

CP-34 Commission Position on Settlement Service Provider Selection, Closing Instructions and Earnest Money Deposits (revised 08/07/2012)

The Commission issues this position statement to clarify how settlement service providers are selected, when closing instructions must be completed by a real estate broker (“broker”) and how earnest money is to be handled.

Selection of settlement service providers

Regardless of whether a broker is acting as a single agent or transaction broker, all brokers acting in their licensed capacities are required to advise their clients to obtain expert advice as to material matters about which the broker knows but the specifics of which are beyond the expertise of the broker. See C.R.S. 12-61-804(1)(c)(V), 12-61-805(1)(c)(V), and 12-61-807(2)(b)(II). Expert advice includes, but is not limited to, the brokering of a mortgage, performing title searches and issuing insurance, appraising real property, surveying and issuing improvement location certificates, performing property inspections and other due diligence (including environmental) and practicing law (which also includes analyzing the legal implications of the foregoing). Brokers need to ensure that they perform the acts required by the real estate brokerage practice act, based on the capacity in which they have agreed to practice, i.e. as a single agent or transaction broker. A common standard of practice amongst brokers is to provide the names of three settlement services providers in a specific area of practice and allow the consumer to choose. The Commission understands that there are occasions when a broker cannot provide the names of three separate settlement service providers that practice in one specific area, but regardless of how many names may be provided, it is imperative that final selection of the settlement service provider be left to the consumer, not the broker.

Closing Instructions

The purpose of closing instructions is for the consumer to engage the company that will be responsible for ultimately closing the sales transaction. In most transactions, the company responsible for closing the transaction is a title company, although there are brokers that provide these services. As stated above, the consumer is responsible for the selection of settlement service providers, including the individual or company that performs the closing services. If the broker is performing the closing services, including the preparation, delivery and recording of closing documents and the disbursement of funds, the broker is the “Closing Company” and thereby is responsible for completing the Commission-approved Closing Instructions at the time that the Contract to Buy and Sell Real Estate is executed by the buyer and seller. As required by Commission Rule E-4 and C.R.S. 12-61-113(i), the broker shall retain a copy of the Closing Instructions for future use or inspection by an authorized representative of the Real Estate Commission.

If a title company is engaged to perform the closing services, the Division of Insurance requires that a title entity provide closing and settlement services only when there are written instructions from all necessary parties. See Division of Insurance Rule 3-5-1. All amendments to existing written instructions with a title entity must also be in writing. If a title company is engaged to provide the closing services, it is the “Closing Company” and it is the responsibility of the title company to complete the closing instructions as required by the Division of Insurance. The broker should make a reasonable effort to obtain a copy of

the closing instructions from the title entity for the broker's transaction file, to ensure compliance with Commission Rule E-4 and C.R.S. 12-61-113(i) as stated above.

Earnest Money Deposits

Commission Rule E-1(o) requires the selling broker to deliver the contract and the earnest money to the listing broker, unless the parties have otherwise agreed in writing. The listing broker is required to deposit the money in the broker's escrow or trust account in a recognized depository no later than the third business day following the day on which the broker receives notice of contract acceptance. If the selling broker receipts for a promissory note, or thing of value, such note or thing of value must be delivered with the contract to the listing broker to be held by the listing broker. Any check or note must be payable, or assigned, to the listing broker. Upon receipt of the earnest money, the listing broker must complete the Earnest Money Receipt as the Earnest Money Holder. A copy of the receipt must be retained by the broker to ensure compliance with Commission Rule E-4 and C.R.S. 12-61-113(i).

If the buyer and seller have agreed in writing that a third party or entity will hold the earnest money, the listing broker must deliver the earnest money to the third party or entity. The listing broker must obtain a dated and signed Earnest Money Receipt from the third party or entity upon delivery of the earnest money. For record keeping purposes, the broker must retain a copy of the Earnest Money Receipt and a copy of the earnest money check, note or other thing of value as required by Commission Rule E-4 and C.R.S. 12-61-113(i).