



FAILURE TO TIMELY PAY: BROKER VERSION

THE INITIAL EARNEST MONEY DEPOSIT ADDITIONAL EARNEST MONEY DEPOSIT, AND/OR THE DUE DILIGENCE FEE

NOTE: This article only addresses issues that arise when funds are not paid as required under Form 2-T. Detailed information concerning the Earnest Money Deposit, Additional Earnest Money Deposit, and the Due Diligence Fee is provided in other articles in this guide.

Is the contract void if the buyer fails to timely deliver the Initial EMD or DDF to the seller?

No. As more fully explored in Contract Formation and Effective Date [link to article], the contract is in full force and effect as soon as it is signed by all parties and such signing is appropriately communicated. The buyer's obligation to deliver the Initial EMD and DDF are terms of the contract that the buyer must fulfill.

As explained more fully in this article, if a buyer does not timely deliver the Initial EMD and/or the DDF, they could be in breach of contract.

Can the seller accept another offer if the buyer fails to timely deliver the Initial EMD and/or the DDF after the contract is fully executed?

No. Since the parties are under contract, the seller cannot accept another offer unless the contract is properly terminated, even if the buyer has failed to timely deliver the [Initial EMD and/or the DDF](#).

Agents are reminded that all offers must be submitted to a seller-client. However, the Code of Ethics also requires that REALTORS® recommend their seller obtain the advice of legal counsel before accepting another offer if the seller is already under contract, unless the second offer is contingent on the termination of a pre-existing contract, or in other words, unless the second offer is a back-up contract.

What can the seller do if the buyer fails to timely deliver the Initial EMD and/or the DDF?

Under paragraph 1(d) in Form 2-T, the seller is permitted to demand payment of the Initial EMD and/or DDF in writing. Agents are encouraged to use Form 355-T to make this demand. If the buyer thereafter fails to make payment of the Initial EMD or the DDF via cash, official bank check, wire transfer, or electronic transfer within one banking day, then the seller has the unilateral right to terminate the contract. Agents should use Form 352-T to unilaterally [terminate the contract](#).

"Banking day" in Form 2-T means Monday-Friday, except for recognized bank holidays. This means that if the seller gives the written demand on a Friday, the buyer would have until close of business on Monday to deliver the funds (assuming no holiday is applicable).

What if the buyer gives a bad check for the Initial EMD or DDF?

The contract is not void, and the contract will remain in full force and effect unless it is properly terminated. Paragraph 1(d) of the contract says that the seller can use the same written demand process explained above to demand funds when the buyer's check or other payment method is dishonored. The buyer would then have one banking day to provide the required funds.

What if the buyer fails to timely pay the Additional EMD?

The contract states that time is of the essence for payment of any Additional EMD. If the buyer does not pay these funds, no written demand is necessary from the seller. The seller can immediately check the appropriate box on Form 352-T, and unilaterally terminate the contract if they wish.

Form 2-T requires that Additional EMD must be paid by "cash, official bank check, wire transfer or electronic transfer." Failure to timely pay via one of these methods will similarly permit the seller to immediately terminate the contract.

If the buyer does not pay the Additional EMD by one of the required methods, a personal check for example, then the listing agent should consult with the seller to see if they want to accept the non-conforming payment. The listing agent can either reject the non-conforming payment or deposit it (if the listing agent is the escrow agent) [in accordance with the seller's direction](#).

Can the seller terminate if the DDF, EMD, or Additional EMD have been put in the mail but not actually received by the seller by the applicable due date?

Yes. Form 2-T requires that funds actually be received by the seller in order to be considered "delivered" under the contract. Therefore, if the contract gives the seller the right to terminate for failure to timely "deliver" funds, the buyer's merely putting the funds in the mail will not be sufficient if the seller does not, in fact, receive the funds by the applicable due date.

Sometimes agents will mistakenly apply the "Mailbox Rule" to delivery of funds in the contract. The NC Real Estate Commission's North Carolina Real Estate Manual makes clear that "[t]he mailbox rule basically operates only as a method of communicating acceptance of an offer. It does not apply to any other situation." If a party wishes to use the mail to deliver time-sensitive funds, brokers should make sure that the seller agrees in writing to any deadline adjustment if the funds will not arrive in the [seller's possession in time](#).

Does a buyer agent acting as an escrow agent have any duty to notify the seller or listing agent that the EMD hasn't been paid or that the buyer's check has bounced?

Yes. As Escrow Agent, the buyer agent's firm owes duties to the seller too regarding the [EMD](#). You can read more about the escrow agent's responsibilities in our article titled [Escrow Agent](#).