

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 25 ESCROW COMPANIES
PART 2 ESCROW COMPANY ACT

12.25.2.1 ISSUING AGENCY: Financial Institutions Division of the Regulation and Licensing Department, 2550 Cerrillos Road, Santa Fe, New Mexico 87505. Telephone No. (505) 476-4885.
[12.25.2.1 NMAC - Rp, 12 NMAC 25.2.1, 7/1/15]

12.25.2.2 SCOPE: All escrow companies licensed by the state of New Mexico.
[12.25.2.2 NMAC - Rp, 12 NMAC 25.2.2, 7/1/15]

12.25.2.3 STATUTORY AUTHORITY: Section 58-22-6(A) NMSA 1978.
[12.25.2.3 NMAC - Rp, 12 NMAC 25.2.3, 7/1/15]

12.25.2.4 DURATION: Permanent.
[12.25.2.4 NMAC - Rp, 12 NMAC 25.2.4, 7/1/15]

12.25.2.5 EFFECTIVE DATE: July 1, 2015, unless a later date is cited at the end of a section.
[12.25.2.5 NMAC - Rp, 12 NMAC 25.2.5, 7/1/15]

12.25.2.6 OBJECTIVE: The objective of this sub-part is to effectuate the purposes of the Escrow Company Act.
[12.25.2.6 NMAC - Rp, 12 NMAC 25.2.6, 7/1/15]

12.25.2.7 DEFINITIONS:

A. “Generally accepted principles of accounting” means professional standards of accounting practice as promulgated from time to time by the American institute of certified public accountants.

B. “Act” means the Escrow Company Act, Sections 58-22-2 NMSA 1978 *et seq.*, *as amended*.

C. “Banking day” means a day a financial institution is open for the normal conduct of its business, but does not include Saturday, Sunday or any legal holiday.

D. “Director” means the director of the financial institutions division.

E. “Division” means the financial institutions division of the regulation and licensing department, state of New Mexico.

F. “Escrow closing agent” means an escrow company which, in the normal course of business, acts as the agent of a buyer and seller of real estate for the purpose of consummating a sale, including, but not limited to, the performance of the following described functions:

(1) preparation of deeds, mortgages, promissory notes, deeds of trust, real estate contracts, assignments or other documents incidental to the sale as permitted by law;

(2) calculations and disbursements of prorated taxes, insurance premiums, utility bills and other charges incidental to the sale;

(3) preparation of buyers’ and seller’ closing statements;

(4) supervision of signing of documents;

(5) collection and disbursement of a down payment, realtors’ commissions, fees and other charges pursuant to a sales agreement; and

(6) recordation of documents.

G. “Ledger” means a chronological record of dated debits and credits maintained either in a bookkeeping ledger book or in a readily retrievable electronic format.

H. “Escrow” means any transaction wherein any written instrument, money, evidence of title to real or personal property or other thing of value is delivered to a person not otherwise having any right, title or interest therein for the purpose of effecting the sale, transfer, encumbrance or lease of real or personal property, to be held by that person as a neutral third party until the happening of a specified event or the performance of a prescribed condition when it is then to be delivered by such person to a grantee, grantor, promise, promisor, obligee, obligor, bailee, bailor or any agent or employee of any of them pursuant to the written instructions of the principals to the transaction; escrow also includes accepting payments on loans for remission to a third party, otherwise known as “servicing”.

I. “Escrow agent” means any person, other than escrow closing agent as defined in Subsection F of 12.25.2.7 NMAC, who engages in the business of receiving escrows for deposit or delivery and who receives or is promised any fee, commission, salary or other valuable consideration, whether contingent or otherwise, for or in anticipation of performance.

J. “Escrow company” means any person, other than an escrow closing agent as defined in Subsection F of 12.25.2.7 NMAC, engaged in the business of receiving escrows for deposit or delivery for compensation who is required to be licensed under the Escrow Company Act.

K. “Licensee” means a person holding a valid license as an escrow company or escrow agent.

L. “Person” means an individual, cooperative, association, company, firm, partnership, corporation or other legal entity.

M. “Principal(s)” means all the actual parties or legal entities to the escrow closing transaction, and the term principal(s) shall be deemed to include a duly appointed agent or attorney-in-fact.
[12.25.2.7 NMAC - Rp, 12 NMAC 25.2.7, 7/1/15]

12.25.2.8 ESCROW COMPANY ACT REGULATIONS:

A. Cash surety bond:

(1) the surety bond shall run concurrent with the licensing period and shall be in the minimum amount of \$100,000.00 for the benefit of the people of the state of New Mexico;

(2) it shall be in a form devised by the director; and

(3) the escrow company shall provide the director with notice of cancellation of the bond at least fifteen (15) days prior to the effective date of cancellation.

B. A person may satisfy the requirements of Subsection A of 12.25.2.8 NMAC by depositing with the financial institutions division, in an amount equal to the surety required, a deposit consisting only of the following: cash, certificates of deposit in any financial institution doing business in the state of New Mexico which are insured by the federal deposit insurance corporation or the national credit union administration, or any combination of these. The deposit shall be accepted and held by the financial institutions division. No claimant or judgment creditor of the escrow company or escrow agent shall have the right to attach or levy upon any of the assets or securities held on deposit. The director, by order, shall have discretion to use such deposit, as follows:

(1) to satisfy any final judgment entered against the escrow company for actual damages suffered by any person by reason of any fraud, dishonesty, misrepresentation or concealment of material fact growing out of any escrow transaction;

(2) for use in the liquidation of the escrow company under the provisions of Section 58-22-27 (B) NMSA 1978 of the Escrow Company Act; and

(3) to release any or all of such deposit to the escrow company when, in the opinion of the director, such deposit is no longer required by state law.

C. Manager’s experience: The office manager of an applicant to be licensed as an escrow company under the act shall be an employee of the applicant, and shall:

(1) not have been convicted of a felony or a misdemeanor involving moral turpitude, subject to the provisions of the “Criminal Offender Employment Act,” Section 28-2-1 NMSA 1978 *et seq*; and

(2) have at least two (2) years previous escrow experience with a title company, abstract company, real estate company, trust department of a bank or any other entity conducting an escrow business; and

(3) have at least two (2) years experience in the bookkeeping or accounting field, one (1) year of which involved the handling of custodial funds while in the employ of a financial organization; or

(4) have such other experience as the director may deem acceptable.

D. Accounting controls:

(1) An escrow company shall establish and maintain on a current basis the following books and records, which shall be maintained in accordance with generally accepted principles of accounting:

(a) a separate ledger for each escrow account, which shall contain a record of all receipts and disbursements made on that particular escrow account;

(b) a general ledger and a cash receipts and disbursements journal;

(c) a control ledger with each bank the escrow company is doing business with, listing the name and account number of the buyer or obligor and recording the monies paid to the escrow company by the buyer or obligor for taxes and insurance; the control ledger shall be reconciled at least once each calendar month with the trust account(s) and copies of the monthly reconciliation accompanied by corresponding bank statements, for the three (3) months immediately preceding the license renewal, shall be remitted to the division as part of the license renewal package;

(d) trust funds held for future payments, such as semiannual or annual payments, shall be documented and reconciled showing the current balance; a separate ledger or control sheet shall be maintained, showing all trust funds collected by the escrow company and not disbursed.

(2) An escrow company shall post all receipts and disbursements to the cash receipts and disbursements journal and the general ledger. The reconciliation necessary to trace the individual transaction in an examination and shall be preserved and maintained in a logical sequence.

(3) Receipts shall be reconciled with disbursements at least once each calendar month, and a permanent record of each reconciliation and shall be retained by the escrow company.

(4) Each entry on the general ledger and the cash receipts and disbursements journal shall include a cross reference to the separate escrow ledger to which it relates. Receipts and disbursements corresponding to the same cross referenced transaction on the separate escrow ledger shall be in balance.

(5) The general ledger and cash receipts and disbursements journal shall be reconciled with the trust account at least monthly and not later than the 30th day after the last day of each calendar month. The net interim debits and credits reflected on the general ledger and cash receipts and disbursements journal shall be in balance with the debits and credits to the trust account(s) during the same time period or the differences, if any, shall be explained to the satisfaction of the director. All reconciliations shall be approved and signed by the escrow manager or by an employee otherwise designated by the escrow manager. A permanent record of each reconciliation shall be retained by the escrow company.

(6) The provisions of Paragraph (5) of Subsection C above, shall also apply to any other accounts maintained by the escrow company, provided, however, that such accounts must be reconciled monthly or as frequently as statements are issued by the depository institution.

(7) An escrow company shall submit to the director at the time of license renewal the following information for the tax or accounting year most recently closed:

(a) copy of the federal and state tax return for the year immediately preceding the license renewal or if the income and expenses of the escrow company are reported on an individual federal tax return, then the schedule C associated with the escrow company;

(b) a statement of financial condition of the escrow company prepared in accordance with generally accepted accounting principles;

(c) a statement of income and expense;

(d) a financial statement of the principal owners prepared in accordance with generally accepted accounting principles;

(e) a summary of the amount of trust funds received and disbursed each month and the amount of trust funds received and disbursed for the entire year;

a list of total number of accounts serviced and dollar amount serviced by the escrow company;

(f) reconciliations for the three (3) months immediately preceding renewal, accompanied by the corresponding bank statements; and

(g) in the event that required information is not available, the director shall use discretion as to whether a conditional license will be issued pending receipt of requisite information.

E. Records:

(1) The records of an escrow company shall include, but are not limited to:

(a) copies of all pre-numbered cash receipt forms used by the escrow company, which shall be filed in numerical order with all numbers accounted for, including voided cash receipts;

(b) all pre-numbered vouchers and pre-numbered blank checks used by the escrow company, which shall be stored in numerical order with all numbers accounted for, including voided vouchers and checks with signature blocks removed from voided checks;

(c) copies of all forms, other than checks, used by the escrow company to make transfers of funds between customer escrow accounts; and

(d) an accounting for all lost or missing receipts, checks, vouchers or transfer memos; such statement shall be renewed at least once in each calendar quarter, and shall be dated and signed by the person designated, by the escrow company, as responsible for maintaining the records required by this section.

(2) No cash shall be received in trust by the escrow company without issuing a receipt therefor. No funds shall be disbursed out of trust by an escrow company without issuing a check or obtaining a wire transfer memo or electronic confirmation from the bank to account for the transaction. All cash receipt forms and checks used by the escrow company shall be pre-numbered in consecutive numerical order and, when used, shall bear the number of the pertinent escrow account on its face.

F. Record inspection:

(1) The offices, places of business, books, records, accounts, safes, files and papers of an escrow company shall be maintained freely accessible and available for inspection or examination during normal business hours by the director or a duly authorized representative of the director.

(2) The escrow company shall, upon request, provide to the director or the director's designee, continuing authorization to certify the actual balance in any trust account. Such authorization shall be placed on file with the depository institution in which the account is maintained and a copy filed with the director. The director shall give twelve (12) hours advance notice to the escrow company before using the continuing authorization unless waived by the escrow company.

(3) Section 58-22-19 NMSA 1978 of the Escrow Company Act provides that division examination reports, financial information contained in licensee applications and renewal applications and information on investigations relating to violations of the Escrow Company Act that do not result or have not yet resulted in administrative, civil or criminal action are not subject to the Inspection of Public Records Act, are not subject to subpoena, and may be disclosed only with the consent of the director.

G. Preservation of records: An escrow company shall preserve for at least six (6) years all bank statements of its bank accounts and all records required by these regulations.

H. Trust fund accounts:

(1) All money deposited in escrow shall be deposited and maintained in a federally insured bank, savings and loan association or credit union and kept separate and distinct and apart from funds belonging to the escrow company or escrow agent. Such funds, when deposited, are to be designated as trust funds, indicating that the funds are not the funds of the escrow company.

(2) The escrow company shall notify the director in writing of the opening and closing of pooled trust accounts within ten (10) days following the date of opening or closing. The notification shall include the licensed name of the escrow company, the name of the bank, savings and loan association or credit union, the number of each account opened or closed and the designation for each account opened.

(3) Each escrow company shall maintain a permanent record of all investments of trust funds, including, but not limited to, amounts and dates of deposits and withdrawals, copies of certificates of deposit, corresponding debits and credits to affected trust accounts, and amounts and dates of interest earned or credited.

(4) Trust funds are not subject to execution or attachment on any claim against an escrow company.

I. Written escrow instructions:

(1) An escrow company or escrow agent may not accept funds, property or documents in escrow without dated, written escrow instructions from the principals to the transaction, or their agent, or a dated executed agreement in writing between the principals to the transaction.

(2) An escrow company or escrow agent may not close an escrow or disburse any funds or property except as provided by Paragraph (6) of Subsection I of 12.25.2.8 NMAC without obtaining dated escrow instructions in writing from the principals to the transaction or their duly appointed agent, adequate to administer and close the transaction, or, in the case of disbursement, to disburse the funds and property.

(3) An escrow company or escrow agent may not solicit or accept any original, amended or supplemental escrow instructions containing any blank to be filled in after signing. An escrow company or escrow agent shall not allow any alteration of original, amended or supplemental escrow instructions, unless the alteration is signed or initialed by the principals.

(4) If a real estate contract or promissory note which is the subject of an escrow provides for a late payment fee, the fee shall be treated by the escrow company as the property of the payee, unless expressly stated otherwise in the contract, note or written escrow instructions.

(5) An escrow company, except a company acting as an escrow closing agent as defined in these codes, shall use, deliver or transfer documents or other property deposited in escrow only in accordance with the written instructions of the principals to the escrow transaction or pursuant to an order of a court of competent jurisdiction.

(6) If an escrow agent receives conflicting demands from the parties, regarding the performance of duties, the escrow agent may hold any money or documents related to the conflicting demands. The money or documents may be held until mutual instructions, that resolve the conflict, are received by the all parties to the escrow or until a civil action has been finally concluded in a court of competent jurisdiction determining the rights of all parties to the escrow. In any civil action commenced to resolve the conflicting demands of the parties to the escrow, the escrow agent may recover a reasonable amount of attorney's fees and costs.

J. Restriction on escrow clients:

(1) When an escrow company is appointed by the parties to an escrow as their mutual or dual agent, the escrow company shall not act with partiality to any of the parties to the escrow.

(2) An escrow company shall not act as an escrow agent in any escrow transaction in which it or any of its owners, officers, directors, partners or employees may directly or indirectly have a monetary or title interest in the real property either as buyer or seller, unless the escrow company upon acquiring knowledge of the existence of an interest discloses that interest to the parties to the escrow.

(3) An escrow company shall not act as escrow agent in any transaction in which the escrow company is related to any party to a promissory note, mortgage, deed of trust, real estate contract or other debt instrument for which the escrow company acts as escrow agent, unless the escrow company, upon acquiring knowledge of the existence of a relationship, fully discloses such relationship to the parties to the escrow.

(4) An escrow company, upon acquiring knowledge of either an "interest" as described in Paragraph (2) of Subsection J of 12.25.2.8 NMAC, or a "relationship" as described in Paragraphs (3) and (5) of Subsection J of 12.25.2.8 NMAC, shall:

(a) immediately upon receipt of the escrowed documents, deliver or cause to be delivered to the parties to the document a written notice disclosing the nature and extent of the relationship; the notice shall contain substantially the following statement: "we call this interest (relation) to your attention in order to be perfectly open and fair with you; this interest (relation) will not, IN OUR OPINION, prevent us from being a fair and impartial escrow agent in this transaction; nevertheless, you may request that this transaction be handled by some other escrow company or agent if you so desire";

(b) obtain proof of a receipt from each party to whom the notice is delivered;

(c) maintain a separate file of all notices delivered and proof of receipt obtained pursuant to this section;

(d) if, within ten (10) business days after delivery of a notice of disclosure required by this section, any party to the document requests in writing that the file be transferred to another escrow company or agent, then the escrow company shall permit such transfer, without imposing any additional fees against the party.

(5) For the purposes of this section, an escrow company shall be deemed to be "related" to a party if:

(a) the escrow company is owned in whole or in part by the party or by an owner, officer, director, partner or an employee of the party;

(b) the escrow company or any of its owners, officers, directors, partners or employees owns, in whole or in part, a party which is a legal entity;

(c) any owner, officer, director, partner or employee of the escrow company is also a party or is an owner, officer, director, partner or an employee of a party; and

(d) any owner, officer, director, partner or employee of the escrow company is related by blood or marriage to a party, or to any owner, officer, director, partner or employee of a party which is a legal entity.

K. Required notice to the director:

(1) Except as otherwise provided, an escrow company or escrow agent shall notify the director of:

(a) the entry of a judgment against the escrow company in any civil action involving the alleged misconduct of the escrow company or escrow agent in an escrow transaction;

(b) the entry of a judgment against an officer, director, partner, employee or owner of the escrow company involving the alleged misconduct of the officer, director, partner, employee or owner in an escrow transaction handled by the escrow company or escrow agent; and

(c) the entry of a conviction judgment by a court of competent jurisdiction in any criminal proceeding involving the alleged misconduct of the escrow company or of any officer, director, partner, employee or owner of the escrow company or escrow agent in an escrow transaction handled by the escrow company or escrow agent.

(2) The notification to the director required by Paragraph (1) of Subsection K of 12.25.2.8 NMAC shall be in writing and shall include a brief description of the escrow transaction involved and the names of the principals. In a civil action, the notification shall include a copy of the conviction judgment entered.

(3) The notification of the director required by Paragraphs (1) and (2) of Subsection K of 12.25.2.8 NMAC shall be made within ten (10) business days after the date of entry of the judgment. Notification shall include whether or not the judgment has been or will be appealed. If a judgment is appealed, each subsequent decision of an appellate court shall be subject to the notification requirements of this section.

L. Required notice to parties to an escrow account:

(1) Within ten (10) business days of a written request made by a party to the escrow agreement, a licensee shall provide a full statement of the escrow account, setting forth credits to principal and interest for the period and other information requested.

(2) Within ten (10) business days following a buyer depositing the final payment on an account, the licensee shall send a notice to the seller and the buyer of property, containing a final statement of account, which statement shall disclose at a minimum the following:

- (a) the names of the all sellers and all buyers on the account;
- (b) the address or legal description of real property or a definitive description of the property if it is not real property;
- (c) a statement that the account was paid in full;
- (d) the amount of the final payment;
- (e) the date that the final payment was deposited with the licensee; and
- (f) the date that the final payment was or is expected to be disbursed by the licensee; money shall be disbursed within five (5) business days of the money becoming available to the licensee.

(3) A copy of the notice required by this section shall be retained by the licensee and shall be available for examination by the director pursuant to Section 58-22-17 NMSA 1978.

M. Unauthorized business practices: In addition to the unauthorized business practices listed in Section 58-22-26 NMSA 1978 as amended, it shall be an unauthorized business practice for an escrow company to do the following:

- (1) refuse to provide to any party to an escrow account, upon written request, any information pertaining to that party's escrow account such as the date a payment was received and disbursed, a history which provides all details as to monies received and disbursed and amount applied to interest and principal, and copies of the escrow instructions;
- (2) arbitrarily charge higher fees to individuals who transfer their escrow account from one (1) escrow company to another;
- (3) assess escrow fees without notifying in writing all parties to the escrow account to be charged;
- (4) borrow or otherwise appropriate trust funds for the use of the escrow company, escrow agent or its owners, officers, directors, partners or employees; or
- (5) operate a trust account which for any reason is unable to meet its current obligations.

N. Escrow fees: Escrow fees charged by the escrow company for collection or disbursement shall be withdrawn from any trust account within two (2) business days after the fees become available, except that if escrow fees are recorded on a fee ledger separate from the account ledger they shall be withdrawn from the trust account no less than once each month. The check or voucher used to withdraw the escrow fees shall disclose the pertinent escrow account number and the amount of each fee included in the check total.

O. Escrow closing agents: The following requirements shall be applicable to escrow closing agents.

(1) All funds received in conjunction with an escrow closing shall be considered trust funds and shall be placed in a trust account. All trust funds received into escrow shall be deposited in the trust account no later than the close of business of the business day following the date of receipt, unless the escrow closing agent is instructed in writing by all principals to the transactions to delay such deposit.

(2) Immediately upon deposit of trust funds, the escrow closing agent shall create and maintain a separate ledger dedicated to each individual escrow upon which funds have been received. The escrow closing agent shall close and escrow only upon specific written instructions from all principals to the transaction. Such written escrow instructions shall be in the form of loan closing instructions from a lender in the case of loan closings or by any other specific document executed by all principals to the transaction which incorporates instructions for closing.

(3) Upon completion of an escrow transaction, an escrow closing agency shall deliver to each principal to the transaction, an appropriate, duly verified statement of the applicable escrow account in writing. The statement shall specify all receipts and disbursements of escrow funds for that account and shall include to whom made.

(4) All documents furnished to or prepared by the escrow closing agent together with the escrow closing agent's accounting records shall be retained for a period of not less than six (6) years.

P. Internal controls: An escrow company shall maintain the following:

- (1) an operations guide containing detailed daily operating procedures of the escrow company;

(2) written procedures regarding cash controls and deposit policies; written procedures including, but not limited to, accepting payments, cash accounting, handling and safeguarding, separation of duties; written procedures regarding dual controls and security;

(3) an employee manual that includes definitive information on employee positions and duties.

[12.25.2.7 NMAC - Rp, 12 NMAC 25.2.7, 7/1/15]

HISTORY OF 12.25.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center under:

Regulation 84-2, Escrow Company Act Regulations, filed 12/12/84.

Regulation 87-4, Escrow Company Act Regulations, filed 6/11/87.

History of Repealed Material:

12 NMAC 25.2, Escrow Company Act, filed 9/17/97 - Repealed, effective 7-1-15.