

Safe Disbursement Practices

In Today's Dangerous Cyber World

Presented by

LEGAL EDUCATION DEPARTMENT

of

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Safe Disbursement Practices

in Today's Dangerous Cyber World

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Senior Legal Education Attorney

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Overview

How payments are made

- Payment rails
- Negotiable instruments

How to disburse proceeds

- Individuals
- LLC
- Trust
- Foreign & dissolved corporations
- Real estate agents

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1st Rule of Closings – Must have all the Money



- All money must be "collected funds" pursuant to
  - Contract – FR/Bar Paragraph 18. S.
  - Florida Administrative Code – Rule 69O-186.008 (1) &
  - Florida Bar – Rule 5-1.1(j)
- "Collected funds"
  - Must be deposited without possibility of recall

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How Payments are Made

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Credit vs. Debit Transfers

- Credit – party making payment sends it to receiver
  - Information about this payment follows the same route
    - Wire transfers
    - RTP (real time payments)
    - ACH (automated clearing house network)
- Debit – party making payment sends it & authorization to receiver, however
  - Information about this payment comes from receiver through the bank & back to original party making the payment
    - A check or
    - ACH (automatic payment)

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Credit Transfer Providers & Limits

Wire – can be held up (hours or up to 2 banking days)

- Limits vary by financial institution
  - Fedwire – used by Federal Reserve Bank
  - CHIPS (Clearing House Interbank Payments Systems)
    - Privately owned & operated

RTP – 24/7 instant payments (available in seconds)

- Limits up to $1,000,000
  - FedNow
  - R|T|P®

ACH – can be a credit or debit transaction

- Limits – regular – unlimited; same day – up to $1,000,000
  - Regular 1 to 3 business days
  - Same day may be processed in 1 banking day

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Debit Transfer Providers & Limits

- Checks – several days or more to clear
  - Limits as established by financial institution



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Modern Payment Rails

Wires, RTP & ACH

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Wires

- Payments sent is generally final & non-reimbursable
- Instructions may be canceled if
  - Cancelation is received before receiving bank has accepted, or
  - If receiving bank has accepted & agrees to cancelation
    - May agree if wire transfer request made by fraudster
- Receiving bank is not obligated to agree to cancelation
- Once you hit send – it is gone



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Wires – Fraud Risk

Fraudsters are

- Familiar with wire process
- Have sophisticated schemes to acquire funds
  - BEC (Business Email Compromise) – intercepting emails
    - Changing payoff letters or instructions
  - Other social engineering processes

Mitigation

- Education
- Strong wire procedures
- Legal recourse under Reg. E and UCC Article 4A

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RTP

- Payments is irrevocable except for voluntary returns
  - Request for return of funds made by sending bank upon notification of sender of erroneous or fraudulently induced payment
  - Receiving bank
    - Must confirm receipt of request
    - Respond within 10 banking days either
      - Accept or reject return of funds
- Once you hit send – it is gone



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RTP – Fraud Risk

- Generally lower than wires & ACH
- RTP platform has
  - Prefunding requirements
  - Multifactor authentication
- However, once sent – it is gone
- Legal recourse under Reg. E and UCC Article 4A



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ACH – Credit or Debit Transaction

Money is Sent

Payments can be reversed

Refunds

If request is made within two days after settlement day

Return of funds may be made within 60 days

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ACH – Credit or Debit Transaction – Fraud Risk

- Debit transaction support
- Wide availability of account numbers & routing information
- Fraudsters are very familiar with ACH process
- Unauthorized withdraw from account
- Mitigation
  - Legal recourse under Reg. E and UCC Article 4A



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Cancelation of Payment Order Sec. 670.211, F.S.

- Sender can request receiving bank to cancel or amend payment order orally, electronically, or in writing
- Receiving bank
  - To follow security procedure for communication to be effective or
  - Receiving bank agrees to cancel or amend
    - Sec. 670.211 (1), F.S.
- After a payment order has been accepted by beneficiary's bank
  - Cancelation or amendment of payment order is not effective unless receiving bank agrees or
  - Funds-transfer system rule allows cancelation or amendment without agreement of the bank
    - Sec. 670.211 (3), F.S.

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Mitigating Risk with Payment Rails

- Train & Warn
  - Staff
    - Include "fire drills"
  - Real estate agents
  - Buyers &
  - Sellers
- Have a written wire transfer check sheet
- Use a company like CertifID
- Have a written rapid response plan 

  - If something goes wrong

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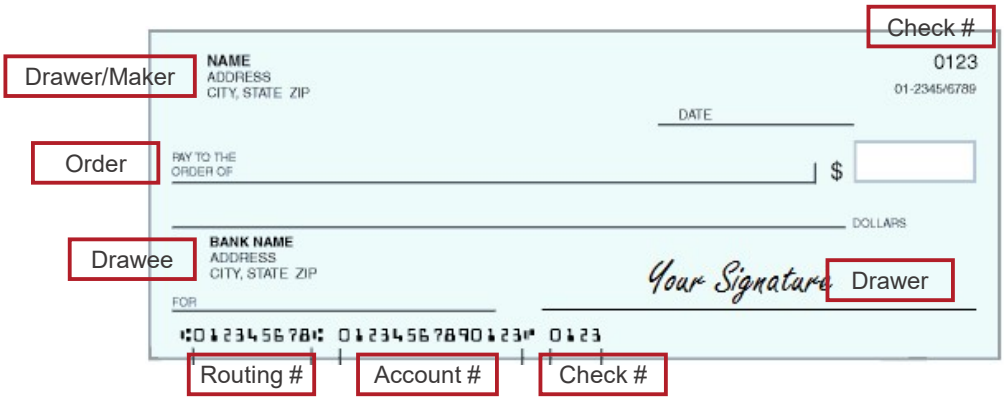
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Negotiable Instruments

Checks

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Definitions Sec. 673.1031, F.S.

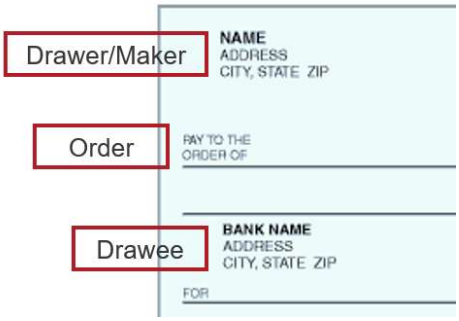


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Negotiable Instrument – Sec. 673.1041, F.S.

- Payable on demand or defined time
  - If it is a promise, then it is a "Note"
  - If it is an order, then it is a "Draft"
    - Check is a draft
  - "Cashier's Check" a draft with the same drawer and drawee of the same bank or branches of same bank
    - Check written from a bank checking account held at that same bank



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Negotiable Instrument

- Person who signs an instrument is liable
  - Sec. 673.4011, F.S.
- Drawee (check writer's bank) not liable on instrument until drawee accepts it
  - Sec. 673.4081, F.S.
- Obligation of drawer (check writer), if check is unaccepted, drawer is obligated to pay according to its terms as first issued
  - Sec. 673.4141 (2)(a), F.S.
- Endorser is obligated to pay according to the terms of the instrument, if it is dishonored
  - Sec. 673.4151 (1)(a), F.S.

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Negotiable Instrument

- Presentment – demand payment of the negotiable instrument
  - Sec. 673.5011, F.S.
- Presentment warranties – if bank pays an unaccepted draft, the party receiving funds is the warrantor that
  - They are entitled to fund
  - Draft has not been altered &
  - No knowledge that signature of the draft is unauthorized
    - Sec. 673.4171, F.S.
  - Drawee making payment may recover from warrantor

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Negotiable Instrument

- Alteration – unauthorized change in an instrument
  - Drawee (check writer's bank) paying a fraudulently altered instrument, in good faith and without notice may enforce rights of instrument according to its original terms
  - Sec 673.4071, F.S.



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Negotiable Instrument

- Customer's duty to discover & report unauthorized signature or alteration
  - Sec. 674.406 (3), F.S.
  - In examining statement
    - Must exercise reasonable promptness – can be:
      - 24 hours business accounts
      - 30 days personal accounts
    - Determine whether any payment was not authorized because of
      - Item was altered
      - Signature was not authorized
    - Must promptly notify the bank
      - Then customer may assert a loss against the bank

Negotiable Instrument – Mitigation of Risks



- Limit access to check stock
- Use Positive Pay
- Use checks with extra safety features
  - Controlled paper stock, chemical sensitivity, sequence inventory control numbers, visible fibers, microprinting & more
- Check account daily for issues

How to Disburse Proceeds

Or Deposit in a Dispute

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How to Draft the Payment to Sellers



- To all sellers of the property – parties listed as "seller(s)" on deed

Simple

- How do you know that these are all sellers?
- If given wire instructions, how do you know it is going to a bank account of all sellers?
- Sellers just want it their way
  - Not necessarily the correct way

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Fraud can & will be Attempted

- Bad actors
- Greed
- Sellers could be getting a divorce
- Dispute in LLC
- Beneficiaries want proceeds directed to them & not the trustee

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Checking an ID

- If something seems off, ask for another form of governmental issued ID
- Quiz presenter
- Check
  - Expiration date – cannot be expired
  - Signature
  - Security features – use black light
  - Birthdates on front and back of Florida DL should match
  - Picture is not more than head & neck
  - Lamination should not be wrinkled & it should go to edges
  - Picture looks like the person
- For more detailed information see the On-Demand webinar "Spot the Fraud"

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Fraud can & will be Attempted

- Impersonation of a seller
  - Check ID
  - Pre-signed document
- Wire instructions to an account
  - Not owned by all sellers
  - Not the seller at all (seller has no bank account)
- Instructions to disburse signed outside your office
  - How do you know who signed?
  - Was identification checked?
- Request for payment to the only seller receiving a 1099-S

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Common Request

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1st Rule of Closing – Must have all the Money

- Broker is holding deposit
  - Wants to subtract commissions due to brokerage from deposit
- All fund must be "collected funds" pursuant to
  - Contract – FR/Bar Paragraph 18. S.
  - Florida Administrative Code – Rule 69O-186.008 (1) &
  - Florida Bar – Rule 5-1.1(j)
- "Collected funds"
  - Must be deposited without possibility of recall
- Broker must submit all funds to settlement agent

Real Estate Agent Wants to be Paid Directly

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- Obtain a signed disbursement agreement from broker
- Disburse as directed by broker
  - This is a service you are providing to the broker
  - Real estate agent is a nonemployee of the broker



Real Estate Agent Wants to be Paid Directly

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- Obtain a signed disbursement agreement from broker
  - 1099 reporting responsibility still lies with broker



Show me the money

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Someone Breaches

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Buyer & seller cannot agree on who gets escrow deposit

- How do you disburse?
- Without both sides agreeing in writing, you cannot disburse
- Follow the contract
  - Parties can go to mediation
  - Either party may start a court action to receive deposit
    - Loser pays court costs & winner's legal fees
- You may place funds in court registry with an interpleader action

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Paying off Credit Cards

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Lender requires payoff of certain credit cards

- What, if anything do you do?
- Only pay the specific credit cards
  - Ensure you are paying the correct credit card
  - In specified amounts
  - If balance is different, contact lender for directions



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Paying off Credit Cards

Seller request that you payoff of certain credit cards

- What, if anything do you do?
- Why?
  - This may be a way to lower the net amount of proceed to thus reduce the tax burden
- You are not the seller's accountant



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Seller Gives ABA # & Account # for Wire

- Call bank & verify that account holder is seller
  - If husband & wife are selling
    - Both husband & wife need to hold the given account
- Request a voided check or deposit slip (on all wire request)
  - Must have printed holders of the account name(s)
- If in doubt, disburse by check to seller(s)



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Seller Request Disbursement to Attorney

This could be to avoid paying partners, family, creditors or tax responsibilities

Only if going to be used for purchase of another property after confirmation

Attorney is the agent of the seller (Guardian Ad Litem)

Be very careful!

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Proceeds to Purchase Another Property



- You are closing the seller's purchase
  - Retain needed proceeds for purchase
- You are **not** closing the seller's purchase
  1. Obtain written instruction to disburse to another attorney or title agent
  2. If title agent, verify they are licensed with DFS
  3. If attorney, verify with the state bar
  4. Contact the receiving party to obtain written confirmation proceeds are being used to purchase real estate

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LLC is Seller



- Request to disburse to each of the members
  - How do you know that these are all of the members?
- The person signing the deed is representing the LLC as a whole
- Disbursement should be to the LLC
- LLC states that they have no bank account or EIN
  - Make a check out to the LLC
  - Leave the EIN blank on the 1099-S
    - An EIN is very quick to obtain on-line

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Trust is Selling

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- To whom should the disbursement be made?
- Who signs the deed when property is held in a Trust?
  - Trustee
- What if
  - Beneficiaries want to be paid directly?
    - Check to the trustee
  - Trustee says it is fine to disburse to beneficiaries?
    - Check to the trustee
  - There is no bank account?
    - Check to the trustee

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Dissolved Corporation is Seller

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- Check payable to dissolved corporation
  - Even if it does not have a bank account



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Foreign Corporation is Seller

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- May or may not have a bank account in the US
- Upon direction of principals of corporation, disbursement may be made to
  - Attorney who represented corporation in acquisition of property or
  - Current registered agent in Florida of corporation



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Divorcing Husband & Wife are Sellers

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- If divorce has not been filed
  - Parties need to agree in writing with signature or
  - Draft check made out to both
- If divorce has been filed
  - Court will have the final say on proceeds
  - Disbursement pursuant to court order
  - Parties may agree &
    - Direct disbursement pending a resolution of pending action
    - Could be problematic
  - Disbursement could be made to attorneys of record

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Sale is Part of a Court Proceeding

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Follow court order



If no court order yet,

Upon written agreement, distribution may be made to an attorney of record in proceeding

Parties may stipulate delivery of proceeds pending resolution of action – be careful

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A Disbursement Request is Produced

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- Request is for less than all sellers
- Delivered request are highly suspect
- Disbursement request should be signed after reviewing signatory's picture identification
  - In your office
  - Office of a notary
  - Another known attorney
- If in doubt, write a check to all sellers
  - Those that signed disbursement request can endorse check to desired seller

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Missing ID

- **Seller A** forgot his ID in New York (drove to Florida)
- **Seller B** will verify that **Seller A** is who he says he is
- Be very careful as this could be fraud
- **Seller A** MUST produce a valid, government issued ID, plus an additional form of ID
- If the notary does not personally know the **Seller A**
  - **Seller A** MUST produce valid, government issued ID



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1031 Exchange

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- 1031 exchange must be set up prior to closing
  - After closing it is too late
- Work with the qualified intermediary
- Seller should not receive any proceeds
  - If Seller receives proceeds, they will be taxed
  - Defeating the purpose of a 1031 exchange
    - Notify qualified intermediary prior to giving seller any proceeds
- Proceed to be disbursed to qualified intermediary

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Seller is Using a Relocation Company

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- Follow directions of relocation company
  - Payment so directed to
    - Employee's company or
    - Relocation company
- Verify relocation company on membership list of Worldwide Employee Relocation Council
- www.erc.org
  - Directory
    - Mobility/Relocations Services
      - Scroll down

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How to Disburse Proceeds

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- To all sellers of subject property – parties listed as "seller(s)" on deed

Simple

- Written authorization from party(ies) on settlement statement is not enough to pay someone else

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ALTA Outgoing Wire Preparation Checklist

Visit the ALTA Website: https://www.alta.org/business-tools/information-security.cfm

Date: _____

File Number: _____

Company Name/Location: _____

Section 1: Provide the source of the wiring instructions:

☐	I received the initial outgoing wire instructions directly from the **payee in person**. The instructions have not been modified or amended. ***Proceed to Section 2.***
☐	I received the initial outgoing wire instructions directly from the **payee via the United States Postal Service or a known overnight mail or messenger service** and **verified** the accuracy of the instruction by **calling the payee** at a phone number obtained independently from any phone number shown in the package. The instructions have not been modified or amended. ***Proceed to Section 2.***
☐	I received the initial outgoing wire instructions directly from the **payee via fax** and **verified** the accuracy of the instruction by **calling the payee** at a phone number obtained independently from any phone number shown in the package. The instructions have not been modified or amended. ***Proceed to Section 2.***
☐	I received the initial outgoing wire instructions from the **payee**, which have been modified or amended in writing in person at the following date/time: _____. ***Proceed to Section 2.***
☐	I received the initial outgoing wire instructions directly from the **payee by email** and **verified** the accuracy of the instruction by **calling the payee** at a phone number obtained independently from any phone number shown in the email. The instructions have not been modified or amended. ***Proceed to Section 2.***
☐	I received the initial outgoing wiring instructions **via a 3rd party** (e.g., attorney, realtor, lender) and have **verified** the accuracy of the instruction by **calling the payee** at a phone number obtained independently from any phone number obtained via the 3rd party. The instructions have not been modified or amended. ***Proceed to Section 2.***

Section 2: Verify instructions received by email or from someone other than the payee.

☐	Wire Payee Name:	
☐	Wire Amount:	
☐	Payee Phone Number:	
☐	Source of Phone Number (*never use the phone number included in an email*):	
	☐	Original Order or Contract:
	☐	Secure Portal:
	☐	Internet Search:
	☐	Other (*describe*):
☐	Name of Person I Spoke With:	Date:

☐	Wire Information confirmed. Account and ABA Routing Number, and Account Name match payee in the file. Wire instruction notes indicate correct payment information (e.g., loan number, beneficiary, other information).
☐	Wire Information confirmed. Account and ABA Routing Number match an entry on our company's list of validated wire instructions for common bank payoffs.

Wire Creator: _____ _____
(Signature) **(Date)**

_____
(Printed Name)

Wire Authorizer: _____ _____
(Signature) **(Date)**

_____
(Printed Name)

Section 3: Verify Delivery of Wired Funds.

☐	Date Wire Was Sent:	
☐	Date Wire Was Received:	
☐	Name of Person Who Confirmed Receipt:	
☐	Purpose of Wire:	
	☐	Loan Payoff
	☐	Equity Loan Payoff
	☐	Seller Proceeds
	☐	Real Estate Commission
	☐	Other (*describe*):

Verified By: _____ _____
(Signature) **(Date)**

_____
(Printed Name)

ALTA Rapid Response Plan for Wire Fraud Incidents - Response Worksheet

Date/Time of Incident: _____	
Date/Time Incident was Discovered: _____	
Incident Discovered By: _____	
Amount: _____	
Transaction Affected (File Number): _____	
Client/Parties Affected: _____	
Systems/Devices Affected: _____	
Response Coordinator: _____	
Step 1: Alert Company Management - Notes:	**Assigned To:**
Step 2: Report to Sending and Receiving Banks - Notes:	**Assigned To:**
Step 3: Report to Law Enforcement - Notes:	**Assigned To:**
Step 4: Confirm recall request was processed by Sending Bank - Notes:	**Assigned To:**

Step 5: Inform clients/parties affected - Notes:	**Assigned To:**
Step 6: Review Incident Response Plan for next actions - Notes:	**Assigned To:**
Step 7: Contact insurance carrier(s) and legal counsel - Notes:	**Assigned To:**
Step 8: Hire counsel in country where funds were wired - Notes:	**Assigned To:**
Step 9: Document your response - Notes:	**Assigned To:**
Step 10: File a complaint with the FBI - Notes:	**Assigned To:**

Disburse Correctly, Disburse Directly

By: W. Ted Conner, Fund Vice President - Claims

THE FUND and its member agents are experiencing a significant increase in claims relating to identity theft and forgery. In many of these transactions title agents have been sued by the true owners for disbursing pursuant to directions provided by persons without proper authority or using assumed identities. These claims are the result of deliberate actions and losses may be over $1 million in an individual claim. A recurrent factor in such claims is a direction to distribute the proceeds of the sale or mortgage to someone other than the seller or mortgagor as reflected on the settlement statement. It is easy to forge someone's signature on a direction to disburse given to a closing agent. It is more difficult to open a bank account to deposit a check made out to an assumed identity.

THE FUND has created the following guidelines to protect the public, member-agent attorneys, and THE FUND itself. Persons committing real estate and mortgage fraud have learned to take advantage of a common practice of accepting a direction to make payments to a third party. As a result of numerous claims THE FUND is instituting the following guidelines for issuing Fund policies. Fund Member Agents following these guidelines will benefit from reduced risk of demands from parties associated with the transaction. THE FUND considers these guidelines as a best practice to prevent "fraudsters" from hijacking the trust accounts of attorneys and escrow accounts of title agents.

Application. These guidelines are designed to be used with transactions involving residential property, including owner-occupied and rental property, and vacant property. THE FUND has experienced a much lower incidence of fraudulent activity associated with property improved for commercial use.

The Guideline. Disbursements should be made to the party listed on the settlement statement. Written authorization from the party who is entitled to receive the disbursement is ordinarily not sufficient to override this guideline. Disbursement should not be made to an attorney or other representative of the party entitled to receive the funds. Like every rule, there are appropriate exceptions identified among the considerations below.

Situations Meriting Specific Consideration. The terms of real estate transactions are endlessly varied. There are transactions in which it has become common to disburse to third parties and there will be transactions in which it is appropriate to depart from the guidelines identified above. To manage the increased risk of disbursing to a third party the most common instances are identified below with THE FUND's guidelines for each transaction:

1. Seller uses proceeds to purchase another property. If a seller or mortgagor is using the proceeds of THE FUND's insured transaction to purchase other real estate, the proceeds of THE FUND's insured transaction may be disbursed to the other closing

agent upon compliance with the following requirements. (a) Receipt of written instruction to disburse to another attorney or title agent.

(b) If a title agency is designated as the closing agent for the subsequent transaction verify the title agency is licensed by the Florida Department of Financial Services and appointed by a title insurer. This verification may be made on the website maintained by the Department of Financial Services at http://www.fldfs.com. Select “Licensing and Renewals” under the heading “For Agents and Adjusters” then click on “Agency Search” and enter the name of the title agency. The inquiry will display both a license status and any title insurer appointments.

(c) Contact the title company or attorney closing the second transaction to obtain written confirmation the proceeds are being used to purchase real estate. Distribution directly to the title company or attorney is acceptable. Distribution may be made by wire or check.

2. Distribution to fewer than all the sellers or mortgagors. THE FUND has received a number of claims in which cotenants, often family members or spouses, have taken the proceeds of a sale or mortgage belonging to other cotenants. This is also an area in which title agents have been sued for improper disbursements. Cotenants have induced title agents to distribute improperly by either forging the insured instrument or by delivering a forged direction to disburse. In some cases, the direction to disburse was signed in the Fund Member Agent’s office by someone impersonating the cotenant. If there is a compelling reason disbursement checks should not be prepared to all cotenants the risk can be managed if the person directing payment to a cotenant is a long-term client of the Fund Member Agent. If the person directing payment to another is not a longterm client, the person authorizing the payment may be asked to produce indicia of identity in addition to the identification used to execute the deed or mortgage. Any direction to distribute proceeds should be executed under the supervision of the Fund Member Agent, either in the member agent’s office or at the office of a notary or other attorney selected by the Fund Member Agent. Disbursement directions received by mail or delivered by another party without these safeguards are generally not reliable.

3. Relocation companies. Distribution at the direction of an established relocation company is acceptable. Payments so directed may be made to the employer or relocation company. For issuing a Fund policy, Fund Member Agents may rely on the membership list of Worldwide Employee Relocation Council, a relocation trade group, to verify a relocation company as established. The membership may be accessed at http://www.erc.org. To navigate to the membership list, click on the Membership tab, then on the Relocation Service Companies link. From that point, click on the Global Workforce Services Directory then the U.S. Relocation Services link and enter the company name at the prompt.

4. Paying off credit cards. In some transactions the lender will require paying off non-title related debt such as credit cards instead of distributing all proceeds to the mortgagor. The lender’s instructions must be followed, and the payments reflected on the settlement statement.

5. Limited liability companies. Limited liability companies (LLC) merit special comment. THE FUND has received numerous claims arising from allegations of individual LLC members exceeding their authority to sell or mortgage real estate and to accept the proceeds of such transactions. In transactions in which an LLC is selling or mortgaging real property, the request of an individual LLC member or members to disburse the proceeds directly to the LLC members should be considered a red flag, even if it has been represented that the payees include all of the members of the LLC. If a lack of a bank account in the name of the LLC is given as a reason for distribution to LLC members, please see the discussion below.

6. Selling entity does not have a bank account. Some entities such as a partnership or a dissolved corporation may not have a bank account. Another example may be the trustee of a trust does not have a trust bank account. Proceeds should be issued in the name of the entity or trustee. The fact that the selling entity does not have a bank account is not persuasive; remember, the selling entity could open an account with the proceeds check. In compelling cases, a check may be issued to all of the beneficiaries of a trust if the original trust document is produced to the Fund Member Agent. In the case of a partnership or dissolved corporation, a check may be issued to all of the partners or directors if the Fund Member Agent is satisfied the parties represent everyone with an interest in the entity. Additional exceptions may be made in instances where the proceeds are relatively small, or the Fund Member Agent has a longstanding relationship with the seller.

7. Foreign corporations. A common practice in South Florida has been for foreign nationals to title residential property in a foreign corporation. The foreign corporation will rarely have a bank account. Upon direction of the principals of the corporation, distribution may be made to an attorney who represented the corporation in the acquisition of the property or is the current registered agent in Florida of the corporation. The current registered agent status may be confirmed at http://www.sunbiz.org and click on “Document Searches.” A letter from a member of The Florida Bar confirming representation of the corporation in the acquisition of the property may be relied on if that option is selected.

8. Disbursing to an attorney. The claim files of THE FUND reveal that clients have used the trust account of unsuspecting attorneys to avoid responsibility to business partners or family members, to avoid responsibility for tax issues, and to avoid underwriter requirements such as the prohibition on certain overseas wires described in paragraph 10. Directing sale proceeds to the trust account of an attorney represents a significant risk for both the title agent and the receiving attorney. Directions to disburse to an attorney should only be accepted when contemplated by one of the situations described in this article or upon approval of a Fund underwriting counsel.

9. Distribution pursuant to court proceeding. Some or all of the parties to a transaction may be subject to a court order relating to a property. Examples include a dissolution of marriage proceeding or a partition action. Distributions pursuant to the terms of a court order are acceptable. There may be occasions when the parties to current litigation stipulate to the delivery of proceeds pending a resolution of the pending

action. Upon written agreement of the parties, distribution may be made to an attorney of record in the proceeding.

10. 1031 exchanges. In a 1031 exchange the settlement statement will identify that the proceeds are payable to the qualified intermediary for the seller. Such payment as reflected on the settlement statement is permitted.

11. Distribution by wire versus check. In situations where proceeds are generated by means of identity theft, payments by check permit additional avenues of recovery for THE FUND. These avenues are not present when funds are wired by the settlement agent. Checks are preferred over wire transfers; however, wires are permitted. If a wire transfer is utilized, the Fund Member Agent must contact the receiving bank to verify the name on the account at the beneficiary bank is the same as the person entitled to the distribution. If a party requests funds be wired to a bank outside the United States for a transaction in which any of the documents were executed outside of a Fund Member Agent's office, prior approval of a Fund underwriting counsel must be obtained.

General considerations. These guidelines are to assist THE FUND and its member agents in avoiding claims and title agent liability associated with various forms of real estate fraud. Requests to disburse relatively small amounts of money to accommodate reasonable requests are permitted. In general, any distributions totaling fewer than $50,000 would be included in this direction.

These guidelines are provided for the protection of Fund Member Agents and constitute a best practice. If a member agent departs from the guidelines, THE FUND may ask the member agent to be responsible for any loss suffered by THE FUND that would have been avoided if the guidelines had been followed.

There may be compelling reasons to depart from these guidelines in specific transactions. In the event such reasons are identified, Fund Member Agents may contact a Fund underwriting counsel to discuss avenues to manage the risk associated with payments to third parties.

8/1/2007

Final Order No. BPR-99-01088 Date 2-17-99
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: Brenda M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA REAL ESTATE COMMISSION

IN RE: The Petition of NRT, Incorporated and Coldwell Banker Residential Real Estate, Inc.

CASE NO. FREC DS-98-02

DS 99-004

FINAL ORDER

On January 20, 1999, in Orlando, Florida, this matter came before the Florida Real Estate Commission pursuant to *s.*120.565, *Fla. Stat.*, and Chapter 28-105, *Fla. Admin. Code*, for the purpose of considering the Petition for a Declaratory Statement filed by NRT, Incorporated and Coldwell Banker Residential Real Estate, Inc.

The Petitioners, who are more fully described below, petitioned the Commission to issue a statement as to the application of s.475.42(1)(d), *Fla. Stat.*, as it applies to the Petitioners' particular set of circumstances.

Having considered the Petition and being otherwise fully advised in the premises, the Commission makes the following findings and conclusions:

FINDINGS OF FACT

1. The Petitioner NRT, Incorporated, is a California corporation. Petitioner Coldwell Banker Residential Real Estate, Inc. (Coldwell Banker) is a Florida corporation, registered as a real estate broker in Florida pursuant to Chapter 475, Part I, *Fla Stat.* NRT, Incorporated owns Coldwell Banker.

2. Coldwell Banker, as a registered real estate broker in Florida, is subject to Chapter 475, Part I, *Fla. Stat.*, and the rules and orders of the Florida Real Estate Commission (Commission).

3. At each of its branch offices in Florida, Coldwell Banker has entered into independent contractor agreements with licensed real estate salespersons. Each salesperson is entitled to receive compensation from Coldwell Banker in return for a certain level of involvement in various real estate transactions, including purchases and sales of real property.

4. Currently, when a real estate transaction closes, the entire commission is disbursed to Coldwell Banker which then, following the authorization from the corporate office in Mission Viejo, California, has the local Florida office disburse the appropriate commission amount to the salesperson or salespersons. There is a delay in the salesperson receiving the commission from Coldwell Banker following the closing of the transaction.

5. The procedure followed by Coldwell Banker is in accordance with the Commission's current interpretation of s.475.42(1)(d), *Fla Stat.*, which requires that the entire commission be paid to the broker who, in turn, disburses the commission to the salesperson(s).

6. The Commission had previously stated in December 1990 and again in February 1991, that the salesperson could not receive a commission directly from the closing agent even with the express consent of the broker. Therefore, the practice of Coldwell Banker is consistent with the Commission's earlier interpretation of s.475.42(1)(d), *Fla. Stat.*, that the entire commission be paid to the broker who, in turn, would make the disbursements.

7. Coldwell Banker is requesting that the Commission interpret s.475.42(1)(d), *Fla. Stat.*, in such a way that will allow it to give written authorization to the closing agent so the closing agent can disburse commissions directly to its salespersons.

8. Specifically, Coldwell Banker, through its broker, would give written authorization to the office managers in each of Coldwell Banker's 78 offices to authorize disbursement from the closing agents to the salespersons. The office manager, based upon the broker's written authorization, would give written authorization to the closing agent to disburse commissions to the salespersons. The written authorization from the office manager to the closing agent would identify the transaction, the salespersons entitled to commissions, and the specific amount of commission to be paid to each salesperson. The written authorization would be signed by the office manager. Disbursement would not occur until after the transaction has closed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter, pursuant to s.120.565, *Fla. Stat.*, and Rule 28-105.003, *Fla. Admin. Code*.

2. Coldwell Banker has requested that a statement be issued finding under the facts set out above that s.475.42(1)(d), *Fla. Stat.*, allows Coldwell Banker to give written authorization to a closing agent to disburse commissions directly to Coldwell Banker's salespersons.

3. Section 475.42(1)(d), *Fla. Stat.*, provides, in part:

> (d) No salesperson shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer;... (emphasis supplied)

4. The Commission has previously taken the position that commissions from a real estate transaction must be paid in its entirety to the broker. The broker, in turn, would then make the appropriate disbursements to the salespersons. Discussions which occurred at the December 1990 and February 1991 meetings addressed this issue and the Commission stated, in an informal manner, that a broker could not authorize a closing agent to disburse commissions directly to a salesperson. These discussions, however, were not in the nature of a Declaratory Statement nor were they final agency action.

5. It has long been recognized that the administrative construction of a statute by an agency charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous. Fort Pierce Utility Authority v. Florida Public Service Commission, 388 So.2d 1031 (Fla. 1980); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988); Tristate Systems, Inc. v. Department of Transportation, 491 So.2d 1192 (Fla. 1st DCA 1986); See also Humana, Inc. v. Department of Health and Rehabilitative Services, 492 So.2d 338 (Fla. 4th DCA 1986). An agency's interpretation of a statute need not be the sole possible interpretation or even

the most desirable one; it need only be within the range of possible interpretations. Board of Medical Examiners v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984).

6. The phrase "except in the name of the employer and with the express consent of the employer" as found in s.475.42(1)(d), *Fla. Stat.*, is subject to various interpretations. So long as the Commission's interpretation of the statute is within a range of possibilities, even though it may be viewed by some as not being the most desirable, it will be accorded great weight.

7. The Commission, therefore, concludes the following based upon its interpretation of s.475.42(1)(d), *Fla. Stat.*:

a) That Coldwell Banker, through its broker, may give written authorization to its office managers in each of its offices statewide to have commissions disbursed by closing agents directly to its salespersons.

b) The office manager may then, upon the written authorization of the Coldwell Banker broker, give written authorization to the closing agent to disburse commissions to Coldwell Banker's salespersons.

c) The written authorization from the office manager to the closing agent shall identify the specific transaction, identify the salespersons entitled to disbursement and identify the specific amount the closing agent is to disburse to each salesperson. The written authorization shall be signed by the office manager.

d) In the alternative to the office manager giving the specific written authorization, the broker may do so in the manner described in paragraph (7)(c) immediately above.

e) The disbursement will occur only after the transaction has closed.

8. There is competent substantial evidence to support the Commission's Findings of Fact and Conclusions of Law.

WHEREFORE, the Florida Real Estate Commission approves the Petition for Declaratory Statement and, further, it is the opinion of the Florida Real Estate Commission that Coldwell Banker may by written authorization request that a closing agent disburse commissions directly to its salespersons following the closing of the transaction.

This Declaratory Statement constitutes final agency action. A party who is adversely affected by this Order may seek judicial review pursuant to s.120.68, *Fla. Stat.* Proceedings for judicial review may be initiated by filing a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department of Business and Professional Regulation, and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days of the date upon which this Declaratory Statement is filed with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 8th day of Feb. 1999 in Orlando, Florida.

Ana Tangel-Rodriguez
Chairperson, Florida Real Estate Commission

69B-186.008 Escrow Disbursements.

(1) For purposes of this rule, the term "settlement agent" refers to the title insurance licensee or licensee's designee who receives and disburses funds in accordance with Section 626.8473, F.S.

(2) Any person disbursing escrow funds being held as part of a real estate transaction in which one or more title policies are to be issued must provide the parties to the transaction with the information required by this rule.

(3) A written statement by the settlement agent must certify that he or she has reviewed the forms prepared for the transaction and agrees to disburse the escrow funds in accordance with the terms of the transaction and Florida law. Compliance with the aforementioned certification requires the settlement agent to certify to the truth of the following statement: "I have reviewed the Closing Disclosure, the settlement statement, the lender's closing instructions and any and all other forms concerned with the funds held in escrow, including any disclosure of the Florida title insurance premiums being paid, and I agree to disburse the escrow funds in accordance with the terms of this transaction and Florida law."

(4) The title agency must provide the parties to the transaction with the following information no later than the time such funds are disbursed:

(a) The name and license number of the title insurance agency issuing the title insurance policy and/or holding and disbursing the escrow funds. If there is more than one title agency involved in the transaction, a separate form is to be provided by each agency. Any agency not holding any escrow funds should disclose that to the parties to the transaction at this time.

(b) The name, and when applicable, the license number of the settlement agent responsible for disbursing the escrow funds.

(5) All buyers, borrowers and sellers involved in the transaction must provide written approval authorizing the holding of escrow funds and disbursement of escrow funds by the named title agency.

(6) In addition to the requirements listed above, the title insurance agency must provide the parties to the transaction with the following information when a Closing Disclosure form is completed by the lender and the cost for the title insurance policies being purchased differs from the premium calculated pursuant to Rule 69O-186.003, F.A.C.

(a) A written comparison of the cost of the lender's policy versus the cost of an equivalent policy based on Florida premium rates. The cost comparison must clearly disclose the premiums being charged for all endorsements in addition to the base policy.

(b) All sellers, buyers and borrowers involved in the transaction must acknowledge and authorize in writing that the title insurance premiums will be disbursed from the escrow funds in accordance with the premium disclosure certification.

(7) Any form or forms that satisfy the requirements of this rule will be considered part of a title insurance and escrow transaction in Florida. Such form or forms will not constitute loan documents.

(8) A completed and signed copy of the approved form or forms must be:

(a) Provided to the buyer, seller and lender who are named in the transaction; and,

(b) Maintained in the title insurance agency files for at least five (5) years.

(9) Form DFS-H1-2146, http://www.flrules.org/Gateway/reference.asp?No=Ref-05954, "Florida Insurance Premium Disclosure & Settlement Agent Certification," (Effective 10/03/2015), meets all of the requirements necessary to comply with this rule and is incorporated by reference herein. The form is available from the Department of Financial Services, Division of Insurance Agent and Agency Services, at http://www.myfloridacfo.com/Division/Agents.

Rulemaking Authority 624.308(1), 626.8473(6) FS. Law Implemented 626.8473 FS. History–New 10-28-15.

Regulatory Compliance Corner

By Bob Rohan, Fund Regulatory Compliance Counsel

The now-common practice of disbursing the agent's portion of a real estate commission pursuant to a FREC-compliant directive from their broker has led some Fund members to question their responsibility to provide an IRS Form 1099-MISC to the agent. For the same reason settlement agents are not required to file and furnish such forms to individual real estate brokers, surveyors, or other third-party vendors on a settlement statement, there is no such requirement when the commission is split in this fashion.

Treas. Reg. Sec. 1.6041-1 governs these information returns and paragraph (e) explains payments made on behalf of others. An information return must be made if such a payor "(h)as a significant economic interest in the payment" or "(p)erforms management or over-sight functions in connection with the payment" as opposed to one who is "writing checks at another's direction." Example 3 in paragraph (e) is right on point. It reads, in part:

Settlement agent F provides real estate closing services to real estate brokers and agents. F deposits money received from the buyer or lender in an escrow account and makes payments from the account to real estate agents or brokers, appraisers, land surveyors, building inspectors, or similar service providers according to the provisions of the real estate contract and written instructions from the lender. F may also make disbursements pursuant to oral instructions of the seller or purchaser at closing. F is not performing management or oversight functions and does not have a significant economic interest in the payments and is not subject to the information reporting requirements of section 6041.

For information about these and other regulatory matters, please email The Fund's Regulatory Compliance Counsel at RegulatoryCompliance@TheFund.com. 11/1/2021

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§ 1.6039I–1T Reporting of certain employer-owned life insurance contracts (temporary).

(a) *In general.* The Commissioner may prescribe the form and manner of satisfying the reporting requirements imposed by section 6039I on applicable policyholders owning one or more employer-owned life insurance contracts issued after August 17, 2006.

(b) *Effective/applicability date.* These regulations are applicable for tax years ending after November 13, 2007.

(c) *Expiration date.* The applicability of this section expires on or before November 9, 2010.

[T.D. 9364, 72 FR 63807, Nov. 13, 2007]

§ 1.6041–1 Return of information as to payments of $600 or more.

(a) *General rule*—(1) *Information returns required*—(i) *Payments required to be reported.* Except as otherwise provided in §§ 1.6041–3 and 1.6041–4, every person engaged in a trade or business shall make an information return for each calendar year with respect to payments it makes during the calendar year in the course of its trade or business to another person of fixed or determinable income described in paragraph (a)(1)(i) (A) or (B) of this section. For purposes of the regulations under this section, the person described in this paragraph (a)(1)(i) is a payor.

(A) Salaries, wages, commissions, fees, and other forms of compensation for services rendered aggregating $600 or more.

(B) Interest (including original issue discount), rents, royalties, annuities, pensions, and other gains, profits, and income aggregating $600 or more.

(ii) *Information returns required under other provisions of the Internal Revenue Code.* The payments described in paragraphs (a)(1)(i)(A) and (B) of this section shall not include any payments of amounts with respect to which an information return is required by, or may be required under authority of, section 6042(a) (relating to dividends), section 6043(a)(2) (relating to distributions in liquidation), section 6044(a) (relating to patronage dividends), section 6045 (relating to brokers' transactions with customers and certain other transactions), sections 6049(a)(1) and (2) (relating to interest), section 6050N(a) (relating to royalties), or section 6050P(a) or (b) (relating to cancellation of indebtedness). For information returns required under section 6045(f) (relating to payments to attorneys), see special rules in §§ 1.6041–1(a)(1)(iii) and 1.6045–5(c)(4).

(iii) Information returns required under section 6045(f) on or after January 1, 2007. For payments made on or after January 1, 2007 to which section 6045(f) (relating to payments to attorneys) applies, the following rules apply. Not withstanding the provisions of paragraph (a)(1)(ii) of this section, payments to an attorney that are described in paragraph (a)(1)(i) of this section but which otherwise would be reportable under section 6045(f) are reported under section 6041 and this section and not section 6045(f). This exception applies only if the payments are reportable with respect to the same payee under both sections. Thus, a person who, in the course of a trade or business, pays $600 of taxable damages to a claimant by paying that amount to the claimant's attorney is required to file an information return under section 6041 with respect to the claimant, as well as another information return under section 6045(f) with respect to the claimant's attorney. For provisions relating to information reporting for payments to attorneys, see § 1.6045–5.

(2) *Prescribed form.* The return required by subparagraph (1) of this paragraph shall be made on Forms 1096 and 1099 except that (i) the return with respect to distributions to beneficiaries of a trust or of an estate shall be made on Form 1041, and (ii) the return with respect to certain payments of compensation to an employee by his employer shall be made on Forms W-3 and W-2 under the provisions of § 1.6041–2 (relating to return of information as to payments to employees). Where Form 1099 is required to be filed under this section, a separate Form 1099 shall be furnished for each person to whom payments described in subdivision (i), (ii), or (iii) of subparagraph (1) of this paragraph are made. For time and place for filing Forms 1096 and 1099, see § 1.6041–6. For the requirement to submit the information required by Form 1099 on magnetic media for payments after December 31, 1983, see section 6011(e) and

§ 301.6011–2 of this chapter (Procedure and Administration Regulations).

(b) *Persons engaged in trade or business*—(1) *In general.* The term ''all persons engaged in a trade or business'', as used in section 6041(a), includes not only those so engaged for gain or profit, but also organizations the activities of which are not for the purpose of gain or profit. Thus, the term includes the organizations referred to in section 401(a), 501(c), 501(d) and 521 and in paragraph (i) of this section. On the other hand, section 6041(a) applies only to payments in the course of trade or business; hence it does not apply to an amount paid by the proprietor of a business to a physician for medical services rendered by the physician to the proprietor's child.

(2) *Special rule for REMICs.* For purposes of chapter 1 subtitle F, chapter 61A, part IIIB, the terms ''all persons engaged in a trade or business'' and ''any service-recipient engaged in a trade or business'' includes a real estate mortgage investment conduit or REMIC (as defined in section 860D).

(c) *Fixed or determinable income.* Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually or at regular intervals. The fact that the payments may be increased or decreased in accordance with the happening of an event does not for purposes of this section make the payments any the less determinable. A payment made jointly to two or more payees may be fixed and determinable income to one payee even though the payment is not fixed and determinable income to another payee. For example, property insurance proceeds paid jointly to the owner of damaged property and to a contractor that repairs the property may be fixed and determinable income to the contractor but not fixed and determinable income to the owner, and should be reported to the contractor. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable income.

(d) *Payments specifically included*—(1) *In general.* Amounts paid in respect of life insurance, endowment, or annuity contracts are required to be reported in returns of information under this section—

(i) Unless the payment is made in respect of a life insurance or endowment contract by reason of the death of the insured and is not required to be reported by paragraph (b) of § 1.6041–2,

(ii) Unless the payment is made by reason of the surrender prior to maturity or lapse of a policy, other than a policy which was purchased (*a*) by a trust described in section 401(a) which is exempt from tax under section 501(a), (*b*) as part of a plan described in section 403(a), or (*c*) by an employer described in section 403(b)(1)(A),

(iii) Unless the payment is interest as defined in § 1.6049–2 and is made after December 31, 1962,

(iv) Unless the payment is a payment with respect to which a return is required by § 1.6047–1, relating to employee retirement plans covering owner-employees,

(v) Unless the payment is payment with respect to which a return is required by § 1.6052–1, relating to payment of wages in the form of group-term life insurance.

(2) *Professional fees.* Fees for professional services paid to attorneys, physicians, and members of other professions are required to be reported in returns of information if paid by persons engaged in a trade or business and paid in the course of such trade or business.

(3) *Prizes and awards.* Amounts paid as prizes and awards that are required to be included in gross income under section 74 and § 1.74–1 when paid in the course of a trade or business are required to be reported in returns of information under this section.

(4) *Disability payments.* Amounts paid as disability payments under section 105(d) are required to be reported in returns of information under this section.

(5) *Notional principal contracts.* Except as provided in paragraphs (b)(5)(i) and (ii) of this section, amounts paid after December 31, 2000, with respect to notional principal contracts referred to in § 1.863–7 or 1.988–2(e) to persons who are not described in § 1.6049–4(c)(1)(ii) are required to be reported in returns of information under this section. The

amount required to be reported under this paragraph (d)(5) is limited to the amount of cash paid from the notional principal contract as described in §1.446–3(d). A non-periodic payment is reportable for the year in which an actual payment is made. Any amount of interest determined under the provisions of §1.446–3(g)(4) (dealing with interest in the case of a significant non-periodic payment) is reportable under this paragraph (d)(5) and not under section 6049 (see §1.6049–5(b)(15)). See §1.6041–4(a)(4) for reporting exceptions regarding payments to foreign persons. See, however, §1.1461–1(c)(1) for reporting amounts described under this paragraph (d)(5) that are paid to foreign persons. The provisions of §1.6049–5(d) shall apply for determining whether a payment with respect to a notional principal contract is made to a foreign person. See §1.6049–4(a) for a definition of payor. For purposes of this paragraph (d)(5), a payor includes a middleman defined in §1.6049–4(f)(4).

(i) An amount paid with respect to a notional principal contract is not required to be reported if the payment is made outside the United States (as defined in §1.6049–5(e)) by a non-U.S. payor or a non-U.S. middleman.

(ii) An amount paid with respect to a notional principal contract is not required to be reported if the payment is made outside the United States (as defined in §1.6049–5(e)) by a payor that has no actual knowledge that the payee is a U.S. person, and the payor is—

(A) A U.S. payor or U.S. middleman that is not a U.S. person (such as a controlled foreign corporation defined in section 957(a) or certain foreign corporations or foreign partnerships engaged in a U.S. trade or business); or

(B) A foreign branch of a U.S. bank. See §1.6049–5(c)(5) for a definition of a U.S. payor, a U.S. middleman, a non-U.S. payor, and a non-U.S. middleman.

(e) *Payment made on behalf of another person*—(1) *In general.* A person that makes a payment in the course of its trade or business on behalf of another person is the payor that must make a return of information under this section with respect to that payment if the payment is described in paragraph (a) of this section and, under all the facts and circumstances, that person—

(i) Performs management or oversight functions in connection with the payment (this would exclude, for example, a person who performs mere administrative or ministerial functions such as writing checks at another's direction); or

(ii) Has a significant economic interest in the payment (i.e., an economic interest that would be compromised if the payment were not made, such as by creation of a mechanic's lien on property to which the payment relates, or a loss of collateral).

(2) *Determination of payor obligated to report.* If two or more persons meet the requirements for making a return of information with respect to a payment, as set forth in paragraph (e)(1) of this section, the person obligated to report the payment is the person closest in the chain to the payee, unless the parties agree in writing that one of the other parties meeting the requirements set forth in paragraph (e)(1) of this section will report the payment.

(3) *Special rule for payment by employee to employer.* Notwithstanding the provisions of paragraph (e)(1) of this section, an employee acting in the course of his employment who makes a payment to his employer on behalf of another person is not required to make a return of information with respect to that payment.

(4) *Optional method to report.* A person that makes a payment on behalf of another person but is not required to make an information return under paragraph (e)(1) of this section may elect to do so pursuant to the procedures established by the Commissioner. See, e.g., Rev. Proc. 84–33 (1984–1 C.B. 502) (optional method for a paying agent to report and deposit amounts withheld for payors under the statutory provisions of backup withholding) (see §601.601(d)(2) of this chapter).

(5) *Examples.* The provisions of this paragraph (e) are illustrated by the following examples:

Example 1. Bank B provides financing to C, a real estate developer, for a construction project. B makes disbursements from the account for labor, materials, services, and other expenses related to the construction project. In connection with the payments, B

performs the following functions: approves payments to the general contractor or subcontractors; ensures that loan proceeds are properly applied and that all approved bills are properly paid to avoid mechanics' or materialmen's liens; conducts site inspections to determine whether work has been completed (but does not check the quality of the work). B is performing management or oversight functions in connection with the payments and is subject to the information reporting requirements of section 6041 with respect to payments.

Example 2. Mortgage company D holds a mortgage on business property owned by E. When the property is damaged by a storm, E's insurance company issues a check payable to both D and E in settlement of E's claim. Pursuant to the contract between D and E, D holds the insurance proceeds in an escrow account and makes disbursements, according to E's instructions, to contractors and subcontractors performing repairs on the property. D is not performing management or oversight functions, but D has a significant economic interest in the payments because the purpose of the arrangement is to ensure that property on which D holds a mortgage is repaired or replaced. D is subject to the information reporting requirements of section 6041 with respect to the payments to contractors.

Example 3. Settlement agent F provides real estate closing services to real estate brokers and agents. F deposits money received from the buyer or lender in an escrow account and makes payments from the account to real estate agents or brokers, appraisers, land surveyors, building inspectors, or similar service providers according to the provisions of the real estate contract and written instructions from the lender. F may also make disbursements pursuant to oral instructions of the seller or purchaser at closing. F is not performing management or oversight functions and does not have a significant economic interest in the payments, and is not subject to the information reporting requirements of section 6041. For the rules relating to F's obligation to report the gross proceeds of the sale, see section 6045(e) and §1.6045–4.

Example 4. Assume the same facts as in *Example 3.* In addition, the seller instructs F to hire a contractor to perform repairs on the property. F selects the contractor, negotiates the cost, monitors the progress of the project, and inspects the work to ensure it complies with the contract. With respect to the payments to the contractor, F is performing management or oversight functions and is subject to the information reporting requirements of section 6041.

Example 5. G is a rental agent who manages certain rental property on behalf of property owner H. G finds tenants, arranges leases, collects rent, responds to tenant inquiries regarding maintenance, and hires and makes payments to repairmen. G subtracts her commission and any maintenance payments from rental payments and remits the remainder to H. With respect to payments to repairmen, G is performing management or oversight functions and is subject to the information reporting requirements of section 6041. With respect to the payment of rent to H, G is subject to the information reporting requirements of section 6041 regardless of whether she performs management or oversight functions or has a significant economic interest in the payment. See §1.6041–3(d) for rules relating to rental agents. See §1.6041–1(f) to determine the amount that G should report to H as rent.

Example 6. Literary agent J receives a payment from publisher L of fees earned by J's client, author K. J deposits the payment into a bank account in J's name. From time to time and as directed by K, J makes payments from these funds to attorneys, managers, and other third parties for services rendered to K. After subtracting J's commission, J pays K the net amount. J does not order or direct the provision of services by the third parties to K, and J exercises no discretion in making the payments to the third parties or to K. J is not performing management or oversight functions and does not have a significant economic interest in the payments and is not subject to the information reporting requirements of section 6041 in connection with the payments to K or to the third parties. For the rules relating to L's obligation to report the payment of the fees to K, see paragraphs (a)(1)(i) and (f) of this section. For the rules relating to K's obligation to report the payment of the commission to J and the payments to the third parties for services, see paragraphs (a)(1)(i) and (d)(2) of this section.

Example 7. Attorney P deposits into a client trust fund a settlement payment from R, the defendant in a breach of contract action for lost profits in which P represented plaintiff Q. P makes payments from the client trust fund to service providers such as expert witnesses and private investigators for expenses incurred in the litigation. P decides whom to hire, negotiates the amount of payment, and determines that the services have been satisfactorily performed. In the event of a dispute with a service provider, P withholds payment until the dispute is settled. With respect to payments to the service providers, P is performing management or oversight functions and is subject to the information reporting requirements of section 6041.

Example 8. Assume the same facts as in *Example 7.* In addition, assume that after paying the service providers and deducting his legal fee, P pays Q the remaining funds that P had received from the settlement with R. With respect to the payment to Q, P is not

performing management or oversight functions, does not have a significant economic interest in the payment, and is not subject to the information reporting requirements of section 6041. For the rules relating to R's obligation to report the payment of the settlement proceeds to P, see section 6045(f) and the regulations thereunder. For the rules relating to R's obligation to report the payment of the settlement proceeds to Q, see paragraphs (a)(1)(i) and (f) of this section. For the rules relating to Q's obligation to report the payment of attorney fees to P, see paragraphs (a)(1)(i) and (d)(2) of this section.

Example 9. Medical insurer S operates as the administrator of a health care program under a contract with a state. S makes payments of government funds to health care providers who provide care to eligible patients. S receives and reviews claims submitted by patients or health care providers, determines if the claims meet all the requirements of the program (e.g., that the care is authorized and that the patients are eligible beneficiaries), and determines the amount of payment. S is performing management or oversight functions and is subject to the information reporting requirements of section 6041 with respect to the payments.

Example 10. Race track employee T holds deposits made by horse owner U in a special escrow account in U's name. U enters into a contract with jockey V to ride U's horse in a race at the track. As directed by U, T pays V the fee for riding U's horse from U's escrow account. T is not performing management or oversight functions, does not have a significant economic interest in the payment, and is not subject to the information reporting requirements of section 6041. For the rules relating to U's obligation to report the payment of the fee to V, see paragraph (a)(1)(i) of this section.

Example 11. X is a certified public accountant employed by Firm Y, and is not a partner. Client Z pays X directly for accounting services. X remits the amount received to Y, as required by the terms of his employment. X does not have any reporting obligation with respect to the payment to Y. For the rules relating to Z's obligation to report the payment to Y for services, see paragraphs (a)(1)(i) and (d)(2) of this section.

Example 12. Bank contracts with Title Company with respect to the disbursement of funds on a construction loan. Pursuant to their arrangement, the contractor sends draw requests to Title Company, which inspects the work, verifies the amount requested, and then sends the draw request to Bank with supporting documents. Bank pays Title Company the amount of the draw request, and Title Company insures Bank against any loss if it cannot obtain the necessary lien waivers. Bank has a significant economic interest in the payment as a mortgagee, and Title Company exercises management or oversight over the payment. Since Title Company is closest in the chain to the contractor, Title Company should report the payment, unless the parties agree in writing that Bank will report the payment.

(f) *Amount to be reported when fees, expenses or commissions are deducted*—(1) *In general.* The amount to be reported as paid to a payee is the amount includible in the gross income of the payee (which in many cases will be the gross amount of the payment or payments before fees, commissions, expenses, or other amounts owed by the payee to another person have been deducted), whether the payment is made jointly or separately to the payee and another person. The Commissioner may, by guidance published in the Internal Revenue Bulletin, illustrate the circumstances under which the gross amount or less than the gross amount may be reported.

(2) Examples. The provisions of this paragraph (f) are illustrated by the following examples:

Example 1. Attorney P represents client Q in a breach of contract action for lost profits against defendant R. R settles the case for $100,000 damages and $40,000 for attorney fees. Under applicable law, the full $140,000 is includible in Q's gross taxable income. R issues a check payable to P and Q in the amount of $140,000. R is required to make an information return reporting a payment to Q in the amount of $140,000. For the rules with respect to R's obligation to report the payment to P, see section 6045(f) and the regulations thereunder.

Example 2. Assume the same facts as in *Example 1*, except that R issues a check to Q for $100,000 and a separate check to P for $40,000. R is required to make an information return reporting a payment to Q in the amount of $140,000. For the rules with respect to R's obligation to report the payment to P, see section 6045(f) and the regulations thereunder.

(g) *Payment made in medium other than cash.* If any payment required to be reported on Form 1099 is made in property other than money, the fair market value of the property at the time of payment is the amount to be included on such form.

(h) *When payment deemed made.* For purposes of a return of information, an amount is deemed to have been paid when it is credited or set apart to a person without any substantial limitation or restriction as to the time or manner of payment or condition upon

which payment is to be made, and is made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition.

(i) *Payments made by the United States or a State.* Information returns on:

(1) Forms 1096 and 1099 and

(2) Forms W-3 and W-2 (when made under the provisions of § 1.6041–2)

of payments made by the United States or a State, or political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, shall be made by the officer or employee of the United States, or of such State, or political subdivision, or of the District of Columbia, or of such agency or instrumentality, as the case may be, having control of such payments or by the officer or employee appropriately designated to make such returns.

(j) *Effective date.* The provisions of paragraphs (b), (c), (e), and (f) apply to payments made after December 31, 2002.

[T.D. 6500, 25 FR 12108, Nov. 26, 1960, as amended by T.D. 6628, 27 FR 12794, Dec. 28, 1962, T.D. 6888, 31 FR 9205, July 6, 1966; T.D. 7284, 38 FR 20827, Aug. 3, 1973; T.D. 7580, 43 FR 60159, Dec. 26, 1978; T.D. 7888, 48 FR 17587, Apr. 25, 1983; T.D. 8458, 57 FR 61313, Dec. 24, 1992; T.D. 8734, 62 FR 53471, Oct. 14, 1997; T.D. 8804, 64 FR 11378, Mar. 9, 1999; T.D. 8881, 65 FR 32205, May 22, 2000; T.D. 9010, 67 FR 48756, July 26, 2002; T.D. 9270, 71 FR 47080, Aug. 16, 2006]

§ 1.6041–2 Return of information as to payments to employees.

(a)(1) *In general.* Wages, as defined in section 3401, paid to an employee are required to be reported on Form W-2. See section 6011 and the Employment Tax Regulations thereunder. All other payments of compensation, including the cash value of payments made in any medium other than cash, to an employee by his employer in the course of the trade or business of the employer must also be reported on Form W-2 if the total of such payments and the amount of the employee's wages (as defined in section 3401), if any, required to be reported on Form W-2 aggregates $600 or more in a calendar year. For example, if a payment of $700 was made to an employee and $400 thereof represents wages subject to withholding under section 3402 and the remaining $300 represents compensation not subject to withholding, such wages and compensation must both be reported on Form W-2. A separate Form W-2 shall be furnished for each employee for whom a return must be made. At the election of the employer, components of amounts required to be reported on Form W-2 pursuant to the provisions of this subparagraph may be reported on more than one Form W-2.

(2) *Transmittal form.* The transmittal form for a return on Form W-2 made pursuant to the provisions of subparagraph (1) of this paragraph shall be Form W-3. In a case where an employer must file a Form W-3 under this paragraph and also under § 31.6011(a)–4 or § 31.6011(a)–5 of this chapter (Employment Tax Regulations), the Form W-3 filed under such § 31.6011(a)–4 or § 31.6011(a)–5 shall also be used as the transmittal form for a return on Form W-2 made pursuant to the provisions of this paragraph.

(3) *Time for filing*—(i) *General rule.* In a case where an employer must file Forms W-3 and W-2 under this paragraph and also under § 31.6011(a)–4 or § 31.6011(a)–5 of this chapter (Employment Tax Regulations), the time for filing such forms under this paragraph shall be the same as the time (including extensions thereof) for filing such forms under § 31.6011(a)–4 or § 31.6011(a)–5.

(ii) *Exception.* In a case where an employer is not required to file Forms W-3 and W-2 under § 31.6011(a)–4 or § 31.6011(a)–5 of this chapter, returns on Forms W-3 and W-2 required under this paragraph (a) for any calendar year shall be filed on or before February 28 (March 31 if filed electronically) of the following year.

(iii) *Cross reference.* For extensions of time for filing returns, see section 6081 and the regulations thereunder.

(4) *Place for filing.* The returns on Forms W-3 and W-2 required under this paragraph shall be filed pursuant to the rules contained in § 31.6091–1 of this chapter (Employment Tax Regulations), relating to the place for filing certain returns.

(5) *Statement for employees.* An employer required under this paragraph