TRUST ACCOUNT GUIDELINES

I. INTRODUCTION

"Trust" is perhaps the one word which best describes the relationship of the real estate licensee to his or her clients and customers. The seller trusts the licensee to promote his or her best interests in the sale of the property. The investor trusts the licensee/rental manager to manage his or her property and protect the investment. The buyer trusts the licensee to provide complete and accurate information concerning the property which he or she is considering buying. But perhaps nowhere is the licensee's position of trust more clearly illustrated than in his or her role as custodian of the funds of others; i.e., "trust money."

The following information is provided for the purpose of assisting North Carolina real estate licensees in understanding and carrying out their duties and responsibilities as trustees for the funds of others. It is important that both licensees and persons studying for real estate licenses carefully study this material, and that practicing licensees review and evaluate their current procedures in light of this information.

While no single treatment of this subject can possibly answer all questions or address all situations that the licensee may encounter, nevertheless, an attempt has been made to deal with those questions that arise most frequently and to address those situations most often encountered during the course of "typical" real estate transactions. In addition, the specialized areas of property owner association management and rental management have been given separate treatment where it was deemed necessary.

Licensees are reminded that questions or problems involving the handling or accounting of trust money should be directed to the Real Estate Commission office in Raleigh.

II. LEGAL REQUIREMENTS

For most people, a home represents the largest single investment (the most expensive purchase) they will ever make. Rental payments and security deposits represent a substantial financial investment on the part of tenants. Consequently, during the course of real estate transactions, sizable sums of money change hands, a great deal of which passes through the hands of the real estate licensee. Recognizing the very serious consequences of the licensee's actions as a trustee for these funds, the Real Estate License Law (N.C.G.S. 93A) includes a number of provisions designed to govern the activities of real estate licensees acting in the capacity of trustee.

In general, these provisions require licensees to deposit trust monies in an escrow or trust account maintained by a broker (separate from the broker's general or operating account); to maintain complete records of deposits and withdrawals; and to make a final accounting to the persons for whom the broker is holding the funds. G.S. 93A-6(a) grants the Real Estate Commission authority to suspend or revoke any real estate license or to reprimand or censure any licensee where the licensee is deemed to be guilty of:

(7) Failing, within a reasonable time, to account for or to remit any moneys coming into his or her possession which belong to others.

(12) Commingling the money or other property of his or her principals with his or her own or failure to maintain and deposit in a trust or escrow account in a bank as provided by subsection (g) of this section all money received by him or her as a real estate licensee acting in that capacity, or an escrow agent, or the custodian or manager of the funds of another person or entity which relate to or concern that person's or entity's interest or investment in real property, provided, these accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest bearing account and also provide for the disbursement of the interest accrued.

(14) Failing, at the time a sales transaction is consummated, to deliver to the broker's client a detailed and accurate closing statement showing the receipt and disbursement of all monies relating to the transaction about which the broker knows or reasonably should know. If a closing statement is prepared by an attorney or lawful settlement agent, a broker may rely on the delivery of that statement, but the broker must review the statement for accuracy and notify all parties to the closing of any errors.

Also,

(d) Each broker shall maintain complete records showing the deposit, maintenance, and withdrawal of money or other property owned by his principals or held in escrow or in trust for his principals. The Commission may inspect these records periodically, without prior notice and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a licensee.

(g) A broker's trust or escrow account shall be a demand deposit account in a federally insured depository institution lawfully doing business in this State which agrees to make its records of the broker's account available for inspection by the Commission's representatives.

With regard to monies received in time share sales transactions, G.S. 93A-45 requires that:

(c) Any payments received by a time share developer or time share salesperson in connection with the sale

of the time share shall be immediately deposited by such developer or salesperson in a trust or escrow account in an insured bank or savings and loan association in North Carolina and shall remain in such account for 10 days or cancellation by the purchaser, whichever occurs first. Payments held in such trust or escrow accounts shall be deemed to belong to the purchaser and not the developer.

In addition, the Real Estate Commission has adopted rules to enable it to administer the statutes. Specifically, these rules are:

A. 0107 Handling and Accounting of Funds

(a) Except as provided in this Rule, all monies received by a licensee acting in his or her fiduciary capacity shall be deposited in a trust or escrow account maintained by a broker not later than three banking days following receipt of such monies except that earnest money deposits paid by means other than currency which are received on offers to purchase real estate and tenant security deposits paid by means other than currency which are received in connection with real estate leases shall be deposited in a trust or escrow account not later than three banking days following acceptance of such offer to purchase or lease; the date of acceptance of such offer to purchase or lease shall be set forth in the purchase or lease agreement. All monies received by a provisional broker shall be delivered upon receipt to the broker by whom he or she is employed, except that all monies received by nonresident commercial licensees shall be delivered as required by Rule .1808 of this Subchapter. A licensee may accept custody of a check or other negotiable instrument made payable to the seller of real property as payment for option money or option fee in connection with an option contract or for a fee to the seller for a buyer's right to inspect property or determine its suitability for the buyer's needs prior to the closing of a sales transaction, but only for the purpose of delivering the instrument to the seller. While the instrument is in the custody of the licensee, the licensee shall, according to the instructions of the buyer, either deliver it to the seller or return it to the buyer. The licensee shall safeguard the instrument and shall be responsible to the parties on the instrument for its safe delivery as required by this Rule. A licensee shall not retain such an instrument for more than three business days after the acceptance of the option or other sales contract.

(b) If monies received by a licensee while acting in a fiduciary capacity are deposited in a trust or escrow account which bears interest, the licensee having custody over such monies shall first secure from all parties having an interest in the monies written authorization for the deposit of the monies in an interest-bearing account. Such authorization shall specify how and to whom the interest will be disbursed, and, if contained in an offer, contract, lease, or other transaction instrument, such authorization shall be set forth in a conspicuous manner which shall distinguish it from other provisions of the instrument.

(c) Closing statements shall be furnished to the buyer and the seller in the transaction not more than five days after closing.

(d) Trust or escrow accounts shall be so designated by the bank or savings and loan association in which the account is located, and all deposit tickets and checks drawn on said account as well as the monthly bank statement for the account shall bear the words "Trust Account" or "Escrow Account."

(e) A licensee shall maintain and retain records sufficient to identify the ownership of all funds belonging to others. Such records shall be sufficient to show proper deposit of such funds in a trust or escrow account and to verify the accuracy and proper use of the trust or escrow account. The required records shall include:

(1) bank statements;

(2) canceled checks and other evidence or memoranda of payments from the account, whether by transfer between accounts, wire payments, or payments by electronic means, which shall be referenced to the corresponding journal entry or check stub entries and to the corresponding sales transaction ledger sheets or for rental transactions, the corresponding property or owner ledger sheets. Checks and other evidence or memoranda of payments from the account shall identify the payee by name and shall bear a notation identifying the purpose of the disbursement. When a payment is used to disburse funds for more than one sales transaction, owner, or property, the check or other evidence or memoranda of payment shall bear a notation identifying each sales transaction, owner, or property for which disbursement is made, including the amount disbursed for each, and the corresponding sales transaction, property, or owner ledger entries. When necessary, the check notation may refer to the required information recorded on a supplemental disbursement worksheet which shall be cross-referenced to the corresponding check or payment. In lieu of retaining canceled checks, a licensee may retain digitally imaged copies of the canceled checks or substitute checks provided that such images are legible reproductions of the front and back of such instruments with no smaller images than 1.1875 x 3.0 inches and provided that the licensee's bank retains for a period of at least six years the original checks, "substitute checks" as described in 12 C.F.R. 229.51 or the capacity to provide substitute checks as described in 12 C.F. R. 229.51, and makes the original or substitute checks available to the licensee and the Commission upon request;

(3) deposit tickets or other evidence or memoranda of deposits or payments into the account, whether by transfer between accounts, wire payments, or payments by electronic means. For a sales transaction, the deposit ticket or other evidence or memoranda of deposits or payments into the account shall identify the purpose and remitter of the funds deposited, the property, the parties involved, and a reference to the corresponding sales transaction ledger entry. For a

rental transaction, the deposit ticket or other evidence or memoranda of deposits or payments into the account shall identify the purpose and remitter of the funds deposited, the tenant, and the corresponding property or owner ledger entry. For deposits of funds belonging to or collected on behalf of a property owner association, the deposit ticket or other evidence or memoranda of deposits or payments into the account shall identify the property or property interest for which the payment is made, the property or interest owner, the remitter, and the purpose of the payment. When a single deposit ticket or payment is used to deposit funds collected for more than one sales transaction, property owner, or property, the required information shall be recorded on the ticket or other evidence or memoranda of deposits or payments into the account for each sales transaction, owner, or property, or it may refer to the same information recorded on a supplemental deposit worksheet which shall be cross-referenced to the corresponding deposit ticket;

(4) a payment record sheet for each property or interest for which funds are collected and deposited into a property owner association trust account as required by Paragraph (i) of this Rule. Payment record sheets shall identify the amount, date, remitter, and purpose of payments received, the amount and nature of the obligation for which payments are made, and the amount of any balance due or delinquency;

(5) a separate ledger sheet for each sales transaction and for each property or owner of property managed by the licensee identifying the property, the parties to the transaction, the amount, date, and purpose of the deposits and from whom received, the amount, date, check number, and purpose of disbursements and to whom paid, and the running balance of funds on deposit for the particular sales transaction or, in a rental transaction, the particular property or owner of property. Monies held as tenant security deposits in connection with rental transactions may be accounted for on a separate tenant security deposit ledger for each property or owner of property managed by the licensee. For each security deposit the tenant security deposit ledger shall identify the remitter, the date the deposit was paid, the amount, the tenant, landlord, and subject property. For each disbursement of tenant security deposit monies, the ledger shall identify the check number, amount, payee, date, and purpose of the disbursement. The ledger shall also show a running balance. When tenant security deposit monies are accounted for on a separate ledger as provided in this Rule, deposit tickets, canceled checks and supplemental worksheets shall reference the corresponding tenant security deposit ledger entries;

(6) a journal or check stubs identifying in chronological sequence each bank deposit and disbursement of monies to and from the trust or escrow account, including the amount and date of each deposit and a reference to the corresponding deposit ticket and any supplemental deposit worksheet, and the amount, date, check number, and purpose of disbursements and to whom paid. The journal or check stubs shall also show a running balance for all funds in the account;

(7) copies of contracts, leases and management agreements;

(8) closing statements and property management statements;

(9) covenants, bylaws, minutes, management agreements and periodic statements relating to the management of a property owner association; and

(10) invoices, bills, and contracts paid from the trust account, and any documents not otherwise described in this Rule necessary and sufficient to verify and explain record entries.

Records of all receipts and disbursements of trust or escrow monies shall be maintained in such a manner as to create an audit trail from deposit tickets and canceled checks to check stubs or journals and to the ledger sheets. Ledger sheets and journals or check stubs must be reconciled to the trust or escrow account bank statements on a monthly basis. Records of trust or escrow monies must include a worksheet for each such monthly reconciliation showing the ledger sheets, journals or check stubs, and bank statements to be in agreement and balance.

(f) All trust or escrow account records shall be made available for inspection by the Commission or its authorized representatives in accordance with Rule 21 NCAC 58A .0108.

(g) In the event of a dispute between the seller and buyer or landlord and tenant over the return or forfeiture of any deposit other than a residential tenant security deposit held by a licensee, the licensee shall retain the deposit in a trust or escrow account until the licensee has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction. Alternatively, the licensee may deposit the disputed monies with the appropriate clerk of court in accordance with the provisions of G.S. 93A-12. If it appears to a licensee holding a disputed deposit that a party has abandoned his or her claim, the licensee may disburse the money to the other claiming parties according to their written agreement provided that the licensee first makes a reasonable effort to notify the party who has apparently abandoned his or her claim and provides that party with an opportunity to renew his or her claim to the disputed funds. Tenant security deposit monies shall be disposed of in accordance with the requirements of G.S. 42-50 through 56 and G.S. 42A-18.

(h) A licensee may transfer earnest money deposits in his or her possession collected in connection with a sales transaction from his or her trust account to the closing attorney or other settlement agent not more than ten days prior to the anticipated settlement date. A licensee shall not disburse prior to settlement any earnest money in his or her possession for any other purpose without the written consent of the parties.

(i) The funds of a property owner association, when collected, maintained, disbursed or otherwise controlled by a licensee, are trust monies and shall be treated as such in the manner required by this Rule. Such funds must be deposited into and maintained in a trust or escrow account dedicated exclusively for funds belonging to a single property owners association and may not be commingled with funds belonging to other property owner associations or other persons or parties. A licensee who undertakes to act as manager of a property owner association or as the custodian of funds belonging to a property owner association shall provide the association with periodic statements which report the balance of association funds in the licensee's possession or control and which account for the funds the licensee has received and disbursed on behalf of the association. Such statements must be made in accordance with the licensee's agreement with the association, but not less frequently than every 90 days.

(j) Every licensee shall safeguard the money or property of others coming into his or her possession in a manner consistent with the requirements of the Real Estate License Law and the rules adopted by the Commission. A licensee shall not convert the money or property of others to his or her own use, apply such money or property to a purpose other than that for which it was paid or entrusted to him or her, or permit or assist any other person in the conversion or misapplication of such money or property.

(k) In addition to the records required by Paragraph (e) of this Rule, a licensee acting as agent for the landlord of a residential property used for vacation rentals shall create and maintain a subsidiary ledger sheet for each property or owner of such properties onto which all funds collected and disbursed are identified in categories by purpose. On a monthly basis, the licensee shall reconcile the subsidiary ledger sheets to the corresponding property or property owner ledger sheet.

(l) In lieu of maintaining a subsidiary ledger sheet, the licensee may maintain an accounts payable ledger sheet for each owner or property and each vendor to whom trust monies are due for monies collected on behalf of the owner or property identifying the date of receipt of the trust monies, from whom the monies were received, rental dates, and the corresponding property or owner ledger sheet entry including the amount to be disbursed for each and the purpose of the disbursement. The licensee may also maintain an accounts payable ledger sheet in the format described in Paragraph (k) of this Rule for vacation rental tenant security deposit monies and vacation rental advance payments.

B. 0501 Time Share Trust Funds

(a) Except as otherwise permitted by G.S. 93A-45(c), all monies received by a time share developer or a time share salesperson in connection with a time share sales transaction shall be deposited into a trust or escrow account not later than three banking days following receipt and shall remain in such account for ten days from the date of sale or until cancellation by the purchaser, whichever first occurs.

(b) All monies received by a person licensed as a broker in connection with a time share transaction shall be delivered immediately to his or her project broker.

(c) When a time share purchaser timely cancels his or her time share purchase, the developer shall refund to the purchaser all monies paid by the purchaser in connection with the purchase. The refund shall be made no later than 30 days following the date of execution of the contract. Amounts paid by the purchaser with a bankcard or a credit card shall be refunded by a cash payment or by issuing a credit voucher to the purchaser within the 30-day period.

(d) Every project broker shall obtain and keep a written representation from the developer as to whether or not lien-free or lien-subordinated time share instruments can be recorded within 45 days of the purchaser's execution of the time share purchase agreement. When a lien-free or lien-subordinated instrument cannot be recorded within said time period, on the business day following the expiration of the ten day time share payment escrow period, a project broker shall transfer from his or her trust account all purchase deposit funds or other payments received from a purchaser who has not cancelled his or her purchase agreement, to the independent escrow agent in a check made payable to the independent escrow agent. Alternatively, the check may be made payable to the developer with a restrictive endorsement placed on the back of the check providing "For deposit to the account of the independent escrow agent for the (name of time share project) only."

The Commission considers violations of these laws and rules to be a particularly serious matter. In fact, more licensees are disciplined for trust money or trust account violations than for any other single type of offense.

III. TRUST MONEY

Definition

In the context of real estate transactions, "trust money" is most commonly money belonging to others received by a real estate licensee who is acting as an agent in a real estate transaction. Certain monies, such as tenant security deposits and time share down payment monies are trust money simply because the law declares them to be. Also, a licensee who acts as the temporary custodian of money belonging to others must hold that money in trust even if the circumstances are only collateral to the licensee's role as an agent in a real estate related matter, e.g., a listing agent receives money from his out-of-town seller to use to maintain the property. A licensee who collects money on behalf of a property owner association for a fee must deposit that money into a properly designated trust or escrow account.

The most common examples of trust money are earnest money deposits, down payments, tenant security deposits, rents, homeowner association dues and assessments,

and money received from final settlements. In the case of resort and other short-term rentals, trust money would also include advance reservation deposits and the state (and local, if applicable) sales taxes on the gross receipts from such rentals.

Except for depositing and maintaining in a trust account $100 (or such other amount as may be required) to cover bank charges, it is inappropriate for a licensee to mix trust money held for others with the licensee's own money. This impermissible mixing of trust money and licensee money is referred to as commingling. For example, it would be commingling if a licensee were to deposit commissions earned on a real estate sales transaction into the licensee's trust account. It would also be commingling if a licensee were to deposit $1,000 of the licensee's own money into the licensee's trust account in order to maintain a daily bank balance that would avoid bank service charges.

When a licensee commingles the money he or she holds for others with his or her own in the same bank account, he or she creates doubt whether the account is, in fact, a trust account. These doubts may deprive the account of the special status given to trust accounts and may place money belonging to the licensee's customers and clients in jeopardy.

IV. TRUST ACCOUNTS

Definition/Purpose

A "trust account" (or "escrow account") is simply a bank account into which trust money (and only trust money) is deposited. It must be a *separate custodial account* which provides for *withdrawal of funds on demand* (without prior notice).

By depositing trust money in a trust account and keeping accurate records that identify each depositor (buyer, seller, landlord, tenant, etc.), the depositors are protected from the funds being "frozen" (attached) should the broker/trustee become involved in legal action or become incapacitated or die. Also, deposits are insured by the Federal Deposit Insurance Corporation (FDIC), up to $250,000 per each individual for whom funds are deposited. For example, if a broker is holding $160,000 in his or her trust account for one client, and $100,000 for another, both clients' deposits will be fully insured, assuming neither has other money on deposit in personal accounts in the same bank which would raise the total of his or her money in the bank over $250,000. (Funds in excess of $250,000 for one individual at the same bank are not insured, whether the funds are in one account or spread among several accounts.) Furthermore, by placing these funds in a separate account, brokers are less likely to confuse the trust money with their personal or business funds and inadvertently use trust money (which belongs to others) for personal or business purposes.

Opening the Account

Trust accounts must be opened and maintained in a demand deposit account in a federally insured depository institution lawfully doing business in this State which agrees to make its records of the broker's account available for inspection by the Commission's representatives. A broker who is not using his or her real estate license is not required to open or maintain a trust account. Likewise, if a practicing broker does not collect or otherwise handle the funds of others, no trust account is required. Only when the broker or a licensee associated with the broker or under the broker's supervision takes possession of trust money must the broker open and properly maintain a trust account.

When a broker holds trust money in sales or rental transactions, only one trust account is required, and all earnest money deposits, tenant security deposits, rents, and other trust money can be deposited into this one common account. However, brokers who are active in both sales and rental management often find it helpful to use more than one trust account. For example, they may wish to keep a "general sales trust account" for earnest money deposits, settlement proceeds, etc., and a "rental trust account" for tenant security deposits, rents, and related receipts. Although it is not required, many brokers involved in rental management elect to maintain an additional "security deposit trust account" for the purpose of separating tenant security deposits from rents and other related receipts.

Brokers who manage a property owner association must deposit and maintain that association's trust funds in a trust or escrow account dedicated exclusively for funds of that association. A property owner association's trust funds must not be commingled with the funds belonging to another property owner association or with the funds belonging to third parties (earnest money deposits, security deposits, rents, etc. belonging to third parties). Brokers may open more than one trust account for a property owner association. A provisional broker coming into control of the trust funds of an association must deposit and maintain that association's trust funds in a trust account maintained by a broker.

Broker-Owner Trust Monies

Brokers who sell or lease their own property must not commingle funds received in connection with these properties with funds they hold in trust for others. Earnest money, tenant security deposits and other funds required to be held in trust in connection with broker-owned property must be held in a separate trust account.

For example, if a broker does business as a sole proprietorship, and also owns several rental houses, the broker must not deposit either the rents or the tenant security deposits for the rental properties he or she owns into his or her sole proprietorship trust account since it contains other clients' funds. This would constitute commingling. Instead, because the Tenant Security Deposit Act requires all residential landlords to keep the tenant's security deposit in a trust account, the broker should set up a separate trust account for the security deposits from his or her own tenants.

Only when the owner of the rental property and the owner of the real estate company are separate legal identities

may the broker deposit trust monies from the rental property into the real estate company trust account. Thus, for example, if the broker's real estate company is a corporation and the rental property is owned by the broker individually, then the corporation may manage the individual broker's rental property and may deposit both rental receipts and tenant security deposits into the corporate trust account(s) established for third party clients of the corporation.

A broker who is uncertain whether money from personally-owned rental properties can be deposited into his or her trust account should maintain a separate trust account in order to assure compliance and avoid commingling.

A trust account must be designated as a "Trust Account" or "Escrow Account" by the bank (or savings and loan association) in which the account is located, and all bank statements, deposit tickets and checks drawn on the account must bear the words, "Trust Account" or "Escrow Account."

Trust accounts are subject to the same service charges as regular checking accounts. Whenever possible, brokers should arrange for the depository to either bill them for these expenses or charge these expenses to the broker's personal or general operating account. However, if such arrangements cannot be made, the broker may deposit and maintain in his or her trust account a maximum of $100.00 of his or her personal funds (or such other amount as may be required) to cover such charges. A broker who keeps $100 of his or her own money in the trust account must be careful to properly enter and identify personal funds on the deposit ticket and on a personal funds ledger sheet in his or her trust account records. Thereafter, the broker must record any bank charges as they occur in his or her trust account journal or check stub running balance and post the bank charges on the personal funds ledger sheet.

Interest-Bearing Trust Accounts

Trust money may be deposited in an interest-bearing trust account ONLY under the following conditions: (1) the broker must obtain from the persons for whom he or she is holding the funds written authorization to deposit the funds into an interest-bearing account; (2) the authorization must clearly specify how and to whom the interest will be disbursed; and (3) if the authorization is contained in an offer, contract, lease or other transaction instrument, it must be set forth in a manner which shall draw attention to the authorization and distinguish it from other provisions of the instrument (for example, italics, boldface type, underlining, a blank _____ to be filled in with the name of the party to whom the interest will be paid, or some similar means).

Inasmuch as trust money must be deposited in a demand deposit account as defined by G.S. 93A-6(g), the investment of such funds in any type of security, including government bonds, would be prohibited. The investment of trust money in most certificates of deposit is also prohibited. Trust money may be maintained in a certificate of deposit with a federally insured depository institution lawfully doing business in North Carolina only if the certificate of deposit is federally insured, the terms governing it permit withdrawal of the trust money on demand and without any penalty that would reduce the principal amount of the trust money invested in this manner, and the institution agrees to make the records available for inspection by the Commission's representatives. Trust monies may not be deposited in sweep accounts or invested in repurchase agreements.

V. DEPOSITING TRUST MONEY

Who Should Deposit?

When listing property for sale or lease, a provision should be included in the listing or rental management agreement naming the broker as trustee or escrow agent for the purpose of receiving and holding trust money. Likewise, offers to purchase, sales agreements, leases, etc. should specify in whose account the trust money will be held so that all persons who have an interest in the funds will know whom to hold responsible for their safekeeping.

Unless the parties have agreed otherwise, trust money received by a licensee working with a buyer in a co-brokered sales transaction should be immediately delivered to the listing broker for deposit into the listing broker's trust account. In general, all trust money received by an individual licensee who is associated with or employed by a broker or brokerage firm should, of course, be deposited in the trust account of the employing broker or firm. All trust money received by a provisional broker must be immediately delivered to the provisional broker's supervising broker.

A broker may transfer possession of trust money to a bookkeeper, secretary, or some other clerical employee for that person to deposit the funds in a trust account; however, the broker will still be held responsible for the care and custody of such funds. Brokers should closely and diligently supervise the acts of these persons. Periodic audits and bonding of such persons is recommended.

When to Deposit?

Earnest money received on offers to purchase and tenant security deposits received in connection with leases must be deposited in a trust account not later than three banking days following acceptance of the offer to purchase or lease; however, cash deposits must be deposited not later than three banking days following receipt of such deposits. The date of acceptance must be shown in the purchase or lease agreement. Rents, settlement proceeds, and other trust money must be deposited in a trust account not later than three banking days following receipt of the funds.

A licensee who accepts custody of a check or other negotiable instrument made payable to the seller of real property as option money or as payment of a due diligence fee is not required to deposit the money in a trust or escrow account. The licensee shall handle the check according to the instructions of the buyer and either deliver the check to the seller or return it to the buyer. After acceptance of the option or other sales contract, the licensee has three business days to deliver the check.

In the event of a dispute between the seller and buyer over option money in the form of a check or other negotiable instrument made payable to the seller of the property, the licensee shall handle the money according to the instructions of the buyer.

Option money received by a licensee in the form of cash must be deposited into a trust or escrow account within three banking days of receipt.

VI. DISBURSING TRUST MONEY

Permitted Uses/Access

The instrument creating the trust (sales contract, rental management agreement, lease, etc.) should clearly state to whom and under what conditions the trust money will be disbursed (especially in the event the transaction is not consummated). Brokers may disburse trust money only for the purpose(s) set forth in this instrument; for example, brokers may not use trust money to pay for credit reports, surveys, appraisal fees, or other transaction expenses without the consent of both the buyer and the seller, or the landlord and tenant.

Access to trust money should be limited and carefully controlled. Although a broker may authorize a secretary, a bookkeeper, or some other person who is not a party to the transaction to sign checks withdrawing trust money, the broker will not escape liability and responsibility for the misuse of the funds by such persons. Again, brokers are advised to closely supervise these persons, and periodic audits and bonding of such persons are recommended.

When to Disburse?

Sales Transactions:

In "sales transactions," brokers will normally disburse trust money upon the happening of one of the following events:

(1) Upon revocation or rejection of an offer. A buyer (offeror) may revoke an offer to purchase at any time prior to being notified of the acceptance of the offer. If the buyer revokes his or her offer or if the offer is rejected by the seller (offeree), then the broker should return the earnest money to the buyer. However, if the earnest money is in the form of a personal check which has already been deposited by the broker, the broker should not refund the deposit until the check has cleared.

(2) Upon termination of a transaction. If, for some reason, a transaction is not consummated and there is no dispute between the parties as to the disposition of the trust money, then the broker should disburse the money according to the provisions of the sales agreement. However, in the event of a dispute between the buyer and seller over the funds (or if the broker has reason to believe that such a dispute may arise), then the broker must attempt to obtain a written release from the parties consenting to its disposition. Failing this, the broker must retain the funds in his or her trust account until the dispute is litigated by the parties and disbursement is ordered by a court of competent jurisdiction or the broker utilizes the new G.S. 93A-12 procedure.

(3) Upon closing of a transaction. At the successful conclusion of a real estate transaction, any funds pertaining to the transaction which are on deposit in the broker's trust account should be paid to and subsequently disbursed by the person designated to close the transaction (usually an attorney or lending officer).

Occasionally, however, the broker will actually conduct the closing and disburse the funds. In such cases, brokers should not transfer trust money from their trust account to their general business account for final disbursement, because this would result in a commingling of trust money and non-trust money during that period of time in which the trust money is in the business account. Trust money should be disbursed directly from the trust account to the persons entitled to such funds.

Furthermore, brokerage fees, including interest earned on interest-bearing accounts, or commissions (when earned), should be disbursed promptly (within 30 days) from the trust account to the broker's general business account, with each check clearly indicating the specific transaction to which it applies. When a broker retains deposit money in his or her trust account in order to pay all or a part of the commission or fees owed to him or other licensees involved, he or she should pay the money from his or her trust account into his or her general business account and make further payments from that account. Brokers should not, of course, withdraw from the trust account any portion of their earned commissions prior to closing without the express consent of all parties to the transaction.

Option Transactions:

Option money in the form of cash that has been deposited into the trust or escrow account must be disbursed not more than three business days following the acceptance of the option contract. However, in the event of a dispute between the seller and buyer over the funds (or if the broker has reason to believe that such a dispute may arise), then the broker must attempt to obtain a written release from the parties consenting to its disposition, and failing this, the broker must retain the funds in his or her trust account until the dispute is litigated by the parties and disbursement is ordered by a court of competent jurisdiction.

Lease Transactions:

In "lease transactions," that is, transactions involving the leasing or renting of real estate for others, the leasing agent or rental manager must deposit all rental income and tenant security deposits in his or her trust account; likewise, all disbursements required in connection with the property must be made directly from the trust account to the person(s) entitled to such funds. In general, disbursements of rental income are made to pay the operating expenses of the leased property (utilities, maintenance, mortgage payments, administrative costs, etc.) with the balance being remitted to the property owner. The scope and extent of the rental manager's authority to expend funds on behalf of the owner

should be expressly stated in the Rental Management Agreement.

The rental manager must pay these operating expenses in a timely manner; however, disbursements must not at any time exceed the amount of funds on hand for that particular property owner. For example, if the manager has collected only $300 in rent from property owned by Mr. A, he or she cannot disburse $400 from his or her trust account to repair Mr. A's roof. Although the total of all funds in the trust account may be sufficient to cover the $400 expenditure, such payment would, of course, result in the disbursement of funds belonging to other persons to pay for Mr. A's roof.

The Rental Management Agreement should specify the procedure to follow in situations where expenses exceed receipts for a particular owner. For example, the agreement may authorize the broker to hold a certain sum of money in reserve, or the manager may agree to pay such expenses from his or her general operating account and then be reimbursed as rents are collected. The rental manager should not, however, place any of his or her own funds into his or her trust account to offset such "deficit spending," because this would, of course, constitute a commingling of the rental manager's funds with funds which he or she is holding for others.

Regarding the disposition of tenant security deposits, the rental manager or leasing agent should be aware that such deposits may be used only for certain specified purposes, and if not used, the deposit must be promptly refunded to the tenant (certainly within 30 days after termination of the tenancy). Chapter 42, Article 6 of the North Carolina General Statutes, entitled "Tenant Security Deposit Act," with which brokers acting in the capacity of rental managers, leasing agents, etc. should be thoroughly familiar, sets forth the permitted uses of the deposit. These permitted uses are nonpayment of rent, actual damage to the premises, excluding ordinary wear and tear, nonfulfillment of the rental period, unpaid bills which become a lien on the property, the reasonable costs of re-renting the premises after breach of the lease by the tenant, costs of removal and storage of tenant's property after a summary ejectment proceeding and court costs in connection with terminating the tenancy. Brokers must remain aware that security deposits are the property of the tenants, not the owners, during the duration of the tenancy.

Rental management fees, including interest earned by the broker, should be disbursed promptly (within 30 days) from the trust account to the broker's general business account, and division of earned fees among the broker's agents should be handled through the general business account.

Disputed Funds

Rule A.0107(g) dictates what licensees must do with funds they are holding in trust if the parties to the transaction disagree as to who is entitled to the funds. Note, that if there is no dispute, the licensee is free to release the monies to the party entitled to receive same under the parties' contract. However, if the parties do not agree on the distribution of the trust monies, then a licensee is not authorized to release the monies, but must continue to hold them in his/her trust account until one of the following occurs, either: 1) the parties agree in writing how the funds should be disbursed, **or** 2) one of the parties sues the other and obtains a court order, **or** 3) the broker utilizes a procedure which became available October 1, 2005 which allows the broker, following written notice to the parties, to pay the disputed funds to the Clerk of Court and remove him/herself from the situation. Note that *residential tenant security deposits* generally are not subject to A.0107(g) because State law requires that all such deposits be disbursed either to the property owner or to the tenant, as appropriate, within 30 or 45 days (long term rental versus vacation rental) of the termination of the tenancy.

G.S. 93A-12 provides an avenue for brokers to lawfully rid their trust accounts of disputed monies where the parties to the dispute refuse to come to an agreement or refuse to initiate a legal action to determine who is entitled to the monies. In short, it allows a broker to deposit disputed trust monies, *other than residential tenant security deposits*, received as a licensee acting in a fiduciary capacity with the Clerk of Court in the county where the property is located. The broker first must *notify* all parties claiming ownership of or entitlement to the monies *in writing* that the broker intends to pay the monies to the Clerk of Court 90 days following the notice and that the parties may initiate a special proceeding with the Clerk to recover the disputed funds within one year following the deposit. Notice must either be delivered to the person or sent "... by first class mail, postpaid, properly addressed to the person at the person's last known address." When the broker deposits the disputed funds with the Clerk of Court, s/he must "certify" to the Clerk that notice was given to all parties at least 90 days prior to depositing the funds with the Clerk.

Once the broker gives the required notice to all parties and properly follows the procedure to deposit the funds with the Clerk of Court, the broker's responsibility is over. If any party files a special proceeding with the Clerk within one year of the funds being deposited, then the Clerk will proceed to hear the case, determine "rightful ownership" and disburse the funds. If no party initiates a special proceeding with the Clerk within one year of the monies being deposited with the Clerk, then the Clerk is to escheat the funds to the State Treasurer. Escheat is also available to licensees for unclaimed residential tenant security deposits, for example. Licensees may find more information concerning escheat at *www.treasurer.state.nc.us*

Abandonment of Claim

Occasionally, because of the passage of time, it appears that a party who disputed disbursement of an earnest money deposit or other funds has abandoned his/her claim. In that event, Rule A.0107(g) provides yet another option to those discussed above, namely:

... If it appears to a licensee holding a disputed deposit that a party has abandoned his or her claim, the licensee may disburse the money to the other claiming parties according to their written agreement *provided that the licensee first makes a reasonable effort to notify the party* who has apparently abandoned his or her claim *and provides that party with an opportunity to renew his or her claim* to the disputed funds.

The Commission recommends that licensees notify the party who has apparently abandoned his/her claim by certified mail, return receipt requested, in order to document the broker's effort and to aid in knowing if and when the notification was received. Include in the notice a statement that the licensee intends to disburse the funds to a named person unless the party to whom notice is sent renews his/her claim within a reasonable time frame from receipt of the notice, such as two (2) weeks.

VII. RECORDKEEPING AND ACCOUNTING

Retention of Records

Licensees are required to maintain complete records of all trust account receipts and disbursements, including bank statements, canceled checks (or imaged copies of canceled checks), deposit tickets, or other evidence or memoranda of deposits or payments into or from the account, whether by transfer between accounts, wire payments, or payments by electronic means, closing statements, rental management reports and agreements, copies of offers (both accepted and rejected), copies of contracts, leases, rental management agreements, property owner association management agreements, covenants, bylaws, minutes, periodic statements, brokerage cooperation agreements, declarations of affiliation and other transaction records. The licensee shall retain such records for three years after all funds held by the licensee in connection with the transaction have been disbursed to the proper party or parties or until the successful or unsuccessful conclusion of the transaction, whichever occurs later as promulgated by Rule A.0108. Rule A.0107(e) requires licensees to maintain copies of these documents as well as other detailed books and records. The use and maintenance of separate ledger sheets comparable to those illustrated in the "Guidelines" is required. In the event a branch office maintains a separate trust account, a separate bookkeeping system should be maintained in such office.

Trust Account Journal

Pursuant to Rule A.0107(e)(6), the broker's trust account records must include a journal or check stubs. The journal records in chronological sequence trust money received and disbursed by the broker on behalf of all parties. The bookkeeping entries recorded in the journal must include the following information: 1) the amount and date of each bank deposit and an appropriate reference to the corresponding deposit ticket and any supplemental deposit worksheet (the Commission recommends sequentially numbering deposit tickets and noting the number on the journal and the supplemental deposit worksheet); 2) the amount, date, check number and purpose of disbursements and to whom paid; and 3) a running balance for all funds in the trust account (the running balances must be recorded after each deposit and disbursement entry).

Trust Account Ledgers

In a real estate sales transaction where a broker receives trust funds, ledger sheets record in chronological sequence trust money received (earnest money deposits, closing proceeds, etc.) and disbursed by the broker for each sales transaction. In the case of rental management, ledger sheets record in chronological sequence trust money received (rents, security deposits, etc.) and disbursed by the broker for a particular property or property owner. Each ledger sheet must identify the seller or landlord's name, the buyer or tenant's name and the property address of the property sold or managed by the broker. The bookkeeping entries to each ledger sheet must include: 1) the amount, date, and purpose of the bank deposits and from whom received; 2) the amount, date, check number and purpose of disbursements and to whom paid; and 3) a running balance of funds on deposit for the particular sales transaction or, in a rental transaction, the particular property or property owner.

Security Deposit Ledgers

The receipt of a tenant security deposit and any corresponding disbursement of the security deposit for a property managed by a broker may be recorded on a separate ledger sheet apart from the ledger sheet that records the income and expenses on behalf of the property or property owner. This ledger sheet must identify the property owner's name, the tenant's name, and the property address. The bookkeeping entries posted to this security deposit ledger sheet must include the same information as described above under "Trust Account Ledgers."

Payment Record Sheets

In a property owner association transaction where a broker receives trust funds, a payment record sheet for each property or property interest records in chronological sequence the accrual of assessments or monies due and any corresponding receipt of monies. Each payment record sheet must identify 1) the amount, date, remitter and purpose of payments received, 2) the amount and nature of the obligation, and 3) the amount of balance due or delinquency. Essentially, a payment record sheet is an accounts receivable ledger maintained on an accrual account basis and maintained by property or property interest.

Timeliness

It must be emphasized that all receipts and disbursements must be recorded in the journal and posted to the applicable ledger sheet in a timely manner. Also, reconciliation worksheets should be prepared within a reasonable time frame after receipt of the trust account bank statement. A broker's failure to follow these accounting and bookkeeping principles increases the risk of errors and the misapplication of trust money.

Trust Account Deposit Tickets

A broker should maintain as part of his or her trust account records a bank-validated deposit ticket for each bank deposit. This bank-validated deposit ticket is the broker's record evidencing deposit of trust funds into the trust account. In a sales transaction, the bank-validated deposit ticket must identify 1) the purpose (earnest money deposit) and the remitter of funds deposited; 2) the property; 3) the parties involved (buyer and seller); and 4) a reference to the corresponding sales transaction ledger sheet. If the remitter and the buyer are the same, then only one name would be required to identify both the remitter and buyer.

In a rental transaction, the bank-validated deposit ticket must identify 1) the purpose (rent, security deposit, etc.) and the remitter of funds deposited; 2) the tenant; and 3) the corresponding property or owner ledger sheet. If the remitter and the tenant are the same, then only one name would be required to identify both the remitter and the tenant.

In a property owner association transaction, the bank-validated deposit ticket must identify 1) the property or property interest (example: time share interest) for which the payment is deposited, 2) the property or interest owner, 3) the remitter, and 4) the purpose of the payment.

Trust Account Wire Transfers or Other Electronic Deposits

If funds are deposited into the trust account by wire transfer or other electronic means, then the required identification of funds as described above regarding bank-validated deposit tickets along with the identification number assigned by the bank to each electronic transaction included in a wire transfer or other electronic deposit must be recorded on a supplemental deposit worksheet which must be cross-referenced to the wire transfer or other electronic deposit and to the trust account journal or check stub entry.

Trust Account Checks

Original canceled checks must be obtained from the bank for all broker trust accounts. They must be retained as part of the broker's trust account records. In lieu of canceled checks, a broker may retain digitally imaged copies of the canceled checks or substitute checks. The front and back of the digitally imaged copies must be legible. The image of each check must be no smaller than 1.1875 x 3.0 inches. Also, the bank must retain the original canceled checks or substitute checks for a period of at least 6 years and provide the checks upon request. Canceled checks can be retained on a computer CD ROM (produced by the bank) as long as the checks can be reproduced as described above.

When preparing a check disbursing trust monies from a trust account, the broker must include on the face of the check a reference to the corresponding journal entry or check stub entry. The check number and date on the check are sufficient to reference the corresponding journal entry as long as the check is easily traceable to the entry recording the check in the journal.

Also, the check must reference the corresponding sales transaction ledger sheets or for rental transactions, the corresponding property or owner ledger sheets. In a sales transaction, identifying the buyer, seller and property address on the check is sufficient to reference a check to the sales transaction ledger. For a rental transaction, identifying the property address on the check is sufficient to reference a check to a property ledger sheet or an owner's name is sufficient to reference a check to an owner ledger sheet.

The purpose of the disbursement must be identified on the face of the check or on the corresponding supplemental disbursement worksheet.

Trust Account Wire Transfers or Other Electronic Disbursements

If funds are disbursed out of the trust account by wire transfer or other electronic means, then the date, amount(s), payee(s), purpose of the disbursement(s) and the corresponding sales transaction ledger sheet(s) or for rental transactions, the corresponding property or owner ledger sheet(s) must be recorded on a supplemental disbursement worksheet. The supplemental disbursement worksheet must also be cross-referenced to the wire transfer or other electronic disbursement and to the trust account journal or check stub entry.

Supplemental Worksheets

A bank deposit ticket may include monies from more than one real estate transaction and it may be impractical to identify on it all the monies deposited into the trust account on a deposit ticket. When a single deposit ticket is used for multiple transactions, the broker may create a supplemental deposit worksheet and record on it the information necessary to properly trace the deposited monies. For example, rents collected in cash from various tenants could be recorded on a single deposit ticket as currency and deposited in a lump sum amount. The required identifying information must then be recorded on a supplemental deposit worksheet referencing the deposit ticket. To reference the worksheet to the deposit ticket, the broker must at least record the date and the total amount of the deposit on the worksheet. The Commission recommends sequentially numbering the deposit tickets and recording that number on the worksheet, journal, and ledger sheets as well as the date and the amount.

Likewise, a check may represent disbursements applicable to more than one sales transaction, property, or property owner ledger sheet and it may be impractical to identify all the corresponding ledger sheets on the check itself. For example, one check may be written to disburse rental management fees applicable to various properties. In such an instance, a supplemental disbursement worksheet referencing the corresponding check (date, check number, payee and amount) must be prepared for the check showing the identity of the monies disbursed out of the trust account as outlined above under "Trust Account Checks".

Reconciliation/Trial Balance

Rule A.0107(e) further requires that brokers report all

receipts and disbursements of trust monies in such a manner as to create a clear audit trail from deposit tickets and canceled checks to check stubs or journals and to the ledger sheets. A broker must reconcile ledger sheets and his or her journal or check stubs to the trust account bank statements on a monthly basis. The broker must create a worksheet (Trial Balance) for each such monthly reconciliation and must retain the worksheet (Trial Balance) as part of his or her trust account records.

The trial balance must identify each ledger (e.g. buyer and seller, property address, tenant, etc.) and show the ledger balances as of the date of the trial balance. A trial balance is simply a list of all funds in the trust or escrow account and the identification of the owners of those funds. The month-end bank statement balance must be reconciled to the checkbook and/or journal balance (i.e. running balance of funds on deposit) taking into consideration outstanding checks and deposits. The checkbook and/or journal balance should equal (be balanced with) the total outstanding liability as shown on the ledgers (individual transaction ledgers).

Trust account records must be retained by brokers for at least three years after all the funds held by the licensee in connection with the transaction have been disbursed or until the successful or unsuccessful conclusion of the transaction, whichever occurs later. The trust account records must be made available for inspection by the Commission or its authorized representatives without prior notice. [NOTE: The Real Estate Commission employs Trust Account Auditors to make "spot inspections" of trust accounts and to assist in the investigation of complaints alleging improper handling of trust money.]

Computers

The Commission receives numerous inquiries concerning the format of bookkeeping systems, especially computerized bookkeeping systems. The Commission cannot endorse or recommend a specific computer product for brokers to use. The basic requirements for the computerized bookkeeping system are the same as those requirements for a manual system. The broker-in-charge is encouraged to review these requirements prior to investing in a computerized bookkeeping system that may not comply with Commission guidelines.

Certain software vendors have submitted to the Commission their bookkeeping software systems for evaluation of compliance with the Commission's Rules and Trust Account Guidelines. A list of the softwares evaluated and found to substantially comply can be found on the Commission's web site at ncrec.gov.

Accounting to Principals

Brokers must account for all trust money which they receive and disburse during the course of a real estate transaction. In the rental management area, this accounting would be in the form of a "rental management report", in sales transactions, a "closing statement" and in property owner association management, a "periodic statement" is used.

Although no specific form or format is required, the rental management report, the closing statement and the periodic statement must set forth in a clear and concise fashion a complete accounting of all funds received and disbursed by the broker.

Rental Management Reports:

The "rental management report" is simply a periodic accounting to the owner of all funds received and paid out in connection with the owner's property. The major item of income is, of course, rent, and the major expense items include utilities, maintenance expenses, and administrative costs. It is the responsibility of the broker/rental manager to see that the property owner receives this income and expense report at such times as are required by the management agreement (usually monthly) and that the report covers all receipts and disbursements handled by the rental manager on behalf of the owner. The broker/rental manager must also make a full accounting to the tenant, within 30 days of the termination of the tenancy, regarding the tenant's security deposit (See G.S. 42-52).

Closing Statements:

The "closing statement" is used in sales transactions to show all receipts and disbursements that the broker has handled for the seller, and all money that the broker has received from the buyer and how much money was disbursed. While it is the broker's responsibility to see that the buyer and seller receive a copy of this statement(s) at the closing of the transaction (or not more than five days after closing), the broker is not required to personally prepare the closing statements. He or she may instead elect to adopt the statements prepared by the person who closed the transaction (usually an attorney or lending officer) provided such statements account for all funds received and disbursed in the transaction; however, the broker will be held responsible for the accuracy of closing statements he or she provides to the parties, regardless of who prepares such closing statements.

Periodic Statements:

Licensees who manage a property owner association or who are the custodian of funds of an association must provide to that association periodic statements of not only the balance of the trust funds in the licensee's control but also an accounting of the trust funds received and disbursed on behalf of the association. The periodic statements must be provided by the licensee to the property owner association in accordance with the property management agreement, but in no event less frequently than every 90 days. The property owner association balance sheet and income statement of the funds in the licensee's control is sufficient to account to the association as periodic statements.