



**REALTORS® ASSOCIATION OF NEW MEXICO
INFORMATION SHEET
TIME- OFF- MARKET / EARNEST MONEY – 2018**



WHAT IS A TIME-OFF-MARKET (TOM) FEE?

Once the parties are under contract, it is a fee that the Buyer pays directly to the Seller as compensation for the Seller taking the Property “Off the Market”, which means that Seller will not accept any other offer on the property (except a Back-Off Offer) for an agreed upon period of time. During this Time Off Market period, Buyer has an opportunity to conduct the inspections included under Para. 21 of the Purchase Agreement and review the Seller’s Property Disclosure Statement (if the Seller has agreed to provide a Property Disclosure Statement). These are called the “**TOM Fee Inspections**”.

NOTE: If Buyers have a Buyers’ Sale Contingency AND RANM Form 2503 is being used, Seller is permitted to continue marketing the Property; the Property will NOT be taken “Off-the-Market” until Buyer has delivered notice to Seller that Buyers’ Property has gone under contract.

IS THE TOM FEE REQUIRED?

No, it is optional. The parties may proceed with the Purchase Agreement without a TOM Fee.

IS THE PROPERTY “OFF THE MARKET”, IF BUYER DOES NOT PAY A TOM FEE?

Yes, unless otherwise agreed to in writing, the Seller must take the property Off the Market as of the Date of Acceptance **EVEN IF NO** TOM Fee is being paid to the Seller.

IS THE TOM FEE CREDITED TOWARDS PURCHASE PRICE/CLOSING COSTS AT CLOSING?

No, unless otherwise agreed to in writing. The TOM Fee is a separate fee, unlike Earnest Money, that is earned by the Seller when s/he agrees to take the Property Off the Market. It will NOT be refunded or credited at closing and it will NOT be refunded if the transaction does not close. **NOTE:** that if the parties amend the Purchase Agreement to allow for a credit of the TOM Fee at closing, and Buyer is obtaining a loan, the lender will trace the source of the TOM Fee funds.

IF SELLER MUST TAKE THE PROPERTY “OFF THE MARKET” EVEN IF BUYER DOES NOT PAY A TOM FEE, WHY WOULD A BUYER OFFER TO PAY A TOM FEE?

To understand how the TOM Fee benefits BOTH parties, the parties must first understand the Earnest Money process.

Deposit and Release of Earnest Money (EM). Generally, when the parties go “under contract,” the Buyer pays some initial “good faith” money called EM. The EM is generally held by the Title Company. If the parties close the transaction, the EM is credited towards the Purchase Price or Buyer’s down payment/closing costs. If the Buyer defaults on the Purchase Agreement, the EM *should* go to the Seller to compensate the Seller for damages suffered. In most cases, if the Buyer timely terminates the Purchase Agreement based on one of the contingencies (inspections, financing, appraisal, etc.), the Buyer *should* get his/her EM back. The Purchase Agreement is clear on this and the distribution of EM in other situations; however, title companies are **prohibited** by law from releasing EM to either party without an EM distribution agreement signed by both parties. **NOTE:** The Brokers **cannot** compel the title companies to release the EM.

Resolving Earnest Money Disputes. When a Buyer and Seller cannot come to an agreement on who gets the EM (*and this does happen with regularity*), generally, the following process occurs:

Step #1 - Ombudsman Process. A free-of-charge informal process wherein an “ombudsman” functions as an intermediary, communicating the concerns of one party to the other over the phone, in an attempt to resolve the issue.

Step #2 - Formal Mediation. If the ombudsman process fails, the parties are expected, per the Purchase Agreement, to engage in formal mediation. This is a process wherein the parties meet in-person with a mediator, who works with the parties to resolve the issue. Per the Purchase Agreement, mediation costs are split 50/50; mediation will cost the parties a *minimum* of \$150/each.

Step #3 - Litigation. If mediation fails, one party refuses to mediate or the parties cannot agree on a mediator, then the next step is litigation. One party will have to initiate a law suit against the other. A judge or jury will decide who gets the EM. Per the Purchase Agreement, the losing party in this litigation will be required to pay the prevailing party’s attorney fees and cost. After the time-frame for appeal had passed. the prevailing party would present the judgment to the title company, and generally, the title company would release the EM to the prevailing party.



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Interpleaders. Title companies are permitted by law to file a cause of action called an Interpleader, by which, the title company initiates an action with the court, names the Buyer and Seller as defendants in that action and deposits the EM with the court. The Buyer and Seller are then forced to cross claim against (sue) each other. The party who “loses” in that claim will have to pay the prevailing party’s attorney fees and costs (per the Purchase Agreement), as well as the title company’s attorney fees and costs. Title companies rarely file interpleader actions because of the time and cost involved.

EM as Unclaimed Property. In the event that the parties never come to an agreement and never seek a judgment from the court, and assuming no Interpleader action is filed, the EM will remain at the title company. Eventually, the title company will send the EM to the state as “unclaimed property”.

This leads us to the benefit of the TOM Fee to both parties.

If the parties agree that the Buyer will pay a TOM Fee, the Buyer’s deposit of EM will be delayed:

NO OBJECTIONS. If Buyer has NO objections to the TOM Fee Inspections and wants to move forward with the transaction, the EM will then be deposited within the time-frame provided Para. 4 of the Purchase Agreement.

OBJECTIONS. If Buyer has objections to the TOM Fee Inspections, then the EM will **NOT** be deposited until a time after the parties have resolved those objections as provided in Para. 4 of the Purchase Agreement. If the parties CANNOT resolve the Buyer’s objections within the time frame provided in the Purchase Agreement, then the Purchase Agreement will terminate, and **NO** EM will ever be deposited.

In short, if the transaction terminates during this inspection period, there will be NO need for the parties to sign an EM Distribution Form for the title company and NO chance that there will be an EM dispute, because NO EM will have been deposited. NOTE: An EM dispute may still arise later in the transaction once/if EM is deposited.

TYPICALLY, HOW MUCH DOES A BUYER PAY/SELLER RECEIVE AS A TOM FEE?

The amount is completely negotiable and will depend on such factors as the real estate sales market in that area, the amount of interest in/desirability of the Property, the amount of time the Buyer is requesting for inspections, etc. But generally, a TOM Fee will be in the range of \$50-\$500.

TOM Fee Considerations:

Buyers: When considering whether to *offer* Seller a TOM Fee, recall that Sellers are *giving* something for this TOM Fee - they are taking the Property Off the Market - and this **HAS** value.

Sellers: In considering the *sufficiency* of the TOM Fee, take into account the following:

- 1) insisting on a high-dollar TOM Fee, may discourage otherwise interested buyers;
- 2) if the TOM Fee is bypassed and instead, EM is delivered early in the process (as it has generally been done) and IF the Buyer timely terminates based on inspections, Seller is NOT entitled to retain ANY of the EM. In other words, any amount of TOM Fee paid by the Buyer is more than the Seller would normally receive if only EM was being delivered during this TOM Fee Inspection period; and
- 3) an excessive TOM Fee could create issues with the Buyer’s loan. What amount above \$500 would trigger further inquiry from a Buyer’s lender is unclear, but the higher the amount, the more likely the impact.

HOW IS THE TOM FEE PAID? In the Purchase Agreement, the parties will agree to the form of payment for the TOM Fee. There are several options for *delivery* of the TOM Fee:

- 1) Buyer may deliver the TOM Fee to his/her Broker who will deliver it to the Listing Broker/Brokerage or Seller;
- 2) Buyer may deliver the TOM Fee directly to the Listing Broker/Brokerage; Buyer should obtain a receipt of delivery; or
- 3) Buyer may deliver the TOM Fee directly to the Seller via mail or electronically (if electronic delivery directly to Seller has been agreed to by the parties in the Purchase Agreement).

NOTE: Per the Purchase Agreement, Buyer has satisfied the delivery requirements for the TOM Fee when Buyer or Buyer’s Broker delivers the TOM Fee to the *Listing Broker or Brokerage*.

NOTE: if TOM Fee payment is returned for “insufficient funds”, Buyer is in default of the Purchase Agreement and Seller may put the Property back On the Market.