

FREQUENTLY ASKED QUESTIONS ABOUT EARNEST MONEY DEPOSITS

1. Are earnest money deposits required in order for there to be a binding purchase contract?

No. Earnest money deposits are not required, but are almost always provided as evidence of the buyers' willingness and ability to perform.

2. Can a broker wait until the buyers' offer is accepted before depositing the earnest money check?

Yes. The Occupational Code requires a salesperson to turn over any deposit check to his/her broker and the broker, in turn, to deposit the check "within two banking days after the broker has received notice that an offer has been accepted." MCL 339.2512(j)(i) through (iv).

3. Can a purchase agreement provide that the earnest money check will not be deposited until after the inspection contingency is waived?

Yes, however, in this event, the buyer should not deliver the check to the REALTOR® until such time as it is ready to be deposited. Once the broker has the check in his/her possession, the broker is required to deposit the check if the offer has been accepted.

4. Can a listing broker hold the earnest money deposit or must it be held by the cooperating broker?

A purchase agreement may provide that either the listing broker or the cooperating broker (or anyone else) will hold the earnest money deposit.

5. What are a REALTOR®'s responsibilities when a title company or other entity is to act as escrow agent and hold the earnest money deposit?

A seller and purchaser can agree that any third party will hold the deposit. In such event, if the check is first given to the REALTOR®, then the REALTOR®'s responsibility is to make sure the check is delivered to that escrow agent within two banking days of receiving notice that the offer to purchase was accepted. MCL 339.2512(j)(vi).

6. Once a transaction falls through, does a broker need to get a written release from both parties before releasing the earnest money deposit?

For their own protection, it is always advisable for REALTORS® to obtain a written release from both parties prior to disbursing an earnest money deposit. However, the rules only require that a written release be signed if there is a dispute. Once a broker is aware that both sides claim a deposit, the rules require that the broker not disburse the funds until he has a written agreement signed by both parties or a court order. R 339.22313(6).

7. Can a broker require the parties to release the broker from any liability as a condition to releasing the earnest money deposit?

No. While most release agreement forms also contain language releasing the parties and the brokers from any further liability relating to this transaction and while such a release is desirable, the only agreement that a broker can require of the parties is an agreement as to how the funds will be disbursed.

8. What if an earnest money deposit check bounces?

A REALTOR®'s role as an escrow agent is a neutral role and, therefore, the REALTOR® should notify both parties if the buyers' earnest money check bounces.

9. My sellers' first sale transaction fell through and there is a dispute between the sellers and those buyers over the earnest money deposit. Must the sellers wait until this dispute is resolved before relisting their house?

No. If both parties agree that the sale contract has been terminated and the only dispute is over who is entitled to the earnest money, the sellers may re-list their home.

10. My buyers are having second thoughts about going ahead with the purchase of a home. Can they just walk away from the transaction and forfeit their earnest money or are there other potential risks?

Some purchase contracts provide that in the event of a default by the buyers, the sellers' only remedy is to keep the buyers' earnest money deposit as "liquidated damages." However, many, perhaps most, purchase agreements provide that in the event the buyers default, the sellers can keep the earnest money deposit and sue the buyers for damages.

11. I have money in my trust account from a failed transaction five years ago. I cannot locate either party to the transaction. What should I do with this money?

Unclaimed money "escheats" to the State. (Michigan Department of Treasury – Unclaimed Property Division – 517-636-5320.)

12. Five years ago, both the buyer and the seller claimed the earnest money in connection with a failed transaction. I did not hear anything on this until the buyer called recently and requested the money. Can I release the earnest money to the buyer without contacting the seller?

Once a dispute has occurred, the rules require a REALTOR® to keep the earnest money deposit until the parties reach an agreement or until there is a court order directing the release of the funds. R 339.22313(6). After a dispute arises, there is no provision that allows a REALTOR® to release the deposit after a stated time period has elapsed.

13. Should the commission check that a broker receives at closing be deposited in the broker's trust account pending disbursement of the salesperson's portion of the commission?

It is not necessary that a commission check be deposited in the broker's trust account and, in fact, it is at least arguable that a broker is prohibited from doing so by the rule that prohibits a broker from commingling his own business funds with trust funds. MCL 339.2512(j)(iii). Informally in the past, the Department has indicated that this practice is permissible so long as the funds are disbursed "immediately."

14. What kind of records does a broker need to keep for its trust account? How long does a broker need to keep these records?

The requirements of R 339.22313 provide:

- (1) A trust account must be a non-interest-bearing account;*
- (2) Checks from a trust account must be signed by broker or associate broker;*
- (3) Broker must maintain a chronological journal for the account showing all deposits/disbursements and showing a running balance after each entry;*
- (4) Broker must also maintain separate accounting ledgers showing receipts/disbursements for each transaction;*
- (5) Broker may deposit its own funds – not to exceed \$500 – so as to avoid bank charges. Broker must maintain a ledger for its own funds.*

Trust account records must be maintained for at least 3 years.

More detailed recordkeeping requirements are contained in Rule 313.