

SUMMARY OF NEW PRDS EXCLUSIVE BUYER REPRESENTATION AND BROKER COMPENSATION AGREEMENT (BRBC), BUYER NEEDS AND WANTS ASSESSMENT (BNWA), BUYER UPDATE AND ASSESSMENT OF IDENTIFIED PROPERTY (BNWU) AND MARKET CONDITIONS ADVISORY (MCA) FORMS

The PRDS Forms Committee has released its revised version of the Exclusive Buyer Representation and Broker Compensation Agreement (BRBC), introduced a new Buyer Needs and Wants Assessment (BNWA) that can be used with or without the representation agreement, and updated the Market Conditions Advisory (MCA).

Exclusive Buyer Representation And Broker Compensation Agreement (BRBC)

One of the significant changes to the existing Buyer Representation Agreement is that the new agreement only provides for exclusive representation. There is no option for non-exclusive representation since most brokers are not willing to enter into that type of relationship.

Other significant revisions to the BRBC include the following:

1. The BRBC can be used for any purchase, lease, option, or exchange of property. The defined term (“Acquire/Acquiring/Acquisition”) is used throughout the document to include any or all of these types of transactions. However, ¶ 9, which addresses compensation, has separate subparagraphs for the compensation payable in each of these different types of transactions.
2. Broker’s exclusive authorization extends to locating real property specified in Paragraph 2 of the agreement and/or such other real property as may be acceptable to Buyer and to negotiate terms and conditions acceptable to Buyer for the Acquisition of the Property. The term “Property” is a defined term in the introductory paragraph and includes both the Property specified in Paragraph 2 and any other Property that is acceptable to Buyer.
3. Paragraph 2 allows for the identification of “the Property” by type (residential, commercial, etc.) and/or by location (county, city, or a specific address). There is no need to include price parameters, room counts, or other potential needs and wants. That information should be provided by Buyer to Broker in the BNW or some other writing.
4. Paragraph 4 defines the Broker’s obligations. Rather than creating a lengthy list of those obligations, the Committee chose to state that the Broker’s obligation is to “exercise reasonable effort and due diligence” in performing the terms and conditions of the Agreement. The revised form also states that the Agreement is not intended to change any common-law, ethical, or statutory duties that the Broker owes to the Buyer.
5. Buyer represents and warrants in ¶ 5 that they have not entered into any other type of representation agreement and that they will not do so during the term of the BRBC. The consequence for a Buyer’s breach of this provision is that the Broker shall be entitled to the compensation specified in ¶ 9.
6. Paragraph 6 identifies the Buyer’s obligations, including the following:

- (a) providing significant information (including Buyer's needs and wants, issues, and concerns) throughout the transaction and updating that information once a specific Property is identified and/or after Buyer has received additional information or documentation, such as disclosures, advisories, reports, etc. The Buyer's information can be provided in the BNW or in any other type of document chosen by Buyer, but it needs to be in writing;
- (b) providing relevant personal and financial information and documents to assure Broker that the Buyer is qualified to purchase, but the form clarifies that Broker will not be responsible for obtaining or arranging any financing unless Broker agrees to do so in writing;
- (c) reading all of the documents provided to Buyer throughout the transaction;
- (d) investigating their needs, wants, issues, and concerns as well as those subject matters covered in the PRDS Market Conditions Advisory and San Mateo And Santa Clara County's Advisory;
- (e) retaining qualified, appropriate professionals as needed to assist Buyer in inspecting and/or investigating their needs, wants, issues, and concerns and any other subject matters otherwise indicated in the MCA and the two-County Advisory;
- (f) paying for any reports, inspections, and services obtained on behalf of Buyer;
- (g) acting in good faith; and
- (h) requesting confidentiality if that is an issue for Buyer and requiring Buyer to provide instructions if a confidentiality agreement cannot be secured from Seller and/or the Listing Agent.

7. Compensation is addressed in ¶ 9. For a purchase, compensation is paid at close of escrow of the "Property" as that term is defined in the introductory paragraph and/or in ¶ 2. If Broker receives compensation from another source, then Buyer receives a credit for that amount against the amount due to Broker. Finally, ¶ 9 contains a safety clause for the payment of compensation provided that certain terms and conditions are met.

8. In Paragraph 12, Buyer represents and warrants that all individuals who must sign on behalf of Buyer have done so and have the authority to bind Buyer to the terms of the Agreement. If Buyer is an entity, then obtaining and providing Broker with all legally required documentation to prove Buyer's authority to act is a Buyer responsibility.

9. Paragraph 13 addresses what means of communications are authorized by the parties. They include those indicated on the blank lines below each party's signature (telephone, email, text messages). Buyer can also agree to accept documents by means of a link embedded in an email unless Buyer checks a box indicating links are not acceptable.

10. Broker has the right to cancel the Agreement if Buyer does not provide all of the information required under ¶ 6 (needs and wants, issues, and concerns) and under ¶ 12 regarding Buyer's authority to act. Buyer's right to cancel is not specifically addressed because Buyer would be entitled to do so for specific failings of Broker under California law.

11. The BRBC provides that in the event of any action or claim in any forum between Buyer and Broker, each side shall be responsible for its own attorneys' fees and costs. There is no mediation clause nor an arbitration provision; these intentional omissions avoid the potential risk of a broker being contractually required to mediate or arbitrate disputes involving a buyer and seller.

12. Finally, there is no indemnity provision; instead, there is an express assumption of the risk provision. This provision applies in the event that Buyer fails to perform any or all of Buyer's obligations to Broker (¶ 6). The Buyer is advised to consult with a qualified California real estate attorney regarding the legal significance of this provision. There is an acknowledgement just above the Buyer's signature line that they have, among other things, had the opportunity to consult with a qualified California real estate attorney before executing the BRBC.

Buyer Needs And Wants Assessment (BNWA)

The National Association of REALTORS® is on record in its Buyer Representation program that Brokers should secure written information from Buyers regarding their needs, wants, issues and concerns at the outset of the agency relationship so as to enable Brokers to better represent Buyer. PRDS has created this new BNWA to facilitate the NAR recommendation.

The PRDS Forms Committee revised and finalized the BNWA and created the Buyer Update and Assessment Of Identified Property (BNWU). These forms are also available online.

Highlights include the following:

- The BNWA is a three-page form. The first two pages ask the buyer to provide information on general preferences, needs, wants, and concerns. The buyer's requested information is collectively defined as "Preferences" in the form, and that is how they are referred to in this article. There are three categories of Preferences with the following headings: (1) Personal and Financial Information, (2) Property Preferences and Concerns, and (3) Buyer's Expertise and Past Experience.
- Page three of the BNWA is to be used once the buyer has identified a property they want to acquire. At that point, the buyer is asked to review their stated Preferences (pages 1-2) and confirm that the Property they have identified meets those Preferences and/or to confirm that the buyer is still satisfied with the identified property even if it does not meet all of their Preferences. One reason for doing so is to address the possibility of a buyer later claiming that their agent is responsible for the fact that the property they purchased didn't meet their original stated Preferences.

- Page three then asks the buyer to identify any property-specific concerns or problems based upon, among other things, their review of a seller's disclosure packet, any documents and/or information they may have obtained from any other source, and their review and inspection of the property and the neighborhood. In addition, the buyer is asked to indicate whether any of their Preferences are or are not applicable to the identified property.
- The property-specific concerns or problems sections also ask the buyer to identify their desired present and/or future uses of the property (collectively defined as "Uses") and any desired repairs, modifications, or additions (collectively defined as "Changes") to the property. The last sentence of the form clearly warns the buyer that they are responsible for contacting appropriate professionals and governmental entities regarding the viability of the buyer's Uses and/or Changes. This warning is, among other things, designed to help protect agents from buyers' claims that the buyer "assumed" the agent would be doing that investigation.
- Page three of the BNWA also exists as a stand-alone, one-page form (BNWU) that is to be used in the event that the buyer identifies additional properties for potential acquisition. This stand-alone form allows the buyer to update their specific concerns or problems with each property they ultimately identify for potential acquisition.
- The information in the BNWA is confidential and, regardless of agency relationships, will not be disclosed by the broker and/or agent to anyone unless the buyer authorizes the broker/agent to do so.
- The BNWA is bundled with the BRBC. It does not, however, have to be used with that form. The BRBC recognizes that a buyer's Preferences can be provided to the broker in any document of buyer's choosing.

The BNWA is designed to assist brokers and agents in helping buyers search for and acquire property by asking buyers to identify and document their Preferences. Once a property has been identified, the BNWA will assist in the buyer's investigation and evaluation of the property. It also will hopefully eliminate potential misunderstandings on these subjects.

One additional benefit of consistently using the BNWA is that it may prevent a buyer from claiming that they were not treated fairly as required by the state and federal Fair Housing laws. Past and current Fair Housing claims against real estate agents have focused on agents seeking different information from buyers depending upon their race, color, ethnicity, or any of the other protected classifications. Typically, agents have no documentation to prove that they were seeking the same information from all buyers because agents have traditionally relied on oral discussions or incomplete written communications prompted by those discussions. Using the BNWA with all buyers will help prove that the agents are acting in compliance with the Fair Housing laws.

Finally, while the BNWA and BNWU were designed to be used in conjunction with the BRBC, they can be used when working with a buyer even if there is no Buyer Representation And

Broker Compensation Agreement. However, if you are using the C.A.R. Form BRBC buyer representation agreement, you should consider modifying that form in the Other Terms section to allow the buyer to fill out a proper questionnaire about the buyer's preferences rather than the contractually required C.A.R. BMI form (§ 7E).

Market Conditions Advisory (MCA)

Revisions were made to point out that (1) some of the additional causes of market cycles that were not previously listed, including worldwide conditions, natural disasters, and widespread health issues, (2) agents as well as brokers cannot predict market swings, (3) the insurability of a property is a factor that lenders will evaluate to determine whether to fund a loan and therefore that issue should be considered in determining what buyer contingencies are needed, (4) buyers must determine what is an acceptable risk, and agents cannot make that determination for their clients, and (5) buyers making simultaneous offers on multiple properties at the same time risk being found to have acted in bad faith which could cause the buyers to pay substantial damages. The MCA now includes a reference to acting in good faith and a reference to the definition of fair market value.