Commonwealth of Massachusetts
Division of Professional Licensure
BOARD OF REGISTRATION OF REAL ESTATE BROKERS AND SALESPERSONS

1000 Washington Street • Boston • Massachusetts • 02118

1. **Payments from Escrow Accounts**- Is it permissible for a real estate broker to pay cooperating brokers directly from their escrow account after a closing has occurred where the broker is holding funds in escrow? 254 CMR 3.10 requires a broker to make a "proper account and distribution" of escrow funds once a transaction is either consummated or terminated. The regulations seem clear that a broker cannot pay a cooperating broker before a transaction has closed, but many brokers question whether such payment can be made directly from their escrow account after the closing has occurred.

Nothing in 254 CMR 3.10(a) appears to prohibit the disbursement of funds directly from an escrow account at either the consummation or termination of the transaction. Of course a "proper account and distribution of funds must still be made. Additionally, under 262 CMR 3.10(b) a broker shall also keep and copy of each check deposited into and withdrawn from the escrow account for a period of three years from the date of issuance.

2. **Interest earned on Escrow Accounts**- Is it permissible for a broker, upon agreement from the parties to a transaction, keep monies earned on an interest-bearing escrow account? 254 CMR 3.10 requires that a broker "make a proper account of such interest at either the consummation or termination of the transaction." It is the practice of many brokers to maintain a non-interest-bearing escrow account, as permitted by the regulation. However, for those brokers who do maintain an interest-bearing escrow account, this question is often presented. Many brokers also wonder as to what can be done with the interest if it is kept in an interest-bearing account. If the Parties agree to allow the broker to keep the interest earned, is that an improper commingling of funds? What if the Parties would like the interest given to a charity? Is the charitable donation coming from the broker (again raises the question of commingling) or the parties?

254 CMR 3.10(a) makes it clear that brokers can maintain an escrow account that it either interest bearing or non-interest bearing. In order to give a "proper account and distribution" of all escrowed funds the broker and the parties should, during the pendency of a transaction make all parties aware, by agreement, what kinds of escrow account it is (interest bearing or not) and clearly indicate which party or broker in entitled to the interest at the consummation or termination of the transaction.

3. **Signing authority Escrow Accounts-** Is it permissible for a broker of record to designate check signing authority on an escrow account to another individual. 254 CMR 3.10 describes the responsibilities placed on a broker for maintaining an escrow account. The regulation is silent on the question of whether the broker may delegate check signing authority to brokers or salespersons affiliated with the office or to accountants or bookkeepers employed by the brokerage. This question is particularly relevant for brokerages with multiple offices with locations throughout the state.

   The Board has long interpreted 254 CMR 3.10 as allowing for o*nly* Brokers to keep and maintain escrow accounts. In other words, neither salespersons nor those unlicensed may have access to check writing ability over escrow finds.

   This regulation seems to contemplate the scenario where there is one broker as evidenced by the following sentence:

   > "An escrow account is an account where **the broker** deposits and maintains the money of other parties in a real estate transaction and such broker has no claim to such money." (emphasis added)

   The Board recognizes that the "one-broker" model is outdated and can frustrate the facilitation and consummation of transactions in instances where the broker of record in unavailable. To that end the Board interprets its regulation to allow for affiliated brokers (those brokers working under another brokerage) to be signatories on escrow accounts.

4. **Advertising**- Questions often arise related to the applicability of regulations to online social media advertising. 254 CMR 3.09 requires that "All advertisements shall include the name of the real estate broker." Online social media advertisement is a common form of advertisement not contemplated at the time when these regulations where adopted. On certain social media platforms it may be impossible to comply with the regulatory requirement due to a lack of space. Can this regulation be satisfied by including in all such advertisements a link to a display with the required disclosure? For informational purposes, the Realtor Code of Ethics (which all Realtors are required to adhere to) does allow for the use of links. It states: *Realtors® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that Realtor®'s firm in a reasonable and readily apparent manner either in the advertisement or in electronic advertising via a link to a display with all required disclosures.* (Adopted 11/86, Amended 1/16)

   254 CMR 3.09 makes is clear that "all advertisements shall include the name of the real estate broker. If there is a corporate entity then that entity, or its properly and municipally filed d/b/a must be included somewhere conspicuously in that advertisement. If it is sole proprietorship then the actual Broker's name (or d/b/a) must be also be conspicuously placed in the advertisement. Only using the broker of record's name for a licensed entity runs afoul of this rule.

5. **Advertising**- Another frequent question that arises relates to the phrase "real estate broker" in the regulation. 254 CMR 3.09 provides that, "All advertisements shall include the name of the real estate broker." In this context, can the regulation be satisfied by including the name of the real estate brokerage or the broker of record for that brokerage.

   254 CMR 3.09 makes is clear that "all advertisements shall include the name of the real estate broker. If there is a corporate entity then that entity, or its properly and municipally filed d/b/a must be included somewhere conspicuously in that advertisement. If it is sole proprietorship then the actual Broker's name (or d/b/a) must be also be conspicuously placed in the advertisement. Only using the broker of record's name for a licensed entity runs afoul of this rule.

6. **Business Entities-** Real Estate Salespersons frequently establish business entities such as Limited Liability Companies (LLCs) for the sole purpose of receiving commissions and fees from their broker. This is often done on advice from the Salesperson's accountant or tax advisor because of the tax related benefits of receiving commissions through a business entity. These business entities do not engage in real estate brokerage and do not hold themselves out to the public as a real estate brokerage. Their existence is strictly based on tax advantages to the salesperson. Because they are not engaged in brokerage, are these entities subject to 254 CMR 2.11, which requires an officer in the entity to be licensed as a broker. Other states do allow for this practice. In Arizona, for example, a licensee may be paid in the name of the licensee or through a professional corporation (PC) or professional limited liability corporation (PLC or PLLC), which has been registered by the licensee with the Department. In Oregon, a principal real estate broker or a real estate broker associated with a principal real estate broker may create a corporation, limited liability company, limited liability partnership or other lawfully constituted business organization for the purpose of receiving compensation. The real estate licensee may not conduct professional real estate activity under a business organization created but may only receive compensation.

   254 CMR 2.11

   "Business Entities. No licensee may engage in the business of real estate brokering in a corporation, limited liability company (LLC), partnership, limited liability partnership (LLP), association or society unless the entity is licensed by the Board. No broker's license shall issue to a corporation, LLC, partnership, LLP, association or society unless an officer in such corporation, society or association or partner in a partnership is a licensed broker in the Commonwealth and designated as the broker of record for the entity. The broker of record must be currently licensed at all times, otherwise the license of the entity shall cease. The broker of record shall be in responsible charge of the business entity and personally responsible for the acts of the entity and its employees and agents."

7. **License display in office-** 254 CMR 3.04 states that "Each broker and salesperson shall display a copy of their license in a conspicuous location that is readily observable to the general public." Common practice is for offices to display copies of licenses on a wall in conspicuous location. To comply with this regulation, is it permissible to keep copies in a binder in a conspicuous location? Does the Board interpret this regulation to require licensees to keep their license on their person while engaged in business?

   All licenses must be conspicuously posted in the office of the brokerage with which the licensee is affiliated. While it is a best practice to keep one's license on their person the regulation is silent on this issue.

8. **Referral Payments to out of state and international brokers -** 254 CMR 3.08 states "No fee, commission or other valuable consideration shall be paid to or shared by an owner's managing agent or its employees as the result of the sale of real estate for the owner unless such agent and its employees are licensed brokers or salespersons, except as provided for in M.G.L.c. 112, § 87QQ." Does this permit sharing of fees with brokers or salespersons licensed outside of the Commonwealth as suggested by Sec. 87AAA? What about for international referrals? Are the criteria for sharing fees based upon Massachusetts standards for licensing or what the local rules are? Can a Massachusetts broker share a fee with a real estate professional in a country where licensure is not required?

   M.G.L. c. 112, §87QQ essentially exempts from the practice of Real Estate an owner or a fiduciary of an owner who does buys, sells, exchanges an interest in real property in the ordinary course of their business. This section does not permit sharing fees with licensees outside the Commonwealth, who are for all intents and purposes, unlicensed individuals within the Commonwealth.

9. **Limiting the presentation of offers on instructions from seller -** 254 CMR 3.11(d) states "All offers submitted to brokers or salespeople to purchase or rent real property that they have a right to sell or rent shall be conveyed forthwith to the owner of such real property." Is this absolute or can a broker or salesperson not present an offer to a client if they have been given specific instructions from the client to only present offers that meet specific criteria? For example, if a property is listed for $300,000, can the seller instruct the broker not to present offers below $250,000. Can a seller client instruct a broker not to present offers until a given time, for example, no offer will be presented until the Tuesday after the Open House at 6:00 PM.

What is my obligation to provide offers that I receive to the seller's broker?

Real estate agents are obligated to present all offers that they receive to the seller or the seller's representative. This is provided for in the Board's regulations at 254 CMR 3.11(d). Repeatedly questions come to the Board concerning whether to present offers "substantially" below the asking price. Moreover the Board is asked whether additional offers that come in must be presented to the seller once the seller has accepted an offer.

The Board long ago interpreted its own regulation on offers noting that real estate agents are under no licensing law obligation to present additional offers that may be tendered once a seller accepts an offer. Indeed some might argue that presenting additional offers may place agents in the position of interfering with an ongoing contractual relationship for their own personal gain, which is prohibited by the licensing law. The Board went on to note further that, obviously, the licensing law regulates real estate agents and not the sellers (or buyers) in the transaction. Consequently where a seller accepts an offer but instructs his or her agent to present additional offers the agent may present these so called "back-up offers". In this situation the agent is following the instructions of the client and, of course, the back -up offer only can come to fruition where the accepted offer fails to lead to a purchase and sale agreement.

Concerns over whether offers "substantially" below the seller's asking price should be presented at all are answered by the licensing law cited herein. Again, that law requires the presentation of all offers. Naturally, however, the seller is free to set the parameters. Specifically if a seller instructs his or her agent not to present offers that fall below a certain price the agent can follow those instruction without violating the licensing law. Keep in mind that, as noted before, it is the seller calling the shots. The agent cannot decide on his own to make such judgments.

10. **Clarify Real Estate Teams Advertising -** Currently there are no rules or regulations specifically pertaining to "Teams" and advertising requirements. Many states have begun introducing laws and regulations specific to teams as it is becoming a more prevalent practice. Many of our members have inquired as to what rules they need to keep in mind when working as a team.

    As a licensed salesperson affiliated with a broker may I advertise my services?

    No you may not do so. The Boards regulations specifically state that salespeople cannot advertise and this includes web pages. It is the broker who can advertise and may list his affiliated brokers and salespeople, provided that the advertisement clearly notes the name of the broker running the advertisement. The Board has seen a number of situations where advertisements, including web pages, only list a salesperson without noting the name of the broker with whom the salesperson is affiliated. Often these advertisements are paid for by salespeople and that is also in direct violation of the regulation. The specific regulation is 254 CMR 3.09(a) and (b) and you can find it on the Board's web page at www.mass.gov/dpl/boards/re

11. **Payment of commission to agent no longer affiliated with real estate office.** If an agent has left an office, but is still due a commission from a transaction completed with that office, is the commission paid to (1) The broker of the office they are no longer affiliated with, (2) The new office the agent is affiliated with, or (3) to the agent directly? Same question but when agent has expired license - If an agent completed a transaction with a valid license, but the license has expired prior to the payment of the commission and the agent does not intend to renew their license, can they still be paid their commission? Does the status of licensure at the time of the transaction govern or the time of payment?

    All commissions should be paid to the Broker whose agency is the procuring cause of a transaction. Thereafter, the broker distributes the commission in accord with the contractual relations with the licensee either still within the brokerage are former affiliated licensees.

12. **Is a co-op an interest in Real Estate** - Is the presenting of co-op properties to potential clients considered an interest in real estate or is it more akin to a securities transaction as the client is not purchasing the real estate, but only an option to use that property? Is a real estate license required to show these types of properties?

This issue has come up from time to time over the years in this context and in the context of time shares. It is in interest in real property if the interest is recorded with the applicable Registry of Deeds in the name of the purchaser. If it is more like a share of a larger entity and is not recordable with the registry of deeds then it is outside the jurisdiction of the Board.