

A DOZEN THINGS EVERY REALTOR® SHOULD KNOW ABOUT EARNEST MONEY DEPOSITS

1. Neither the law nor the Code of Ethics dictates whether the listing office or the selling office holds the EMD. Regardless of which real estate office holds the EMD, the role of the escrow agent is a neutral role. Even if it is a buyer's agent that acts as the escrow agent, they would have a duty to disclose to the seller if the EMD check bounced.

2. There is no law that regulates the amount of an earnest money deposit. A purchase agreement without any earnest money deposit is enforceable (although rare). An earnest money deposit is not always refundable and may be nonrefundable at the outset or may become nonrefundable after the happening of a particular event such as an inspection (again, rare in residential transactions).

3. A seller and buyer can agree that any third party will hold the EMD. If a third party (*i.e.*, a non-real estate licensee) holds the EMD, the third party is not subject to the Occupational Code/rules on handling EMDs. If a third party is to hold the EMD, a REALTOR's® responsibility is to deliver the check to the named escrow agent within 2 banking days of receiving notice of acceptance by all parties.¹

4. If a REALTOR® holds the EMD, then the REALTOR® must comply with Occupational Code/rules governing EMDs. A salesperson cannot hold the EMD check until there is a binding contract, but instead must turn over the EMD check to his broker "upon receipt."² The broker, on the other hand, is not required to deposit the check into its trust account immediately.

¹ MCL 339.2512(1)(k)(vii).

² MCL 339.2512(1)(k)(ii).

A broker must deposit the EMD in its trust account within 2 banking days after the broker has received notice that there is a binding purchase agreement.³

5. A seller and buyer can agree, for example, that the EMD check will not be provided by the buyer to the buyer's agent until the inspection contingency is waived. A seller/buyer cannot agree that an EMD check in the buyer's broker's possession will not be deposited until the inspection contingency is waived.

6. Trust account must be a non-interest bearing demand account. Checks must be signed by a broker or associate broker. Broker may not commingle its own funds in the trust account (except for up to \$2,000 to avoid service charges).⁴

7. Broker must maintain duplicate records for its trust account: (i) a chronological record of all receipts/distributions from that account; and (ii) a transaction specific record.⁵

8. If funds are in a real estate licensee's trust account and if there is a dispute over the EMD, the EMD must remain in the trust account until buyer and seller have agreed in writing or there is a court order directing the disbursement of the EMD. This rule only applies where there is a dispute over the EMD. The real estate licensee can also interplead the funds with the court.⁶ If there is no dispute, the Occupational Code permits a licensee to release the EMD without a signed release. (Some purchase agreement forms require a signed release in all cases.)

9. A REALTOR® cannot condition the release of an EMD on the sellers/buyers releasing the REALTOR® from any liability in connection with the transaction.

³ MCL 339.2512(1)(iii)-(v).

⁴ MCL 339.2512(1)(k)(iv)-(v); Rule 313.

⁵ MCL 339.2512(1)(vi); Rule 313.

⁶ Rule 313(5).

10. A purchase agreement may be considered terminated even if there is still a dispute over the EMD. The fact that there is a dispute over the EMD does not prevent the sellers from re-listing or the buyers from looking for a new home.

11. It is not always the case that a purchaser can walk away from a transaction with no adverse consequences other than the forfeiture of the EMD. Many purchase agreements provide that in the event of the buyer's default, the sellers can keep the EMD and sue the buyer for damages.

12. REALTORS® are not entitled to keep abandoned EMDs; rather, the funds escheat to the State of Michigan. Failure to do so can result in the broker having to pay significant fines.