

# STEARNS WEAVER MILLER

---



Risk Reduction for Mitigation Projects:  
Perspectives on Financial Assurances' Best Practices

**STEARNS WEAVER MILLER**

---

**ESCROW ACCOUNTS AND BEST PRACTICES**

---

**AMELIA SAVAGE**

**ASWM HOT TOPICS WEBINAR**

**DECEMBER 7, 2021**

---

MIAMI ■ FORT LAUDERDALE ■ TAMPA ■ TALLAHASSEE ■ CORAL GABLES

## DISCLAIMER

---

*The information provided in this presentation does not, and is not intended to, constitute legal advice; it is for general informational purposes only. Information in this presentation may quickly become outdated. Viewers of this presentation should contact their attorney to obtain advice with respect to any particular matter. No one should act or refrain from acting on the basis of information in this presentation without first seeking legal advice from counsel. Only your attorney can provide assurance that the information contained in this presentation, as well as the reader's interpretation of that information, is appropriate to any particular situation.*

# SUMMARY OF PRESENTATION

---

- **Elements of Escrow Accounts**
- **Parties and General Responsibilities**
- **Duration of Escrow Agreements**
- **Using an Escrow Account**
- **Required Conditions**
- **Considerations and Recommendations**

# ELEMENTS OF ESCROW ACCOUNTS

## WHAT IS AN ESCROW ACCOUNT?

---

- Escrow accounts are case accounts established with a Financial Institution through a designed Escrow Holder.
- An Escrow Holder is the person/entity that pays out the funds deposited in accordance with escrow instructions signed by all parties.
- Escrows are funded to fixed dollar amounts. The amount of money paid from an escrow account is limited to the fixed dollar amount plus any earnings in the escrow account.

## ESCROW INSTRUCTIONS

---

- Escrow accounts are established and maintained in accordance with legal contracts known as “escrow instructions”.
- Escrow instructions are typically short documents and provide less detail than bonds or casualty insurance policies.

## ELEMENTS OF ESCROW INSTRUCTIONS

---

- The Escrow instructions include the responsible agency, mitigation sponsors, Escrow Holder and the beneficiaries to the contract and details and responsibilities of each.
- Escrow instructions include the source of the funds, the permitted financial institutions and financial vehicles for the funds and the prerequisites to pay out the funds including appropriate documentation and destination.
- Requirement that Escrow Holder is to establish one or more accounts at an acceptable financial institution.
- May include security parameters.
- Demand language, which the Authorizing Agency can use to call upon the escrow funds.

**PARTIES AND GENERAL  
RESPONSIBILITIES  
UNDER ESCROW**

## MITIGATION SPONSOR

---

- Provides the cash funds for deposit into the Escrow Account.
- Responsible for implementing and maintaining Mitigation Property in accordance with Mitigation Bank or ILF Instrument or PRM Mitigation Plan.

## AUTHORIZING AGENCY/BENEFICIARY

---

- United States Army Corps of Engineers and/or State agency in charge of regulation of mitigation banks.
- Escrow instructions give Authorizing Agency ability to call upon the funds held in escrow in the event that:
  - the Mitigation Sponsor has failed to comply with the terms and conditions of the MBI; or
  - the Escrow Holder gives notice that it is no longer able to hold the funds and no replacement Escrow Holder is provided.

## ESCROW HOLDER

---

- Depending on jurisdiction, can be a bank, attorney, title company with an escrow department or other entity duly licensed to hold funds as an escrow agent.
- Must provide monies up to the amount of the Escrow balance if presented with duly executed demand for same.

# DURATION OF ESCROW AGREEMENTS

## DURATION OF ESCROW AGREEMENTS

---

- Often issued for ten years.
- Automatically terminate when all funds are disbursed.
- Balance can be reduced in part or in whole at any time as the activities giving rise to the need for assurances are completed/accomplished.

## USING AN ESCROW ACCOUNT

## HOW ARE MONIES PAID?

---

- Generally payable simply upon presentation of signed instructions as provided in the Escrow Agreement (Escrow Holder undertakes no investigation).
- Language of Escrow Agreement provides how monies are paid upon a claim by Authorizing Agency. Monies are disbursed in accordance with the executed claim instructions.

## REQUIRED CONDITIONS

## U.S. ARMY CORPS OF ENGINEER RULES

---

- Modification Clause – 120 days notice
- Cancellation of Policy – 120 days notice

# CONSIDERATIONS AND RECOMMENDATIONS

## THINGS TO CONSIDER

---

- The Escrow Holder usually charges the Mitigation Sponsor an annual fee for escrow account management. This fee is usually a fixed annual amount.
- Escrow accounts are easily called upon by Authorizing Agency, requiring fewer hurdles than other financial assurance documents.
- If called upon, Escrow Holder does not undertake any activities on the mitigation bank as might be done by a bond or an insurance policy. Rather, the Authorizing Agency, or designee, would then be in charge of use of funds and undertaking of required work.
- Escrow agreements are a type of contract. They are regulated under the uniform commercial code and state common law.

## BEST PRACTICES

---

- Create account that without time limit to avoid need for renewal.
- Deposit in federally insured depository that is “well capitalized” or “adequately capitalized” as defined in Section 38 of the Federal Deposit Insurance Act.
- Clearly specify documentation presented to facilitate presentation and draw.
- Simultaneously establish entity to receive funds to avoid issues with the federal Miscellaneous Receipts Act.

## PROS AND CONS

---

- Pros:
  - Can be set up to not require renewal;
  - Simple to negotiate; and
  - Easy to make a claim against.
- Cons:
  - Very large start up cost for Sponsor; and
  - Agency still needs to find a designee to bring the bank back into compliance.

# STEARNS WEAVER MILLER

---



QUESTIONS?