

Escrow Act Interpretive Statement - 01

**RE: Changes in Real Estate Commissions
WAC 208-680D-040 Agreements and Closings**

Question Presented

Must the buyer sign a modification of the escrow instructions if the modification relates only to the real estate commission to be paid by the seller to the seller's real estate broker?

Statute and Rules

WAC 208-680D-040(1) requires an escrow agent to:

Prepare or accept an instrument of escrow instructions among the principal parties and the escrow agent. The escrow instructions shall be signed by the principal parties. Escrow instructions shall contain any and all agreements between the principals and the escrow agent or incorporate other written agreements by reference. **The escrow instructions shall not be modified except by written agreement signed by the principals and accepted by the escrow agent.** (Emphasis added)

Discussion

The written escrow instructions will often include an amount for commissions to be paid to real estate broker(s). It is not uncommon for these commission amounts to be later modified. For example, the overall commission percentage may be changed, or the commission split between the listing and selling brokers may be renegotiated. When this occurs, there is sometimes confusion as to who must provide written approval of the changes.

WAC 208-680D-040(1) requires that the principal parties (the buyer and seller) provide written approval of all changes to the escrow instructions. However, the buyer in a real estate transaction is not normally involved in the payment or receipt of real estate commissions. If this is true in a particular real estate transaction, imposing a requirement that the escrow agent obtain the written approval of the buyer to effect a change in the real estate commission involves an extra step that does not add value or protection to the parties involved. In such a case, the buyer does not benefit from, nor is harmed in any way by the change in commission structure.

If the buyer is not affected by the change in real estate commissions, it is appropriate to exclude the buyer from the written change approval process. The buyer is not a "party to the transaction" for purposes of this change to the escrow agreement. However, the escrow agent would remain obligated to obtain written approval of all parties that are affected by the commission change, typically the broker(s) and seller. Furthermore, changes to the commission sharing arrangement should be documented, agreed upon, and signed by all of those affected parties. Because

agreement among the affected parties is not a certainty, the escrow agent should be prepared to have the parties interplead the contested funds, if necessary.

In the event that a change in commission affects the buyer in a particular real estate transaction, then the buyer's written approval of the commission change is required..

Conclusion

DFI will view only the parties paying or receiving the real estate commission as the "parties to the transaction" for purposes of the requirement that the escrow agent obtain written approval of changes in real estate commissions.

Adopted: July 6, 2004

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