



# DOS clarifies exception to escrow deposit regulation and opinion

By S. Anthony Gatto, Esq.  
NYSAR General Counsel

**R**eal estate brokers often have questions concerning the timing of the good faith deposit into their escrow account. Pursuant to 19 NYCRR §175.1 titled “Commingling Money of Principal,” brokers are required to maintain an escrow account. This regulation has been in place since 1964 and has not been amended since 1982.

The regulation states:

“A real estate broker shall not commingle the money or other property of his principal with his own and shall at all times maintain a separate, special bank account to be used exclusively for the deposit of said monies and which deposit shall be made as promptly as practicable. Said monies shall not be placed in any depository, fund or investment other than a federally insured bank account. Accrued interest, if any, shall not be retained by, or for the benefit of, the broker except to the extent that it is applied to, and deducted from, earned commission, with the consent of all parties.”

As can be seen, the regulation calls for the “deposit of said monies...which

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deposit shall be made as promptly as practicable.” Many brokers have questioned what “as promptly as practicable” means in the eyes of the New York State Department of State (DOS). Fortunately, we have a DOS opinion. In the matter of DOS v. Baramonde, 48 DOS 91, 175.1 was interpreted to mean that deposits must be made by the next business day. According to the decision: “Failure to place a deposit in escrow by the start of the next business day following the receipt of the deposit is, even when the offer has not yet been accepted, a demonstration of incompetency by a real estate broker.” In Baramonde, the broker provided evidence that “it is the practice in the Syracuse area not to place deposits in escrow until the offer that they secure has been accepted.” According to DOS, such a practice is “contrary to the interest of the seller.” This means that regardless of local custom and practice, all brokers accepting good faith deposits on behalf of the parties to a transaction should be depositing such

good faith deposits by the next business day regardless of whether the offer was accepted or not.

There are several scenarios that make this requirement unfair and burdensome to consumers. If a broker is required to deposit good faith monies by the next business day, the purchaser may be put in a situation where the return of such monies upon rejection of the offer would not be in a timely manner so as the purchaser could use the same money for another offer on a different property. Brokers would need to verify that the check has actually cleared. Current check clearing standards are a minimum of two business days and can take up to six business days following the business day of deposit for checks written from an out-of-state bank (information taken from 12 CFR 229.12). Purchasers would not be able to use those monies for another purchase offer until the broker holding the good faith monies can be sure the original check cleared and upon such confirmation would then have to issue a check to the

purchasers. This could take at least one week if not more.

NYSAR has proposed an amendment to 175.1 extending the time to deposit the monies from the next business day (as required by Baramonde) to three business days. This regulation has yet to be approved, but in the meantime, NYSAR’s Legal Services Department obtained a clarification for certain escrow agreements.

During the NYSAR Legal Conference on May 2, 2016, NYSAR presented the DOS with a question about escrow agreements that contain specific requirements and/or time frames for the depositing of escrow monies. The DOS was asked if an escrow agreement contained specific and express provisions where, “The escrow monies shall be deposited no later than four business days after acceptance of the offer” would be in violation of 175.1. The DOS responded by stating such an escrow agreement would be valid as it was agreed to by all the parties. In their opinion, DOS stated that the time provision contained in 175.1 is only applicable where the escrow agreement is silent as to the timing of the deposit. The DOS understands that the terms of an escrow agreement are mutually agreed upon and are fully negotiable and as such, they will accept the agreed upon terms in lieu of the regulatory requirement. In other words, if your purchase contract contains an escrow agreement and that escrow agreement has specific conditions that must be met prior to the deposit of escrow monies and/or the monies are to be deposited within a specific time frame, those parts of 175.1 requiring the deposit the next business day (or three business days if the amended regulation is approved) would not be applicable.

Brokers should review their escrow agreements to see if they comply with the current or proposed regulation (19 NYCRR §175.1). If the escrow agreement contains conditions or a specific time frame for the deposit of escrow monies, and that escrow agreement was properly drafted, the “next business day” deposit requirement under Baramonde or the proposed “three business day” rule would not be enforced. ●

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