



# Consultation Paper

## Proposed Amendments to *Real Estate Act* Rules 96 and 97

## Background to Proposed Amendments to *Real Estate Act* Rules 96 and 97

RECA is an independent, professional self-governing body established under the *Real Estate Act* (REA). It regulates Alberta's real estate brokerage, mortgage brokerage, property management, and real estate appraisal professionals. The Real Estate Council of Alberta (RECA) is committed to the public interest. It promotes the integrity of the industry and protects consumers.

In early 2016, two Calgary-area brokerages went out of business. Many real estate professionals contacted RECA and their industry associations regarding unpaid commissions owing from these brokerages. Some industry professionals believed, incorrectly, that the brokerages held commissions in trust for them. However, under the current REA Rules commissions are held in brokerage general accounts.

When a brokerage ceases to operate, RECA's role is ensuring consumer trust monies are intact. The Real Estate Assurance Fund (the Fund) protects consumers when an industry member engages in fraud, breaches of trust, or a brokerage fails to disburse or account for money held in trust. The REAF is not meant to protect industry professionals who are not paid commissions.

The Alberta Real Estate Association (AREA) created an At-Risk Commissions Working Group (ARCWG) to consider commission losses when brokerages cease to operate. Representatives were from AREA, the Calgary Real Estate Board, the REALTORS® Association of Edmonton, RECA, and the Real Estate Insurance Exchange. The ARCWG's goals were to study the issue and determine whether there were solutions.

The ARCWG considered whether RECA might create commission trust accounts in the REA Rules. RECA was unable to do so because the Government of Alberta created the Fund as a consumer protection Fund. It was not intended to pay commission losses. If rules were created for commission trust accounts, unintended claims could be made. As well, if there was an increase in unintended claims, industry professionals may be required to pay more to the Fund to support the Fund's viability.

As an alternative solution, the ARCWG asked RECA to amend REA Rules to create a new option for brokerages with respect to how they hold commissions.

The new option would permit a brokerage to hold an account known as an "other" account where commissions may be exclusively held. The account could be a non-statutory trust account. If a brokerage chose this option, RECA would not regulate this brokerage "other" account, even if it were a non-statutory trust account.

A brokerage would not be required to hold an "other" account. It could continue to hold commissions in their general account, if it chose. In such a case, there would be no change for a brokerage from the current requirements.

The request from the ARCWG for amendments to REA rules 96 and 97 falls within RECA's mandate. Such amendments may be viewed as a REA s.5(b) service to the real estate industry. This is because commission loss is a demonstrated concern, and the ARCWG requested assistance from RECA. Amendments may also be viewed as necessary to mitigate an unintended risk to the Fund. The risk results from brokerage commission sharing where a trust may be created. Claims to the Fund for compensation were not intended in such circumstances. The Fund was intended to only protect consumer losses.

## Rationale for Amendments

- The ARCWG indicates the rule amendment would permit brokerages to create non-regulated trust accounts i.e. the "other" account. This account could help brokerages protect commissions. RECA gives no assurance or warranty in this regard. Courts will likely determine commission protection issues.
- The ARCWG indicates the rule amendments could allow the industry to come up with its own solution to further protect commissions. RECA gives no assurance or warranty with respect to this development.
- RECA believes the rule amendment is necessary to help ensure the integrity of the Fund, to ensure it is available only to compensate consumers in cases of fraud, breach of trust, or a brokerage's failure to disburse or account for a consumer's money held in trust. Amendments would help maintain the Fund as the Government of Alberta intended. Industry professionals would not be required to pay additional monies to support the Fund for this reason.

## Proposed Amendments to Rules 96 and 97

### Unauthorized Payment From Trust

96 Subject to section 97 of these Rules, a brokerage shall not pay any of the brokerage's personal or general office expenses, commission or other remuneration payable to a brokerage's authorized officials, brokers or associates out of an account in which money is held in trust.

### Payment of Commission or Remuneration

- 97 (1) For purposes of this Rule, the term "other account" may mean a trust account that is not provided for in the *Real Estate Act* or Rules and it does not mean a trust account provided for in s.12 (n) of the *Real Estate Act* or a trust account provided for by any other section of the *Real Estate Act* or Rules. Monies held in an "other account" are not trust monies for purposes of the *Real Estate Act* or Rules.
- (2) Brokerages shall pay all remuneration or commissions to a brokerage general account or other account and shall keep records.

- (3) Where brokerage remuneration or commissions
  - (a) are earned and payable from money deposited in a brokerage trust account for another purpose, and
  - (b) will be shared between brokeragesany share of the remuneration or commissions payable to another brokerage shall be immediately paid from the brokerage trust account to the other brokerages' general account or other account directly and any remaining share shall be immediately thereafter transferred to the brokerage general account or other account.
- (4) When remuneration or commissions are to be shared between two or more brokerages and are not paid in full when due, the amount actually received may be shared between the brokerages as they agree but in the absence of agreement, the brokerage holding the remuneration or commissions must immediately pay the amount into a lawyer's trust account until the matter is resolved.

## Current REA Rules 96 and 97

### Unauthorized Payment From Trust

96 Subject to section 97 of these Rules, a brokerage shall not pay any of the brokerage's personal or general office expenses, commission or other remuneration payable to the brokerage's own authorized officials, brokers or associates out of an account in which money is held in trust.

### Payment of Commission From Trust

- 97
- (1) Subject to (2) below, all payments received by a brokerage as or on account of commission or other remuneration for a trade in real estate shall be classified as trust money and shall be paid into the brokerage's trust account notwithstanding that the commission or remuneration may already have been earned, and, where applicable, the payments shall be recorded as being received in trust for the person liable to pay the commission or other remuneration.
  - (2) Sub-section (1) above does not apply to a commission or other remuneration that is not to be shared between brokerages or to a share of a commission or other remuneration received from another brokerage.
  - (3) Any money in a brokerage's trust account which represents a commission or remuneration that has been earned and is no longer required to be held in trust shall be paid in accordance with the following rules:

- (a) any share of such commission or remuneration payable to another brokerage shall be paid to that brokerage directly out of the trust account;
- (b) after the payment pursuant to clause (a) has been made, the commission or remuneration shall be transferred into a brokerage account; and
- (c) where a client fails to pay a commission or other remuneration in full when due, which is to be shared between two or more brokerages, the amount actually received shall be shared between them as they may agree and, in the absence of an agreement, the brokerage holding the commission may not withdraw any part into its brokerage account until the other brokerage or brokerages have been paid in full.

*\*Note: There is reference to REA Rule 97 in Rule 95(a). This reference will be deleted if REA Rule 97 is amended.*

## Questions:

1. Do you support the proposed amendments? Why or why not?
2. What comments or suggestions do you have?
3. What challenges, if any, do you believe RECA could encounter with the proposed amendments?
4. How could RECA overcome any challenges you identify?

## Consultation and Feedback

RECA wants to hear from you. Your views, comments, and suggestions are welcome and encouraged. If you want to make a written submission, the deadline for submissions is: Tuesday, October 30, 2018.

Submissions should be emailed to [consultation@reca.ca](mailto:consultation@reca.ca) or mailed to:

Real Estate Council of Alberta  
Suite 202, 1506 11 Ave SW  
Calgary AB  
T3C 0M9

Telephone: (403) 228-2954  
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We anticipate Council will decide in late 2018 or early 2019 whether it will amend the Rules.

## **Additional Comments**

If you have any comments on these issues, or if you would like to suggest other changes or bring other matters to our attention, please email them to us.

**RECA looks forward to your response to this consultation. Consultation submissions and responses will be made available on RECA's website. Individuals will not be named. Consultation responses from industry associations will be posted in full, including the responding organization's name.**