

Earnest money: Who gets the deposit? And when?

Working with the major forms providers, VAR has recently made major changes to the Earnest Money Deposit (EMD) section of its Residential Contract of Purchase (Form 600) that clarifies Virginia law for consumers and agents.

Below is the new provision in the form, followed by highlights of the major changes and why they were made.

For starters, here is the new deposit language:

DEPOSIT: Purchaser shall make a deposit of \$ _____ to be held by _____ (the “Escrow Agent”) in the form of: check cash other _____ (the “Deposit”). Purchaser [select one]: has paid the Deposit to the Escrow Agent OR will pay the Deposit to the Escrow Agent within _____ days after this Agreement is fully executed by the parties.

If Purchaser fails to pay the Deposit as set forth herein, then Seller may terminate this Contract by written notice to Purchaser and neither party shall have any further obligation hereunder. The Deposit may be held in an interest bearing escrow account. The Purchaser and Seller waive any claim to any interest accrued or earned by such account and acknowledge that any interest shall be disbursed to the Escrow Agent.

The escrow account shall conform to the Virginia Real Estate Board Regulations, and the Deposit shall not be released by the Escrow Agent until one of the following occurs: (i) It is credited toward the Sales Price at Settlement; (ii) Seller and Purchaser have agreed in writing as to its disposition, (iii) a court of competent jurisdiction orders a disbursement of the funds; OR (iv) it is disposed of in any other manner authorized by the Virginia Real Estate Board.

If the Property is foreclosed upon while this Contract is pending the terms of Section 54.1-2108.1 of the Code of Virginia shall apply to the disbursement of the Deposit. Foreclosure shall be considered a termination of this Contract by Seller and, absent any default by Purchaser, the Deposit shall be disbursed to Purchaser.

Remember: You can download Form 600, and all the VAR forms, at VARealtor.com/standardforms.

Q: If an EMD is held in an interest-bearing escrow account, can the firm holding the funds keep the interest?

A: Whether you place the EMD in an interest-bearing account is your decision, but if you do, the contract has to state who gets the interest. VAR’s new escrow provision clears up who is entitled to the interest.

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Q: I am the principal broker escrow agent; what if my agent forgets to give me the EMD within five business banking days. In other words, the funds are not deposited until the sixth day?

A: You must report this violation to the Real Estate Board within three business days. In fact, any escrow violation must be reported.

Please note that the Real Estate Board needs the broker to report the violation in writing either by regular mail or e-mail. The Board also needs to know the name of the licensee and license number, when the deposit was due and when it was received.

Q: We are dealing with a short sale, and the seller and buyer want to delay depositing the EMD until the lender approves the deal. Is that ok?

A: Yes, remember that parties can agree to a deposit date other than the standard five business banking days following ratification. VAR's Short Sale Addendum to Residential Contract of Purchase contains language below to meet this preference:

*The parties agree that the earnest money deposit will be deposited in Escrow Agent's escrow account (check one):
___ within five (5) business banking days after the date this Contract is fully ratified by Purchaser and Seller; OR
___ within ___ days after delivery by Seller to Purchaser of notice of lienholder approval of this Contract.*



Q: When a house is foreclosed on after contract ratification, do I still have to get the mutual consent of the buyer and the seller to release the EMD? That is very difficult to do after a seller loses his home.

A: As mentioned earlier, the general rule is that an escrow agent may not release EMD funds until he receives the mutual consent of the parties in writing or a court order. However, there is an exception to this rule for foreclosures.

A VAR-supported law makes clear that if a foreclosure sale occurs after contract ratification but before closing, the foreclosure may be considered a termination of the contract by the seller. If the contract provides that the purchaser is entitled to receive the EMD upon termination, and there was no default by the purchaser, the escrow agent may disburse the funds to the purchaser without the seller signing a release.

If the Property is foreclosed upon while this Contract is pending the terms of Section 54.1-2108.1 of the Code of Virginia shall apply to the disbursement of the Deposit. Foreclosure shall be considered a termination of this Contract by Seller and, absent any default by Purchaser, the Deposit shall be disbursed to Purchaser.

Again, this a limited exception for foreclosures.



Q: Is an EMD necessary for contract formation?

A: No. The failure of a buyer to deliver an EMD does not mean there is no contract. It means that the buyer is in default, and the seller will have all rights against the defaulting buyer. However, the question often comes up, “How does the seller enforce his rights?” The new EMD provision makes clear that if the purchaser fails to make the deposit, the seller may terminate the contract.

The new provision also allows the parties flexibility as to when the purchaser must pay the deposit to the escrow agent.

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VAR Legal Hotline (804) 622-7955



**Monday through Friday,
10 a.m. – 4 p.m.**

The VAR Legal Hotline is a free, members-only benefit for brokers.

You can receive answers to questions about Virginia real estate law, and timely information on legal and regulatory issues concerning the real estate industry.

The Legal Hotline provides legal information, not legal services. You should consult your attorney if you need representation or advice.

You must register for the Hotline before you can call. Registration is free and quick. Go to www.VARealtor.com/legalhotline; you will need your NRDS ID number.

Who can use the Hotline?

- You must be a principal or supervising broker.*
- You must be a VAR member.
- You must have registered for the Hotline (see above).
- You must have your NRDS ID number available when you call.

(* Each office can have one other person designated by the principal broker for Hotline access.)

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You can e-mail your questions to hotline@VARealtor.com.

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- You must include your **full name, phone number, and NRDS ID**. We cannot respond to messages that do not include all three.
- We will try to respond within 24 hours, but response time depends on Hotline activity.

Not a broker or member?

If you aren't eligible to use the Hotline, you can browse and search our Hotline archives at www.VARealtor.com/hotlinearchive and find more legal and risk management information in VAR's Legal Resources Center at www.VARealtor.com/legalresources.

You will need your NRDS ID number to log into the site.

Questions?

If you have questions about the Hotline, contact VAR at (800) 755-8271 or (804) 264-5033, or by e-mail at info@VARealtor.com

The VAR Legal Hotline should not replace your own legal counsel. We will not answer questions on matters unrelated to real estate or real estate brokerage, nor can we help with pending arbitrations.

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Q: What do you mean you can't release the EMD – the contract clearly states that I get it when the deal dies?

A: That was a common question escrow agents received because VAR's EMD provision did not educate consumers about real estate licensee escrow responsibilities. We all know that a licensee holding the EMD is bound by the Virginia Real Estate Board's regulations that provide, in a nutshell, that no matter what anybody says, the escrow agent may not disburse without either the written consent of the buyer and seller, or a court order. That is because the escrow agent is a fiduciary to both parties concerning the EMD.

The new provision clarifies the escrow agent's limitations with the following language:

The escrow account shall conform to the Virginia Real Estate Board Regulations, and the Deposit shall not be released by the Escrow Agent until one of the following occurs: (i) It is credited toward the Sales Price at Settlement; (ii) Seller and Purchaser have agreed in writing as to its disposition; (iii) a court of competent jurisdiction orders a disbursement of the funds; OR (iv) it is disposed of in any other manner authorized by the Virginia Real Estate Board.

Q: Does a real estate licensee have to hold the EMD in a real estate transaction?

A: No, but if the licensee holds it he is subject to the escrow provisions of REB regulations — they're in title 18 of the Virginia Administrative Code.



Legal Lines is written by VAR legal counsel Blake Hegeman.

Please note that answers to Legal Lines questions are informational only. Consult your own legal counsel for legal advice.

You can find more Q&A from the archives of our Legal Hotline in our Legal Resources Center at VARealtor.com/legalresources.

