

Agency Frequently Asked Questions (FAQ's)—UPDATED 6/29/05

These FAQs have been prepared by the Greater Boston Real Estate Board and the Greater Boston Association of REALTORS® based on questions that the Board has received. Answers have been drafted and/or reviewed by outside counsel. If you need specific assistance of guidance, please consult your own legal Counsel.*

This Week's Top Questions

Rewriting/Re-executing Contracts written before 7/1

Does the new agency law require me to rewrite and re-execute listing and buyer representation contracts signed prior to July 1, 2005?

No. The new law and regulations do not require brokerage agreements signed before July 1st to be re-executed. The Board of Registration of Real Estate Brokers and Salespersons has made it clear that contracts executed prior to July 1, and lawful under the old agency law, remain in full force and effect after July 1 until such time as the contract is *extended* or *renegotiated*.

Reissuing Disclosure Forms

Does the new Agency Law require me to reissue disclosures provided before July 1, 2005?

No. However, because the new law requires the seller to consent to potential vicarious liability for the acts of a subagent, listing brokers who intend to continue to offer compensation to subagents for listing agreements signed before 7/1 may wish to get written permission from the sellers to continue to offer subagent compensation. If your firm has determined that it will no longer offer subagency after July 1, 2005, but listing contracts signed before July 1 obligate you to pay subagent compensation, before you withdraw your offer of subagent compensation, you should (1) inform sellers of the change and reasons for the change and (2) get written permission from the seller to change the original contract.

Mandatory Education Requirements for Buyer Representation

Does the new agency law require licensees to take a buyer representation course or designation program (such as the ABR course) prior to July 1, 2005, or before acting as a buyer's agent?

No. Nothing in the state law (or the REALTOR® Code of Ethics) requires that a licensee complete specific training or obtain a specific designation as a condition of representing buyers. License law does require that a licensee be competent, which has prompted many real estate firms to adopt office policies requiring agents to be trained in buyer representation before acting as a buyer's agent. Internal training policies are typically implemented to reduce liability by ensuring that agents fully understand their role as a buyer's agent.

New GBREB Listing Forms

GBREB's new listing agreements include a fill-in for "Tax ID." What is this?

The "TAX ID" is the "Tax Parcel ID" used by the municipalities and often referenced by attorneys. Depending on the municipalities, the Tax ID may also be called a "Ward Parcel" or "Map Lot Block." This label will be clarified when the listing forms are reprinted.

1. Is filling out the new Mandatory Consumer Licensee Relationship Disclosure form different than filling in the old Mandatory Agency Disclosure form, and why has the name changed?

The new Mandatory Consumer Licensee Relationship Disclosure form is not called an “agency” disclosure form because the form includes the option of disclosing the “non-agency” role of facilitator. Also, the new form clarifies that a facilitator must hold a real estate license.

The primary distinction between the new form and the old form is the information that agents are now required to provide. Completing the new form requires licensees to:

- A. Identify their status in the transaction as a **Seller’s Agent**, a **Buyer’s Agent** or a **Facilitator**.
- B. Fill-in the *name of the real estate firm* and the *firm’s license number* (if a DBA, the license number of the broker of record is entered).
- C. If acting as a buyer’s agent or seller’s agent (not as a facilitator), the licensee MUST identify the *firm’s agency policy*, that is, whether the agency relationship extends to the entire firm (check **seller or buyer agency, not designated agency** option) *or* only to those agents designated by the firm to represent a seller or buyer (check **designated seller or buyer agency** option).
- D. Sign the form and fill-in his/her name, license number and type, and date.
- E. Have the consumer(s) sign the form. If the consumer refuses to sign, the consumer or licensee must check the appropriate box at the bottom of the form.

2. When do I obtain consent to Designated Agency and/or Disclosed Dual Agency?

Under the old agency law, agents had to wait until the actual conflict of dual agency occurred in order to obtain “informed written consent.” Under the new law, informed consent may be obtained either *in advance of* or *at the signing* of a listing contract or buyer representation agreement. Once **consent** has been obtained, the agent must give **notice** to seller and the buyer when Designated Agency or Disclosed Dual Agency actually occurs. GBREB has created separate *consent* and *notice* forms so agents can provide “up front” consent to Designated Agency and Disclosed Dual Agency, followed by appropriate notice if and when Designated Agency or Dual Agency occurs.

3. I have always offered compensation to subagents as a listing broker. May I continue to offer subagent compensation under the new law, and if so, what must I do to comply with the new law?

Yes, you may continue to offer compensation to subagents under the new law. When the new law goes into effect on July 1, however, listing brokers MUST obtain written consent from the seller in order offer Subagency. The new law requires that listing brokers explain the potential for seller(s) to be held vicariously liable for the acts of subagents and obtain written permission from the seller to offer Subagency. The seller’s consent can be in a separate form or included in the listing agreement itself. GBREB’s new listing agreements include necessary consent language for Subagency. Listing brokers also must obtain the seller’s *consent to continue to offer Subagency* when a listing contract is *extended* or *renegotiated*.

4. What is vicarious liability and how do we explain it to our clients and obtain their consent to offer Subagency?

“Vicarious liability” refers to liability of a person that may result from acts, omissions and misstatements of their agent or subagent. The new agency regulations provide specific language required for obtaining authorization to offer Subagency: *“Vicarious liability is the potential for a seller or buyer to be held liable for a misrepresentation or an act or omission of the subagent and that the seller authorizes the broker or salesperson to offer subagency in the signing of the notice.”* **254 CMR 3.00(13)**

This language may be: (1) included in a listing agreement, (2) attached as an addendum to the listing agreement, or (3) included in a separate consent form. *(In those rare instances where a buyer's broker desires to offer Subagency to other licensees, written consent from the buyer must be obtained, using the language above, but substituting "buyer" for "seller.")* If you use this language, and the seller (or in rare cases the buyer) authorizes you to offer Subagency, you have complied with the new law. GBREB has incorporated this language in its new listing agreements.

5. Did the new law create vicarious liability in Subagency?

No. Principals – and sellers – have always been liable for the acts of agents and subagents. The new agency law simply requires that sellers be informed of their potential liability for acts, misrepresentations and omissions of a subagent and sellers must grant expressed written consent to offer Subagency. In the absence of the seller's consent, Subagency may not be offered.

6. What is Facilitation and what is the role of a facilitator?

Facilitation is defined as a non-agency relationship in which a licensee assists buyers and/or sellers in a transaction by showing properties, conveying information and offers, and helping a buyer locate properties, attorneys and lenders. Because facilitation is a non-agency relationship, a licensee acting as a facilitator represents neither the buyer nor the seller and may not actively negotiate for either party. Facilitators may not recommend a home inspector to a buyer.

7. GBREB has revised its Facilitation Agreement – what does it say and how is the new agreement used?

The revised Facilitation Agreement functions essentially as an open listing where the licensee agrees to use reasonable efforts to locate a buyer, but the relationship with the seller is that of customer. Because the facilitator relationship is not exclusive, the facilitator is not seeking to cooperate with other brokers. In the event the seller wishes to hire the facilitator as a seller's representative, the Facilitation Agreement may be cancelled and the seller and licensee can enter into an exclusive representation agreement. The agreement allows the broker to terminate the facilitation agreement in order to represent a buyer provided that the broker notifies the seller in writing.

8. Since a facilitator does not have an agency relationship with the buyer or the seller, can a licensee show a property to a buyer as a facilitator and later become a buyer's agent for the same buyer and same property?

Yes, there is no conflict in making the change. Since a facilitator has not undertaken agency duties for the seller, the seller was a customer of the facilitator during the initial relationship and remains a customer when the licensee becomes a buyer's agent. Written disclosure of the new role should be given immediately to the seller and listing agent with a new Mandatory Consumer Licensee Relationships Disclosure form. *(Note: The facilitator has no obligation of confidentiality unless specifically agreed. If a facilitator has voluntarily undertaken to keep information confidential, and the seller has provided confidential information to the licensee when the licensee was acting as a facilitator, the agent MUST inform the buyer client that confidential information shared by the seller may not be disclosed and that this may limit the agent's ability to provide "full disclosure" to the buyer.)*

9. May I act as a facilitator with a buyer on some properties and as a buyer's agent on other properties, depending on what the listing agent is offering for compensation?

Yes, but this is not recommended. Frequent changing between agency and non-agency relationships may be confusing to the buyer and could expose you and your office to potential liability. Uncertainty may arise in the mind of the buyer since you agreed to advocate the interests of the buyer on some properties but not on others. Also, you would need to provide different Mandatory Consumer Licensee Disclosure forms for each

property. Further, confidential information received as a buyer's agent must not be disclosed when acting as a facilitator.

10. May I act as a facilitator with a buyer on some properties and as a seller's agent on others, depending on what the listing agent is offering for compensation?

Yes, but again, it is not recommended. Frequent changes from an agency to non-agency relationship may be confusing to the consumer. The least confusing use of serving as a seller's agent and facilitator is the situation where an agent gives disclosure explaining that they are a seller's agent on in-house transactions, but will act as a facilitator in cooperative transactions. A different Mandatory Consumer Licensee Relationship form should be used depending on the relationship with the consumer. Also a firm may require written explanation to the consumer and the consumer's written acknowledgement of the agent's role. Generally speaking, switching roles creates confusion and potential liability.

11. If I am working with a buyer when another agent in my office is the listing agent for the seller, am I a dual agent?

The answer depends on two factors: 1) your relationship with the buyer, and 2) your firm's agency policy.

If your firm practices Designated Agency, you may act as the designated buyer's agent for that buyer (or as a facilitator, if your company allows Facilitation).

If, on the other hand, your firm has not adopted a Designated Agency policy, then the agency relationship is with the entire firm. When the listing agreement was signed, the listing agent established seller's agency for the firm and, provided you have no previous agency relationship with the buyer, you can simply act as the seller's agent, giving them a Consumer Licensee Relationship Disclosure indicating your role and the firm's role as a seller's agent. If you have a client relationship with the buyer, then the entire firm likewise represents the buyer and you may only show one of your company's listings to a buyer client if you have received Consent to Dual Agency. The new law allows you to receive Consent to Dual Agency at the time of signing the listing agreement or buyer representation agreement. Where the seller and the buyer have previously given Consent to Disclosed Dual Agency, you must provide them with a Notice of Disclosed Dual Agency when the dual agency conflict occurs. If the buyers and sellers have not previously given their informed consent, Consent to Dual Agency must be obtained. (Note: Subagency always indicates an *external* relationship. When a seller hires a firm in a traditional agency relationship, i.e., all agents working with the firm represent the seller, only agents from an external firm are subagents. Agents within the firm, whether the listing agent or not, are working on a "direct sale" when they work with buyers with whom they do not have a previous buyer representation agreement.)

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