

Paragraph 5A for Broker Compensation

When owners agree to sell (or lease*) their property with a broker, the seller and broker will agree how broker compensation will be paid. The seller may agree to pay the listing broker an amount that includes compensation for the listing broker and a buyer's broker. Or the seller may agree to only pay an amount for the listing broker's fee. Brokers should discuss the benefits and challenges of both approaches with sellers. The following Texas REALTORS® listing agreements provide separate paragraphs, 5A and 5B, that can be used depending on which approach the seller and listing broker choose.

- Residential Real Estate Listing Agreement, Exclusive Right to Sell (TXR 1101)
- Residential Real Estate Listing Agreement, Exclusive Right to Lease (TXR 1102)
 - *Information applies to landlords and tenants in leasing transactions, where applicable.
- Farm and Ranch Real Estate Listing Agreement, Exclusive Right to Sell (TXR 1201)

Purpose. Paragraph 5A should be used when the seller agrees to pay compensation to the listing broker and a buyer's broker upfront.

Broker's fees. Under 5A, the seller agrees to pay the listing broker a total negotiated broker's fee that includes compensation for the listing broker and the buyer's broker. The listing broker agrees to pay a portion of that total fee to the broker that procures the buyer. The total amount for broker's fees is inserted in 5A(1). The portion of the total that will be paid to the buyer's broker is inserted in 5A(2).

Note: Under 5A, the listing broker is obligated to compensate the other broker that procures a buyer the amount specified in 5A(2). The listing broker cannot further negotiate this amount with a buyer's broker on their own. The seller would have to agree to amend the listing agreement to alter this amount.

A. Broker's Fee (with compensation for other broker):

This Paragraph 5A includes payment of compensation to the other broker working with a buyer. Complete both (1) and (2)

(1) When Earned and Payable, Seller will pay Broker (*insert total amount for Broker and other broker*):

(a) _____ % of the sales price or a flat fee of \$ _____.

(b) _____.

If Broker does not pay the other broker that procures a buyer as specified in Paragraph 5A(2), Broker's Fee in this Paragraph 5A(1) will be reduced by any amount not paid to the other broker.

(2) **If the other broker procures a buyer that purchases the Property, Seller authorizes Broker to pay and Broker will pay the other broker the following fees from amounts specified in 5A(1):**

(a) **if the other broker represents the buyer:** _____ % of the sales price or \$ _____; and

(b) **if the other broker is a subagent:** _____ % of the sales price or \$ _____.

Disclosure of broker compensation. Under 5A, the compensation paid to the buyer's broker is being paid by the listing broker, not the seller. Under 5A(3), the listing broker is automatically authorized to disclose and advertise the amount of available buyer's broker compensation. There is no checkbox or additional authorization needed. Offers of compensation paid by the listing broker can be advertised using broker's typical marketing tools, such as "for sale" signs and the broker's website. Remember, under NAR policy, offers of compensation cannot be included in an MLS. By using 5A, the seller is intending to attract buyers by offering to pay the buyer's broker's fees upfront. When buyer's agents contact listing agents about compensation, listing agents should disclose the amount in 5A(2). Withholding this information defeats seller's purpose of using 5A to attract buyers.

(3) Seller authorizes Broker to publicly disclose compensation for the other broker as specified in 5A(2).

What compensation agreement should be used to pay buyer's broker? Since the buyer's broker compensation under 5A is being paid by the listing broker, a broker-to-broker compensation agreement will be needed such as the *Compensation Agreement Between Brokers* (TXR 2402). TXR 2402 is executed between the listing broker and the buyer's broker. (*For residential leases, brokers can use the *Agreement Between Brokers for Residential Leases* (TXR 2002).)

When should the brokers execute the broker-to-broker compensation agreement? The compensation agreement should be signed before the buyer submits their offer. A buyer would need to know upfront the amount of compensation being paid by the listing broker to properly submit an offer. The terms the buyer will include in their offer regarding broker compensation will depend on whether the listing broker will pay buyer's broker compensation.

Note: The listing broker can execute TXR 2402 before the seller accepts an offer because the seller has already agreed to a specific amount of buyer's broker compensation in paragraph 5A(2). The listing broker is not obligated to pay a buyer's broker until the buyer's broker's fee is "Earned and Payable". In other words, there must be a successful transaction and the buyer's broker must be the procuring cause. In a multiple offer situation, the listing broker can execute multiple TXR 2402 compensation agreements for the same property because they will only have to pay the one broker that is the procuring cause.

B. **Earned and Payable:** Cooperating Broker's fees are Earned when Client enters into a binding agreement during the Term to buy or lease all or part of the Property at any price. Cooperating Broker's fees are Payable (i) if Cooperating Broker is the procuring cause of the sale or lease and (ii) when a lease is executed or when a sale closes, either during the Term or after it ends. Listing/Principal Broker is not obligated to pay Cooperating Broker any fee if, through no fault of the Listing/Principal Broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the Listing/Principal Broker to collect its fee under the separate agreement with Owner. **Any escrow or closing agent is authorized to pay Cooperating Broker's fee from Listing/Principal Broker's fee at closing.**

Can buyer's broker compensation still be negotiated when using 5A? Yes. If the seller originally chose to use 5A with a predetermined amount of buyer's broker compensation in 5A(2), they are still free to negotiate buyer's broker compensation when an offer is submitted. The amount in 5A(2) doesn't become binding until a compensation agreement is executed between the brokers and a sales contract is executed between the seller and buyer. **Note: Even though buyer's broker compensation can be negotiated when using 5A, if the seller intends to negotiate buyer's broker compensation on a case-by-case basis, paragraph 5B is the better choice.**

What if the listing broker isn't paying enough to cover the buyer's broker's fee? The buyer can request the seller pay an additional amount towards the buyer's broker's fee. First, the brokers should execute TXR 2402 to cover the amount the listing broker will pay the buyer's broker. The amount paid by the listing broker should be the same amount agreed to in 5A(2), unless the parties agree to a different amount. Then, the buyer can request the seller to pay any shortfall in the buyer's broker's fee when they submit their offer. For example, the buyer can attach the *Addendum Regarding Brokers' Fees* (TXR 2406) and select Paragraph D(2)(b). Insert the amount to be paid by the seller. Under this scenario, a portion of the buyer's broker's fee will be paid by the listing broker using TXR 2402 and a portion will be paid directly by the seller using TXR 2406.

D. OTHER BROKER'S FEES: Other Broker's fees will be paid as specified below, and Buyer shall pay any remaining amount due to Other Broker specified in a separate written representation agreement between Other Broker and Buyer. **(Check all that apply)**

- (1) Listing Broker shall pay \$ _____ or _____% of sales price as contained in a separate written compensation agreement between Listing Broker and Other Broker (such as TXR 2402). **(Specified amount is for informational purposes only and does not change compensation specified in separate written compensation agreements.)**
- (2) Seller shall pay: **(Check one box only)**
- (a) \$ _____ or _____% of sales price as contained in a separate written compensation agreement between Seller and Other Broker (such as TXR 2401). **(Specified amount is for informational purposes only and does not change compensation specified in separate written compensation agreements.)**
- (b) \$ _____ or _____% of sales price towards Other Broker's fees. **(Use this option only if there is no separate written compensation agreement between Seller and Other Broker. This option creates a new obligation for Seller.)**

What if the listing broker refuses to state if they are offering compensation or what amount is offered? Buyer's agents must protect and promote the interest of their client, the buyer. If the listing broker will not provide any information regarding broker-to-broker compensation, the buyer's agent must discuss the situation with their client and determine if the client wishes to submit an offer and if so, what terms to include in the offer. For example, the buyer may request buyer's broker's fees be paid directly by the seller using the *Addendum Regarding Brokers' Fees* (TXR 2406). Buyer's agents should submit the offer according to the buyer's instructions to begin negotiations.

What if the "other broker" is not paid by the listing broker? Under 5A(1), if there is another broker that procures a buyer, but the listing broker does not pay the other broker the amount specified in 5A(2), the total broker fee is reduced. This provision applies only if there is another broker! The seller agreed to pay the total broker fee in 5A(1) with the expectation that the listing broker would pay the specified amount in 5A(2) to the buyer's broker. If the listing broker does not pay the other broker the expected amount, the seller receives the benefit of the lower payment, and the total broker fee is reduced by the amount that was not paid.

Possible scenarios where this may occur:

- When the buyer chooses to pay their own broker to make their offer more attractive.
- When the buyer submits an offer requesting the seller to pay the buyer's broker's fee directly. If the seller accepts the offer, the seller is now paying the buyer's broker's fee. Since the listing broker will not be paying the buyer's broker the amounts in 5A(2), the total compensation is reduced.

If Broker does not pay the other broker that procures a buyer as specified in Paragraph 5A(2), Broker's Fee in this Paragraph 5A(1) will be reduced by any amount not paid to the other broker.

What if there is no "other broker"? Under 5A(4), if there is no other broker, the listing broker retains the total broker's fee in 5A(1). By using 5A, the seller has agreed to pay broker's fees for the buyer-side of the transaction. If there is no other broker, the listing broker will be performing additional tasks typically performed by a buyer's agent to get to a successful closing. The listing broker is entitled to retain the fees intended for the buyer-side of the transaction for this additional work. This would occur with unrepresented buyers or intermediary transactions.

- Unrepresented buyer. Since there is no buyer's agent, the listing broker will be required to perform additional duties to sell the property. Even though the listing broker is not representing the buyer; the listing broker will have to perform certain buyer-side tasks that would normally be performed by the buyer's agent.
- Intermediary. In an intermediary transaction, the listing broker also represents the buyer. The listing broker is the "other broker" that procures the buyer and is performing the additional work for the buyer-side of the transaction.

(4) Broker will retain amounts specified in 5A(1) as Broker's Fee if there is no other broker that procures the buyer, including, but not limited to, transactions where Broker represents both Seller and buyer (intermediary) or buyer is unrepresented. Amounts specified in 5A(2)(a) will be applied towards any fees a buyer has agreed to pay Broker as specified in a separate written representation agreement.

Paragraph 5B for Broker Compensation

When owners agree to sell (or lease*) their property with a broker, the seller and broker will agree how broker compensation will be paid. The seller may agree to pay the listing broker an amount that includes compensation for the listing broker and a buyer's broker. Or the seller may agree to only pay an amount for the listing broker's fees. Brokers should discuss the benefits and challenges of both approaches with sellers. The following Texas REALTORS® listing agreements provide separate paragraphs, 5A and 5B, that can be used depending on which approach the seller and listing broker choose.

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 - *Information applies to landlords and tenants in leasing transactions, where applicable.
- Farm and Ranch Real Estate Listing Agreement, Exclusive Right to Sell (TXR 1201)

Purpose. Paragraph 5B should be used when the seller only wants to pay for the listing broker's services. The seller may not want to pay any compensation to a buyer's broker or wants to negotiate buyer's broker compensation on a case-by-case basis with each submitted offer.

Broker's fees. Under 5B, the seller only agrees to pay the listing broker for their services. No compensation is being offered to a buyer's broker. The listing broker's fees are inserted in 5B(1).

B. Broker's Fee (without compensation for other broker):

(1) When Earned and Payable, Seller will pay Broker (*insert amount to be paid to Broker only*):

(a) _____ % of the sales price or a flat fee of \$ _____.

(b) _____.

Disclosure of seller concessions. Even though the seller has not elected to offer buyer's broker compensation upfront, the seller may still wish to let potential buyers know they are willing to consider paying buyer's expenses under the contract, commonly referred to as seller concessions. The listing broker needs authorization from the seller to be able to disclose and advertise that seller is open to paying concessions. The listing broker can obtain seller's authorization by checking the appropriate box in the Note under paragraph 5B. Where permitted, the listing broker can disclose this information on an MLS. For example, an MLS may have "yes" or "no" checkboxes for seller concessions. Some MLSs may also allow brokers to insert a specific amount of seller concessions. The listing broker would need to get additional authorization from the seller to disclose a specific amount. The listing broker can obtain the necessary authorization to disclose a specific amount of seller concessions by using the *Seller's Authorization to Disclose and Advertise Certain Information* (TXR 1412).

Note: Authorization to Disclose Seller Paying Buyer's Expenses. Seller does or does not authorize Broker to disclose to other brokers and prospective buyers that Seller will consider contributing an amount towards buyer's expenses, such as buyer's broker's fees or other expenses payable by a buyer under a sales contract. Seller is not obligated to pay any specific amount and has sole discretion to determine the amount Seller will pay towards buyer's expenses during negotiations with a buyer. (Use TXR 1412 to authorize Broker to disclose and advertise additional information, such as a specific amount of seller concessions.)

What compensation agreement should be used to pay buyer's broker? Since there is no compensation being paid by the listing broker, the buyer can ask the seller to pay the buyer's broker's fees directly. The seller can agree to pay buyer's broker's fees in two ways, (1) by executing a separate agreement with the buyer's broker or (2) by adding a term to the sales contract.

- Compensation Agreement Between Broker and Owner (TXR 2401). TXR 2401 can be used when the seller agrees to pay the buyer's broker through a separate agreement. TXR 2401 is

executed between the seller and buyer's broker. Under Paragraph 6 of TXR 2401, the seller will owe the buyer's broker the negotiated fee when the property closes. The seller would also be liable for the broker's fee if the seller breaches the compensation agreement or breaches the sales contract with the buyer. The seller is not required to pay the buyer's broker if either party terminates the sales contract in accordance with a specific term in the contract, such as the buyer's termination option.

Note: Buyer's agents cannot communicate directly with a represented seller when negotiating the sale or lease of the seller's property. Negotiations, including discussions regarding buyer's agent compensation related to the sale or lease, must be done through the listing broker.

- Code of Ethics, Article 16. REALTORS® cannot take any action inconsistent with the exclusive representation between the seller and the listing broker.
- Real Estate License Act (1101.652(b)(22), TX Occupations Code). License holders cannot negotiate the sale, exchange, or lease of real property with an owner with knowledge that the owner is under a written exclusive representation agreement.

6. BROKER'S FEE: Owner is not obligated to pay Broker a fee until such time as Broker's fee is Earned and Payable. Broker's fees are Earned when Owner enters into a binding agreement to sell or lease all or part of the Property at any price to Prospect or if Owner breaches this Agreement. Broker's fees are Payable in the amounts stated below at the specified times.

A. Sales:

(1) If Owner agrees to sell all or a part of the Property to Prospect at any price during the Term, Owner will pay Broker a fee equal to:

- (a) _____% of the sales price; or
- (b) _____.

(2) The fee is Payable, either during the Term or after it ends, at the earlier of:

- (a) the closing and funding of the sale or exchange of the Property;
- (b) Owner's breach of this Agreement; or
- (c) Owner's breach of a binding contract to sell the Property to Prospect.

- Addendum Regarding Brokers' Fees (TXR 2406). TXR 2406 can be used when the seller agrees to pay the buyer's broker through the terms of the sales contract. This addendum is attached to the sales contract and is executed between the seller and buyer. Check box D(2)(b) and fill out the amount of compensation the seller agrees to pay to the buyer's broker. The seller will owe the buyer's broker the negotiated fee when the property closes. If the seller breaches the sales contract (defaults), the buyer may exercise their rights under the default provision, which may include the buyer receiving the earnest money, or filing a civil lawsuit for damages or specific performance.

D. OTHER BROKER'S FEES: Other Broker's fees will be paid as specified below, and Buyer shall pay any remaining amount due to Other Broker specified in a separate written representation agreement between Other Broker and Buyer. **(Check all that apply)**

- (1) Listing Broker shall pay \$ _____ or _____% of sales price as contained in a separate written compensation agreement between Listing Broker and Other Broker (such as TXR 2402). **(Specified amount is for informational purposes only and does not change compensation specified in separate written compensation agreements.)**
- (2) Seller shall pay: **(Check one box only)**
 - (a) \$ _____ or _____% of sales price as contained in a separate written compensation agreement between Seller and Other Broker (such as TXR 2401). **(Specified amount is for informational purposes only and does not change compensation specified in separate written compensation agreements.)**
 - (b) \$ _____ or _____% of sales price towards Other Broker's fees. **(Use this option only if there is no separate written compensation agreement between Seller and Other Broker. This option creates a new obligation for Seller.)**

Listing broker's fee with an unrepresented buyer. Since the seller has only agreed to pay the listing broker for the seller-side of the transaction under 5B, the listing broker may want additional compensation for the additional work required to get a successful closing when the buyer is unrepresented. Once an unrepresented buyer transaction is contemplated, the listing broker and seller can agree to additional compensation using the *Amendment to Listing* (TXR 1404). The listing broker and seller can also add compensation for unrepresented buyers in the listing agreement using the blank line on 5B(1)(b).

Listing broker's fee with an intermediary transaction. With an intermediary transaction, both the seller and buyer have agreed to pay the broker a fee in their representation agreements. Since the seller has only agreed to pay the listing broker's fee for the seller-side of the transaction by using 5B, the buyer would be responsible for paying the broker's fee for the buyer-side of the transaction under the buyer representation agreement. If the buyer wants to request the seller to also pay their broker for the buyer-side, the buyer can attach the *Addendum Regarding Broker's Fees* (TXR 2406) to their offer. Use Paragraph E, Intermediary Broker's Fees, to include the amount of compensation the buyer is requesting the seller pay. Any amount inserted in paragraph E will be in addition to the amount the seller is already paying the broker under the listing agreement. **Note:** Do not use Paragraph D for intermediary transactions. The seller and buyer have the same broker. So, the buyer is not asking the seller to pay the "other" broker. The buyer is asking the seller to pay their broker additional compensation that will be applied to the broker fees the buyer owes under the buyer representation agreement.

E. INTERMEDIARY BROKER'S FEES: In addition to any fees Seller has agreed to pay Listing Broker in a separate written representation agreement, Seller shall also pay Listing Broker \$_____ or _____% of sales price. Amounts specified in this Paragraph E shall be applied towards any fees Buyer has agreed to pay Listing Broker in a separate written representation agreement. Buyer shall pay any remaining amount due to Listing Broker specified in a separate written representation agreement. *(Use this option only if Listing Broker represents Seller and Buyer as intermediary. This option creates a new obligation for Seller.)*