

## **EXPLANATION OF 2010 BUYER AGENCY AGREEMENT AGENTS FOR HOME BUYERS LLC**

### **Background**

Colorado law requires a written contract to establish an agency relationship between a home buyer and a real estate licensee. In the absence of a contract, the law says that the licensee is working as a “transaction broker,” a legal status that requires them to act as a neutral broker between the buyer and seller. As a transaction broker, they are prohibited from promoting the interests of the buyer, attempting to negotiate price and terms favorable to the buyer, or counseling the buyer about the material risks and benefits of a property or transaction. At Agents for Home Buyers LLC, we are committed to representing the interests of the buyers we work with, so we must have a written buyer agency contract before we begin working with a client to locate, evaluate or negotiate on specific properties.

The Colorado Real Estate Commission, an agency of the Colorado government that is charged with the task of protecting Colorado real estate buyers and sellers, provides standardized forms for all real estate related contracts and requires that all real estate agents use them. Thus, we use the Commission’s standard buyer agency form as the basis for our written agreement with buyer clients, but make extensive deletions and additions to this form both because it is so vague on many key points and because it doesn’t match up well with many of our business practices as EBAs. The purpose of our writing here is to explain why we make the changes we do and to highlight important points about our version of the buyer agency agreement.

### **Mutual Commitment**

By signing the contract, the Buyer commits to work exclusively with us in their home search (see Section 1). If the Buyer wants to work with another broker while under contract with us, that needs to be discussed and an agreement outlined clearly in Section and Section 9 of the agreement.

The Broker, which is defined in Section 3.3 as all members of the Agents for Home Buyers, commits in turn to promote the Buyer’s interests in the course of locating, evaluating and purchasing a property (see Section 6). Section 5 of the contract outlines the basic brokerage duties shared by all licensees working with a buyer, whether they are working as “buyer agents” or “transaction brokers,” commitments which include facilitating communications between the buyer and seller, keeping track of their money and other property, keeping confidential information confidential, and so on. Section 6 outlines the duties that are required of the buyer agent and prohibited for the transaction broker.

Colorado agency law states that the Brokerage Firm (Agents for Home Buyers LLC) has no agency relationship with the Buyer and that specific brokers must be appointed to represent the Buyer. This is reflected in the language of Section 2.1 of the contract. Since we work as a team with each of our buyer clients, we name all members of the Agents for Home Buyers team to represent the Buyer ask their Broker in Section 3.3.

## **How We Get Paid**

Section 7 (Compensation of Brokerage Firm) of the standard form is designed to establish an agreement between the Buyer and the Broker specifying how the Broker is going to get paid for their services. Given the high monetary stakes involved, and the wide variety of situations that can arise in the course of real estate transactions, we don't think it's possible to establish a clear compensation agreement using the standard language of this section. Therefore, we delete most of Section 7 and outline our compensation agreement in Paragraphs B, C, D, E, F, G, and M of the Additional Provisions (Section 18).

We have attempted to summarize that agreement in Paragraph B of Section 18. Generally, we are paid by the listing company or the seller, not the Buyer. We have accepted compensation directly from a buyer only once since 1992, a partial payment of commission that amounted to \$400. In Section 18, we outline several situations that could result in the Buyer paying part or all of our compensation, but it is our responsibility to alert the Buyer when they are reaching a point in a transaction where they might be assuming an obligation to pay our commission and to confirm with the Buyer that this is what they want to do.

While Section 18 contains the core of our compensation agreement, Section 3.5 and Section 7 of the standard form express some key points as well. In Section 3.5, the standard form defines the word "Purchase" to include not only the acquisition of an ownership interest in a property, but (1) entering into a contract to purchase a property, and/or (2) signing a lease on a property. We delete the references to contracts and leases in Section 3.5. By doing this, we narrow the definition of "Purchase" to its more normal meaning, that is, the acquisition of an ownership interest in a property. The meaning of the word "Purchase" is critical here because Section 7.2.1.3 states that the Broker is due compensation (what they call a "Success Fee") at the moment that the Buyer "Purchases" a Property. Thus, the Commission's standard form creates potential obligations for the Broker to be paid compensation not only when the Buyer buys a property, but when they lease one or enter into a contract to purchase one. By narrowing the definition of "Purchase" in our agreement, we make it clear that we are due compensation only when the Buyer actually acquires ownership rights to a property. This is consistent with our editing of Section 7.2.1.3, which eliminates any possibility that we will be due a commission if the Buyer defaults on the purchase contract.

## **The "Holdover Period"**

The standard language of the Commission form in Section 7.5 results in a potential Buyer obligation to pay a commission to the Broker on any property that the Broker has provided the Buyer information on during the term of the agency contract. We narrow this potential obligation here to properties for which we've submitted an offer during the term of the contract.

In Paragraph A of Section 18, we give the Buyer the right to terminate the buyer agency agreement at any point they want to. For us, this creates the potential risk that a Buyer could use our services for a year or two, find a property, get it under contract, work the process through to the closing table, terminate our buyer agency agreement, and then either buy the property on their own or buy it with another broker who would be paid the commission. Our intent in Paragraph F of Section 18 and in our revisions of Section 7.5, is to continue to allow the Buyer to terminate the agreement at any point they like, but to establish an agreement that they will pay us a minimal 2.0% commission if they do this and then buy the property within the next year after we've submitted an offer on a property for them or after we've located a property for them that was not openly listed for sale.

### **The Term (or Time Frame) that the Buyer Agency Contract is in Effect**

Section 3.6 of the contract requires that the Broker and the Buyer specify a time frame during which the contract will be in effect. Under the standard terms of the contract, this “term” is critical, since the Buyer is locked into the contract working with this Broker during the term specified in Section 3.6. In Paragraph A of our Additional Provisions (Section 18), we allow both the Buyer and the Broker to terminate the contract at any time, subject only to the limitations outlined in that Paragraph A and Paragraph F.

### **Conflicts of Interest**

Our “Exclusive Buyer Agency” (EBA) business model, which commits us to representing only buyers and never listing properties for sellers, eliminates many of the most troubling conflicts of interest inherent in more traditional real estate practices, particularly those that arise in attempting to represent the interests of both the buyer and seller in the same transaction. Still, we can run into problems where we have two or more buyers interested in the same property or where we have a buyer interested in a property owned by someone creating a conflict of interest for us (e.g., another buyer client, one of our agents, or a family member or a close business associate). We attempt to clarify how we handle these potential conflicts of interest in Paragraphs I, J, K, L, and M of Section 18 (Additional Provisions). In general, where we encounter these conflicts, our practice is to inform the Buyer(s) involved and refer the Buyer(s) out to other real estate brokers (or attorneys) for representation where we haven’t already submitted an offer on the behalf of one buyer or another. That is, our practice is to forego income in order to ensure that the buyer is properly represented.

As a practical matter, these conflicts do not arise frequently. Since 1992, we have only had to refer two buyers to other brokers under these circumstances. While being referred out to another broker can create some difficulties for the Buyer, we feel strongly that this is better than the common industry practice of continuing to work with the buyer (and receive full commissions) even in cases where serious conflicts of interest exist. The Commission sanctions these common practices in language of the standard form. Section 4.3.1.2, for example, authorizes the Broker to continue working with a buyer as a transaction broker even when buyer is purchasing one of the Broker’s own listings. Similarly, Section 5.4 authorizes the broker to represent two competing buyers who are making offers on the same property. We are convinced that these practices are not in the interest of the buyer and delete this language.

### **Notes on Other Changes We Make to the Standard Commission Form**

- Section 3.4 Property: The language we include here is intended to limit our responsibility so that we are not required to search for property beyond the areas in which we normally work.
- Section 3.5.2: Since we don’t normally become involved in leases, we delete this clause and other references to leases throughout the agreement.
- Section 4 (Brokerage Relationship): This section is designed to help brokers in more traditional companies specify how their agency relationships will work when they are working with both the buyer and the seller in the same transaction. Since we don’t list property for sellers, the only time we become involved in a transaction like this is when we locate a property for a buyer client that is being sold directly by the owner. In this context, we retain our buyer agency loyalty to the buyer and treat the seller as a customer. This means we must treat the seller fairly and honestly, but we have no agency relationship with them.
- Section 5.3: Since the state requires supervision of brokers by supervising broker of the brokerage firm, a Broker representing a Buyer or Seller must get their permission to share confidential information about

the parties and the transaction with the this supervising broker. This is true despite the fact that neither this firm, nor the supervising broker, has any agency responsibilities to the Buyer or Seller. Since our supervising broker (Norris Minick) is always part of the brokerage team representing our clients, we don't need this clause and we eliminate it.

- Section 5.4: We are often working with buyers whose search parameters overlap, so we have to have the Buyer's agreement that we can show properties to potentially competing buyers. However, as noted earlier, we will not assist competing buyers in attempting to purchase the same property at the same time.
- Section 7: We delete the sentence here allowing us to accept compensation in additional to normal commissions and then restate it in Paragraph E of Section 18. In that Paragraph, we commit to use any such monies for the benefit of the Buyer in the transaction, rather than to retain these monies ourselves. We don't accept bribes from the other party in the transaction.
- Section 12 and Paragraph N of Section 18: Our intent here is to commit to the Buyer that we will only disclose their identity and personal information to people who need that information in the course of the normal search process for a property or in the course of processing a contract on a property.