funds remain in the account or for reasons specified in s. REEB 18.035.

SECTION 9. REEB 18.034 (1) (title) is created to read:

REEB 18.034 Account designation. (1) NAME ON TRUST ACCOUNT.

SECTION 10. REEB 18.035 (2) is amended to read:

REEB 18.035 (2) CHANGING OR CLOSING AN ACCOUNT. A broker shall notify the department no later than 10 days after a broker changes a real estate trust account name or number, changes the real estate trust account from one depository institution to another, closes a real estate trust account or changes a real estate trust account to or from an interest-bearing common trust account established for client's funds. The notification shall be provided on a form, as required in s. REEB 18.037. When closing a real estate trust account, a broker may inform the board by letter.

SECTION 11. REEB 18.037 (intro.) and Note are amended to read:

REEB 18.037 Form for notification and authorization. A broker shall provide the information and authorization as specified in ss. REEB 18.035 and 18.036 on a form provided by the department. This form shall be designated "consent to examine and audit trust account." ~~However, when closing a real estate trust account, a broker may inform the board by letter only.~~

Note: A copy of this form may be obtained from the Department of Safety and Professional Services, Division of Professional Credential Processing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708-8935 or downloading from the department's webpage: <http://dsps.wi.gov>.

SECTION 12. REEB 18.06 is amended to read:

REEB 18.06 Escrow agreement for earnest money not held by the broker.

If the parties to a transaction do not desire that the broker hold the earnest money in the broker's real estate trust account, and wish to designate an escrow agent other than the broker, the broker may not draft the escrow agreement. The escrow agreement shall be drafted by the parties or an attorney. The broker may not hold the funds in the broker's real estate trust account, nor may the broker act in any way as custodian of the funds for the parties. The funds, pursuant to the escrow agreement, shall be held by ~~some other a party~~ other than the broker, such as: a bank, a savings and loan association, a credit union, or an attorney.

SECTION 13. REEB 18.08 is repealed.

SECTION 14. REEB 18.09 (1) (intro.) and (a) to (f) are amended to read:

REEB 18.09 Disbursement of trust funds. (1) PROPER DISBURSEMENT. A broker who disburses trust funds from ~~his or her~~ the broker's real estate trust account under any of the following circumstances shall not be deemed to have violated s. 452.14 (3) (i), Stats.:

(a) To the ~~payor~~ payer upon the rejection, expiration or withdrawal prior to binding acceptance of an offer to purchase, lease, exchange agreement or option on real estate or a business opportunity;

(b) As directed in a written earnest money disbursement agreement signed by all parties having an interest in the trust funds. ~~A~~ For the purposes of this subsection, a closing statement is a written earnest money disbursement agreement ~~for the purposes of this subsection. An offer to purchase, lease, exchange agreement or option is not a written earnest money disbursement agreement for the purpose of this subsection.~~

(c) To a court having jurisdiction over a civil action involving all parties having an interest in the trust funds;

(d) As directed by order of a court;

(e) Upon a good faith decision based upon advice of an attorney not representing any party to the contract;

(f) Upon authorization granted within the contract; ~~or.~~

SECTION 15. REEB 18.10 is repealed and recreated to read:

REEB 18.10 Comingling funds prohibited. (1) DEPOSITABLE FUNDS. A broker shall deposit only real estate trust funds in the broker's real estate trust account.

(a) Except for sub. (b), a broker shall not commingle the broker's personal funds or other funds in the real estate trust account.

(b) A broker may deposit and maintain a sum not to exceed \$300.00 from the broker's personal funds in any real estate trust account. Such sum shall be specifically identified and deposited to cover service charges relating to the real estate trust account.

(2) ADDITIONAL FUNDS. A broker shall deposit additional personal funds in sums consistent with sub. (1) (b) in the broker's real estate trust account within 10 business days following receipt of a statement or other notification from a depository institution that a service charge has been made against the account for which insufficient personal funds are available in the real estate account.

SECTION 16. REEB 18.11 (1) renumbered as 18.11 (intro.) and amended to read:

REEB 18.11 Non-depositable items. (1) ~~OTHER THAN PROMISSORY NOTES.~~ ~~With the exception of promissory notes, a~~ A broker shall not hold any instrument, equity or thing of value which is not depositable in a real estate trust account. Non-depositable items ~~other than promissory notes~~ shall be held by one of the parties to a transaction or some other party, subject to an escrow agreement prepared by the parties or an attorney.

SECTION 17. REEB 18.11 (2) and 18.12 and Note are repealed.

SECTION 18. REEB 18.13 (1) (intro.) and (a) to (d) are amended to read:

REEB 18.13 (1) CASH JOURNAL. A broker shall maintain a record, called a journal, ~~which shall show~~ showing the chronological sequence in which real estate trust funds are received and disbursed as follows:

(a) For funds received, the journal shall include at least the date, the name of the party ~~who is giving~~ providing the money, and the amount.

(b) For disbursements, the journal shall include at least the date, the payee, the number of the check, share draft or draft, and the amount.

(c) The journal shall identify each transaction by including at least the name of the principal, an identification number or other means of identification ~~which will link~~ linking the journal to the transactions and the ledger described in sub. (2).

(d) The journal shall ~~show~~ include a running balance for each day on which receipts or disbursements are entered.

SECTION 19. REEB 18.13 (2) to (4) and (6) (e) are amended to read:

REEB 18.13 (2) LEDGER. A broker shall maintain a record ~~which shows~~ including the receipts and the disbursements as they affect each particular transaction ~~e.g., including~~ transactions between buyer and seller, landlord and tenant, etc. The ledger entry shall include the names of ~~both~~ all parties to a transaction, the dates and the amounts received and the name of the party ~~giving~~ or parties providing the money if different from the buyer. ~~The ledger entry~~ Ledger entries shall include at least the date, payee, number of the check, share draft or draft and amount when funds are disbursed. The ledger shall ~~show~~ include a running balance and segregate each transaction. The broker shall maintain a separate ledger or separate section of the ledger for each of the various kinds of real estate transactions, ~~e.g., including~~ sales, rental collections or mortgage and land contract collections.

(3) ACCOUNT RECONCILIATION. The broker or a person designated by the broker shall reconcile the real estate trust account or accounts in writing each month except in the case where there has been no activity during the month. The written reconciliation shall include at least the ending account statement balance, the date and amounts of the deposits in transit, the number of the check, share draft or draft and amount of checks, share drafts or drafts written but not paid by the depository institution as of the ending date shown on the account statement to be reconciled, and the reconciled account statement ending balance.

(4) TRIAL BALANCE. The broker shall prepare or have prepared, in conjunction with sub. (3), a written listing ~~“trial balance”~~, of all open items in the real estate trust account. The written listing shall be referred to as the “trial balance”. ~~The list must show~~ listing shall include at least the names of ~~the~~ all parties to the transaction and the amount held in trust for the parties at the time corresponding to the account reconciliation. The broker may in lieu of the names of the parties to the transaction substitute the ledger page number or other means of identification from the ledger to label the funds in the trial balance.

(6) (e) All records which are not maintained as written paper records are capable of being immediately converted to written paper records and immediately made available without charge to the department or board for the purposes of ~~department~~ an audit or investigation.

SECTION 21. EFFECTIVE DATE. The rules adopted in this order shall take effect on July 1, 2014 pursuant to s. 227.22 (2) (intro.), Stats.

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(END OF TEXT OF RULE)

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This Proposed Order of the Real Estate Examining Board is approved for submission to the Governor and Legislature.

Dated _____

Agency _____

Chair
Real Estate Examining Board