

PROPOSED CRITERIA FOR EVALUATING HOME BUYER CONTRACT FORMS¹

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Form: Is the contract readable and understandable?

- **Length:** The contract should be written solely for home purchasers (excluding renters).² It should not include marginal provisions designed solely to protect the interests of the broker.³ And the agency agreement should be in a separate document.⁴
- **Type size:** Most courts recommend 12-point. Any size smaller will be difficult for some people to read.⁵
- **Organization:** The most important information, including compensation arrangements, should be at the beginning of the document and clearly labeled.
- **Plain Language:** The contract should be written so that it can be understood by home buyers. It should not contain words and language that can be understood only by lawyers.

Content: Is the content of the contract fair to home buyers?

- **Length of Contract:** The contract should clearly state the expiration date.⁶
- **Termination of Contract:** Brokers have the right to terminate contracts at any time; buyers should have the same right with no fees charged.⁷
- **Compensation, Disclosure:** The contract should state prominently that the broker fee is not set by law and is fully negotiable.
- **Compensation, Commission:** The broker's fee should be clearly stated, always as a dollar figure or as an hourly rate.⁸ It should also state that the buyer broker can receive no additional compensation for facilitating the sale.⁹
- **Compensation, Fees:** In a home sale, any additional fees should be deducted from the commission.¹⁰
- **Compensation, When Owed:** Only upon successful closing of the sale.¹¹
- **Compensation, Continuing Obligation:** A buyer can be obligated to compensate a broker who earlier showed a home that was purchased after the contract ended. But this obligation should last for a reasonable period of time, no more than 60 days.
- **Seller Concessions:** Any concessions should be approved by and paid to buyers not brokers, then disposed of by buyers as they see fit.¹²

- **Dual Agency:** Dual agency should not be pre-approved by the contract. If a dual agency situation arises – e.g., the buyer wants to purchase a listing of their agent – written buyer approval should be secured at this point.¹³
- **Conflict of Interest:** The contract should explain how the broker treats different buyer clients interested in the same property.¹⁴
- **Buyer Remedies:** There should be no limits on buyer remedies. Buyers should not be required to submit first to mediation or arbitration to pursue a grievance.¹⁵

¹ The criteria focus on the forms, not always on recommended broker practices. The latter are sometimes included in the notes. For example, one criterion is that the contract state an expiration date but does not specify what that date should be. However, in the note it is recommended that the contract not last longer than six months.

² Including renters and others increases the complexity and unreadability of the contract. Buyers will be less able to understand a contract where “Buyer means Broker’s principal as purchaser, lessee, optionee, or exchanger, including any entities by which the principal has any financial interest to control.”

³ The following clauses, which also increase the unreadability of the contract, are mainly intended to protect buyer brokers and agents: limits on broker’s authority and responsibility, referral to third party vendors, due on sale, entire agreement, FIRPTA, force majeure, heirs and assigns, no imputed knowledge, statute of limitations, cyber-fraud warning. None of these clauses are included in the fairest contracts unless required by state law.

⁴ Agency agreements – which define the relationship between broker and customer or client – need special attention with some states having approved specific forms that define this relationship.

⁵ The author sees the irony related to these notes, which are intended not for consumers but for professionals.

⁶ The Consumer Federation of America (CFA) suggests that buyers request a three-month contract and recommends that they never sign an agreement for more than six months.

⁷ The recently adopted buyer contract by eXp states: “Either party may cancel this agreement, effective upon delivery of written notice to the other part, unless Buyer is under contract to purchase the Property.” Adequate protection to brokers is provided by the “continuing obligation” clause.

⁸ Some consumers do not understand percentages, and a large number fail to comprehend the actual dollar cost of broker compensation expressed as a small percentage of a sale price, as a new CFA report (to be published in August 2024) will reveal. Furthermore, buyer broker compensation should not rise with the sale price. If anything, there should be a financial incentive for buyer brokers to negotiate a lower sale price.

⁹ Buyer broker compensation beyond that negotiated with the buyer is prohibited by the litigation settlement, criticized by a U.S. Department of Justice Statement, and frowned upon by the National Association of Realtor Code of Ethics.

¹⁰ CFA sees no role for additional administrative or processing fees, typically ranging between \$300 and \$900, often charged by brokers in some areas. Yet, CFA does think it reasonable for buyer brokers, who provide essential services to potential buyers that do not result in home purchases, to charge reasonable amounts for these services, for example, a \$50 charge for showing a home. Regardless, we also believe that these charges should be deducted from (i.e., credited to) commissions.

¹¹ Buyers need to be protected from aggressive agents that try to push clients into sales about which they have qualms so then seek to withdraw. Brokers can protect themselves by being sensitive to client needs and concerns. They could also reconfigure compensation agreements to ensure some payment for services actually rendered, such as showing properties.

¹² In the near future, absent easy buyer financing of buyer agent compensation, many sellers will end up helping buyers provide this compensation. But there should be no contractual seller offers of compensation. Buyers, in their offers, should request funds they can use to pay the buyer broker compensation they have negotiated. In many cases this amount will be added to the sale price.

¹³ Dual agency, an oxymoron, is prohibited by eight states and must be contractually approved in almost all others. Dual agency, which typically occurs when a listing broker finds a buyer or a buyer wants to purchase their broker's listing, requires the broker to then facilitate the purchase without advantaging either party. Both sellers and buyers are much more likely to understand dual agency if they do not pre-approve it but consider it as an option when a dual agency situation arises.

¹⁴ Buyer agents with two or more clients desiring the same property face conflicts of interest. This is a complex issue without easy resolution. For example, some brokers will submit only the first offer made while others will submit offers from all clients. However, broker policy on this issue should be spelled out in the contract.

¹⁵ Mediation, which does not limit legal remedies, is far preferable to binding arbitration, which does. But if a mediation option is presented, it should be discussed with and initialed by buyers.