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NEW MEXICO ASSOCIATION OF REALTORS® — 2026
INFORMATION SHEET –
INDEPENDENT CONSIDERATION

REASON FOR INDEPENDENT CONSIDERATION

In contract law, three elements are required to create a binding and enforceable contract: 1) offer; 2) acceptance; and 3) consideration. While the first two are relatively straightforward, consideration is more nuanced.

Valid consideration for contract formation requires a bargained-for exchange where a promise is given by one party to a contract in return for performance or a return promise by the other party. For example, Company A promises to provide a service (promise to perform), and the customer promises to pay (return promise) for that service.

These three elements together create a valid and enforceable contract. Many brokers believe in the context of purchase agreements, the seller's promise to sell and the buyer's promise to purchase, together with the earnest money is sufficient consideration to form a contract. While many courts agree, there are courts in various states that have held otherwise.

These courts have ruled that some purchase agreements are option contracts. An option contract is where one party has the option, not the obligation, to perform. Contracts for real estate have been found to be option contracts because the buyer can walk away under multiple contingencies. In this case, their promise to buy becomes illusory. Illusory consideration is not valid consideration, as it doesn't bind the buyer. Without binding obligations or independent consideration, the contract may not be enforceable.

Under the most recent of the New Mexico Association of REALTORS® ("NMAR") purchase agreements, the buyer has been given a broad due diligence period in which to thoroughly inspect the property, investigate surrounding areas and review all pertinent documents. Based on buyer's findings, the buyer may terminate the contract or may make objections to his/her findings. If the parties cannot negotiate buyer's objections, the buyer may terminate the agreement. In addition, there are multiple other contingencies in the NMAR purchase agreements, such as the ability of the buyer to obtain financing, the appraised value of the property being equal to or greater than the purchase price, and the ability of the buyer to obtain insurance on the property at customary rates to name just a few. In other words, the buyer is not obligated to purchase the property if any of the contingencies are not satisfied. However, buyer does have the option to purchase if all the contingencies are satisfied.

This is where independent consideration becomes important. As the name suggests, it is consideration (i.e., something of value) given independently of the main performance or promise. Independent consideration is generally given to support an option or contract, such as a purchase agreement for real estate.

Independent consideration must be real, bargained-for, not illusory, and it cannot simply be a promise to do what one was already obligated to do. It can be a small sum, even as little as $10.00, but it cannot be zero.

As it applies to purchase agreements, the independent consideration would be negotiated between the parties and given to the seller (directly or through the title company) upon execution of the purchase agreement or some other short period of time thereafter. As soon as the buyer delivers the independent consideration to the seller or title company, as applicable, it is the seller's money to keep, even if the buyer terminates the purchase agreement. A potential exception to seller's right to retain the Independent Consideration would be if seller breached the purchase agreement by refusing to close.

Independent Consideration does not take the place of earnest money and Independent Consideration and earnest money serve very different purposes. The promise to deliver Independent Consideration and the delivery of Independent Consideration is required for formation of the contract. For this reason, if buyer terminates the purchase agreement, the Independent Consideration is not refunded to buyer. Earnest money is a term of the contract that indicates buyer's intent to act in good faith and abide by terms of the purchase agreement. If buyer acts in good faith and abides by the terms of the purchase agreement, but terminates the contract per the terms of the purchase agreement, then buyer is entitled to a return of buyer's earnest money. If buyer fails to act in good faith and abide by the terms of the purchase agreement, then buyer may forfeit his/her earnest money.

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INITIALS SIGNIFY THAT THE BUYER(S) AND/OR SELLER(S) HAS RECEIVED AND REVIEWED THIS INFORMATION SHEET.

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This change to the NMAR purchase agreements was implemented to better protect both consumers and brokers. The law is ever changing, and while New Mexico has not specifically ruled that purchase agreements for real estate are option contracts, due to NMAR's further expansion of a buyer's termination rights, this possibility exists. Independent Consideration is necessary to mitigate the possibility that the contract fails for lack of buyer consideration.

LOGISTICS/PROCESS

- **Independent Consideration is required per the NMAR purchase agreements; it is <u>not</u> optional.**
- NMAR purchase agreements do not dictate the amount of Independent Consideration; it can be as little or as much as the parties negotiate, but it cannot be zero dollars ($0).
- Independent Consideration does not replace earnest money and payment of Independent Consideration does not change how earnest money is treated under the purchase agreement. In the event the parties have agreed that buyer will pay earnest money, payment of the earnest money is in addition to payment of the Independent Consideration. Refund of the earnest money shall be in accordance with the purchase agreement.
- Independent Consideration may be paid to the seller directly or to the title company, as negotiated by the parties in the purchase agreement.
- If Independent Consideration is paid to the title company, it can be paid with the earnest money.
- If Independent Consideration is paid to the seller, it may be paid by any method to which the parties have agreed (cash, check, electronically, etc.). The buyer may request a receipt from the seller indicating seller received the Independent Consideration. Form 2104B – Receipt for Independent Consideration
- Delivery of the Independent Consideration to the seller or the title company, as negotiated, should not be more than three (3) days. The parties agree in the purchase agreements that the buyer's promise to deliver the Independent Consideration within some short period of time after full execution of the purchase agreement is sufficient consideration to form the purchase agreement. The Independent Consideration than becomes the consideration once it is delivered.
- **If buyer fails to deliver the Independent Consideration in accordance with the purchase agreement, the purchase agreement will automatically terminate. Buyer will <u>not</u> have an opportunity to cure buyer's failure to timely deliver the Independent Consideration in accordance with the purchase agreement.**
- If the Independent Consideration is delivered to the title company, the title company will disburse the Independent Consideration to the seller as soon as the title company processes the buyer's payment. Seller will need to direct the title company in writing as to how seller would like the funds distributed to seller. Depending on the disbursement type (for example, check, wire, etc.) there may be title company charges associated with the disbursement. Seller should familiarize him/herself with such charges before providing disbursement instructions to the title company. Processing fees, excluding seller disbursement fees which are borne by the seller, are negotiated between the parties in the purchase agreement.
- The Independent Consideration may be credited to the purchase price, down payment or buyer's closing costs (subject to lender approval), as negotiated between the parties in the purchase agreement. If the Independent Consideration is paid directly to the seller, and the Independent Consideration is being credited to the buyer at closing, the title company may require a copy of the seller's receipt, indicating seller received the Independent Consideration and the amount of the Independent Consideration. If the Independent Consideration is being credited, and Buyer is getting a loan, the lender may need evidence of how/where the Buyer got the Independent Consideration funds.
- Generally, once a title company starts a title commitment for a specific buyer, it will require a termination agreement in order to prepare a title commitment for a different buyer. To mitigate the possibility that the title company will need a fully executed termination agreement should the buyer fail to deliver Independent Consideration in accordance with the contract, the NMAR purchase agreements provide that the title company will **not** begin the title commitment until the title company receives the Independent Consideration or evidence from the seller that the seller has received the Independent Consideration.
- **If the contract terminates (does not result in Closing) for any reason, except for seller's breach of contract, seller retains the Independent Consideration; it shall not be refunded to buyer.**

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