

TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 61 REAL ESTATE BROKERS
PART 23 TRUST ACCOUNTS

16.61.23.1 ISSUING AGENCY: New Mexico Real Estate Commission.
[16.61.23.1 NMAC - Rp, 16.61.23.1 NMAC, 1/1/2012]

16.61.23.2 SCOPE: The provisions in Part 23 of Chapter 61 apply to all licensed qualifying brokers in New Mexico.
[16.61.23.2 NMAC - Rp, 16.61.23.2 NMAC, 1/1/2012]

16.61.23.3 STATUTORY AUTHORITY: Part 23 of Chapter 61 is promulgated pursuant to the Real Estate Licensing Law, Section 61-29-4 NMSA 1978.
[16.61.23.3 NMAC - Rp, 16.61.23.3 NMAC, 1/1/2012]

16.61.23.4 DURATION: Permanent.
[16.61.23.4 NMAC - Rp, 16.61.23.4 NMAC, 1/1/2012]

16.61.23.5 EFFECTIVE DATE: January 1, 2012, unless a later date is cited at the end of a section.
[16.61.23.5 NMAC - Rp, 16.61.23.5 NMAC 1/1/2012]

16.61.23.6 OBJECTIVE: The objective of Part 23 of Chapter 61 is to set forth the requirements and procedures for the description, establishment, maintenance, retention of, and deposits to and disbursement from, trust accounts by qualifying brokers.
[16.61.23.6 NMAC - Rp, 16.61.23.6 NMAC, 1/1/2012]

16.61.23.7 DEFINITIONS: Refer to 16.61.1.7 NMAC.
[16.61.23.7 NMAC - Rp, 16.61.23.7 NMAC, 1/1/2012, A, 1/1/2017]

16.61.23.8 DESCRIPTION, DESIGNATION AND RECONCILIATION:

A. Funds of others. A qualifying broker who receives money belonging to others related to a real estate transaction shall deposit same only in a trust account in an acceptable financial institution, title company or with a qualifying broker also involved in the transaction.

B. Designation. All trust accounts shall be designated on the institution's records as "trust account" and include the trade name of the brokerage as registered with the commission.

C. Electronic transactions. Online payments, direct deposits and other electronic transactions are permitted as long as each transaction can be tracked on the bank statement and on the property ledger.

D. Reconciliation. As defined in Subsection VV of 16.61.1 NMAC Section 1 of the commission rules, trust account reconciliation must be performed monthly and verified by the qualifying broker.

E. Property ledgers. Each trust account transaction shall be assigned to and properly accounted for in relation to the managed property to which it belongs (e.g. single family home, apartment complex or commercial property).

F. Number of trust accounts. A brokerage may have more than one trust account.
[16.61.23.8 NMAC - Rp, 16.61.23.8 NMAC, 1/1/2012; A, 1/1/2017; A, 1/3/2021]

16.61.23.9 TYPES OF TRUST ACCOUNTS: A qualifying broker shall have only the following types of accounts and they shall be used only for the purposes stated.

A. Brokerage trust account. This account shall be used for money belonging to others related to a real estate sales transaction. Property management funds may not be placed in this trust account. In lieu of a brokerage trust account, a broker may deposit funds with a title company authorized to do business in the state of New Mexico. If a title company is used in lieu of a brokerage trust account, then receipt and deposit records shall be kept as outlined in this section.

B. Property management trust account. This account shall be used for money belonging to others received by a qualifying broker related to managing properties for others. All management commissions and fees may be deposited, withdrawn and tracked through the property management trust account as long as those commissions and fees are specified in the agreement between the property owner and brokerage.

C. Special trust account. In the event the principals to a sale transaction agree in writing that an interest bearing special trust account is to be established, a written agreement shall be prepared stating as a minimum the following:

- (1) the qualifying broker shall be named as sole trustee;
- (2) name of the acceptable financial institution wherein the funds are to be deposited;
- (3) the amount of interest to be paid on the funds and to whom the interest shall accrue;
- (4) the final disposition of principal and interest upon closing, termination or default by either party to the transaction; and
- (5) the signatures of all parties to the transaction and the qualifying broker as trustee.

D. Custodial account. Funds designated to be deposited in a custodial account shall first be placed in a brokerage trust account or a property management trust account of the qualifying broker and then may be transferred to the custodial account of the owner. Custodial accounts shall not contain any funds other than those belonging to the owner of the custodial account. Custodial accounts may be interest bearing; however, the interest shall be paid only to the owner or his designee. The qualifying broker shall have on file a written agreement signed by all principals as to the establishment and operational details of each custodial account.

[16.61.23.9 NMAC - Rp, 16.61.23.8 & 9 NMAC, 1/1/2012; A, 1/3/2021]

16.61.23.10 RECORD ACCESSIBILITY, RETENTION AND INSPECTION: Every qualifying broker shall keep bank and office records of all funds related to all trust and custodial accounts under the qualifying broker's control, as set forth below.

A. Accessibility. Records shall be maintained at or accessible from the brokerage office as registered with the commission.

B. Retention. All trust and custodial account records shall be retained for six years after the completion of a transaction.

C. Property management. All trust and custodial account records shall be retained for the full term of any agreement. At the termination of a management agreement, records shall be retained for six years from the date of termination.

D. Inspection. All financial documents shall be subject to inspection by the commission or its duly authorized representative at the designated location of such records or at the offices of the commission. The records shall include, at a minimum, clear indication of all funds received and disbursed on behalf of others in all real estate transactions wherein the qualifying broker is involved.

E. The qualifying broker is responsible for the maintenance and safekeeping of all trust and custodial account records.

[16.61.23.10 NMAC - Rp, 16.61.23.9 NMAC, 1/1/2012; A, 1/3/2021]

16.61.23.11 DEPOSITS, DISBURSEMENTS AND COMMINGLING:

A. Deposits. All trust account deposits shall conform to the following requirements.

(1) Timeliness. All funds of others pertaining to a real estate transaction shall be deposited into the proper trust or custodial account per written agreement of the parties to the transaction.

(2) Receipt records. A detailed record of all funds received shall be maintained by the qualifying broker and shall clearly indicate the following:

- (a) date received;
- (b) date deposited;
- (c) from whom received;
- (d) amount of deposit;
- (e) property address or legal description including unit number (if unit number is applicable); and
- (f) category or purpose of receipt (e.g., earnest money, rent, security deposit, funds from owner, etc.).

(3) Wrongful deposits. The following actions involving any trust account shall be improper and shall constitute commingling:

- (a) depositing a broker's own funds into a trust or custodial account without disclosure to the owner of a managed property and the real estate commission;
- (b) depositing funds in a trust or custodial account that are not directly related to a real estate transaction or a managed property except as allowed by law; and

(c) depositing funds of others in an account that is not a properly designated trust account.

B. Disbursements. All trust account disbursements shall conform to the following requirements.

(1) Timeliness. All funds of others pertaining to a real estate transaction shall be disbursed as soon as reasonably possible after receipt of the funds.

(2) Disbursement records. A detailed record of all funds disbursed shall be maintained by the qualifying broker and shall clearly indicate the following:

(a) check number or unique transaction identification number;
(b) date of disbursement;
(c) payee;
(d) category or purpose of disbursement;
(e) amount of disbursement;
(f) property address or legal description including unit number (if unit number is applicable).

(3) Fees due broker. Fees as determined by written agreement may be disbursed as soon as the basis for calculation can be determined and funds are available.

(4) Wrongful disbursements. The following actions involving any trust or custodial account shall be improper and shall constitute commingling:

(a) disbursing trust funds or custodial funds for personal use of the qualifying broker, an associate broker or the broker's designee;
(b) disbursing commission or commission splits from any trust or custodial account to any entity other than the qualifying broker.
(c) disbursing New Mexico gross receipts tax or other non-property related business expenses directly from a trust or custodial account;
(d) disbursing funds before the completion of the related transaction, except upon court order; this provision does not prevent a broker from transferring funds from one properly designated trust or custodial account to another properly designated trust or custodial account within the same brokerage;
(e) disbursing funds in excess of the trust or custodial account balance or in excess of a specific property or client ledger balance; and
(f) trust or custodial account overages can only be disbursed in accordance with the Unclaimed Property Act with written notification to the commission.

C. Commingling. Commingling of trust or custodial account funds is not permitted. Commingling shall include, but is not limited to, the following actions:

(1) wrongful deposits as described in this section;
(2) wrongful disbursements as described in this section;
(3) allowing a property or client ledger within a trust or custodial account to be in deficit;
(4) placing funds derived from the management of the qualifying broker's personally owned properties, or properties owned by any legally recognized entity in which the qualifying broker has any interest in a trust account containing funds of others;
(5) failing to withdraw from the trust or custodial account within a reasonable time, funds to which the qualifying broker is entitled;
(6) allowing money designated to one property or transaction to be used for the benefit of another property or transaction.

D. Exceptions to commingling.

(1) Non-trust funds may be placed in a trust or custodial account in an amount not to exceed the required minimum balance requirements of a financial institution necessary to maintain the account and avoid charges.

(2) Non-trust funds may be placed in a trust or custodial account in order to pay fees for credit card transactions and bank fees.

(3) Depositing a broker's own funds in a trust or custodial account with full disclosure to the owner of a managed property and with specific, prior written approval of the commission followed immediately by written documentation to the owner and to the commission of the deposit transaction.

(4) If a written sharing agreement specifies, funds of one property may be used for the benefit of another property owned by the same person or entity.

(5) Funds received from an owner for the benefit of all their managed properties may be credited to an owner's ledger.

[16.61.23.11 NMAC - Rp, 16.61.23.10 NMAC, 1/1/2012; A. 1/1/2014; A, 1/3/2021]

16.61.23.12 TRUST ACCOUNT DECLARATION AND RECORD KEEPING: Qualifying brokers who offer property management services for others shall:

A. Execute and submit to the commission, on a form provided by the commission, a declaration of intent to offer such services. Such declaration will acknowledge the qualifying broker's responsibility for all property management services provided by the brokerage including maintenance of the records described below.

B. Maintain records of such services as provided in 16.61.23 NMAC and 16.61.24 NMAC, including:

- (1) A list of all property management trust and custodial accounts maintained by the brokerage;
- (2) The name of the bank(s) at which such trust or custodial accounts are maintained;
- (3) Monthly trust or custodial account reconciliation(s) demonstrating a three-way reconciliation between the trust or custodial account, the bank statement, and the property ledger;
- (4) Trust or custodial account year-end balances.

C. Qualifying brokers who offer property management services for others shall review 16.61.23 NMAC and 16.61.24 NMAC of the commission rules with licensed and unlicensed personnel performing property management services at the brokerage.

D. Qualifying brokers offering property management services for others shall make the records and information delineated in this part available to the commission upon request.

E. Failure of a qualifying broker to comply with the provisions of 16.61.23.12 NMAC, shall subject the qualifying broker to disciplinary action.

[16.61.23.12 NMAC – N, 1/1/2019; A, 1/3/2021]

HISTORY OF 16.61.23 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the state records center and archives under:

Real Estate License Law Manual, filed 10/2/1973;

Rule No. 15 Amendment No. 1, Trust Fund Accounts; Records to be Maintained, filed 6/15/1979;

REC 70-14 Trust Fund Accounts; Records to be Maintained, filed 10/6/1981;

REC 84-14, Trust Fund Accounts; Records to be Maintained, filed 10/25/1984;

Rule No. 11 Trust Accounts, filed 12/18/1987.

History of Repealed Material:

16.61.23 NMAC, Special Trust Accounts, Custodial Accounts, and Other Accounts Containing Funds of Third Parties (filed 11/30/2001) repealed 1/1/2012.

Other History:

Rule No. 11 Trust Accounts (filed 12/18/1987) was reformatted, renumbered, amended, and replaced by 16 NMAC 61.23, Trust Accounts, effective 8/15/1997.

16 NMAC 61.23, Trust Accounts (filed 6/25/1997) was reformatted, amended, renumbered, and replaced by 16.61.23 NMAC, Trust Accounts, effective 1/1/2002.

16.61.23 NMAC, Special Trust Accounts, Custodial Accounts, and Other Accounts Containing Funds of Third Parties (filed 11/30/2001) was replaced by 16.61.23 NMAC, Trust Accounts, effective 1/1/2012.