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Re: Frascona Addenda Package

Colorado Residential Contracts
ADDENDA PACKAGE
Explanation

I. General Comments for All Our Forms

The Colorado Real Estate Commission approved contract forms are sophisticated. However, many of our clients find the need to make repetitive modifications to them. The Real Estate Commission's Rule F-3(a)(1) states: "*If a broker originates or initiates the use of a preprinted or prepared addendum that modifies or adds to the terms of a Commission-approved contract form which does not result from the negotiations of the parties, such addendum must be prepared by: (1) an attorney representing the broker or brokerage firm; or. . .*" These addenda were prepared for your office and are not to be given to other offices or used in violation of our copyright.

Forms avoid the need to "reinvent the wheel" and eliminate the possibility of multiple variations of solutions to a common problem. When used properly, forms greatly aid brokers and consumers. **Yet, there is a tremendous danger in using forms.** Every real estate transaction is different. Thought must be given to whether all of the provisions of our addenda fit a specific transaction and whether the language within a particular provision is appropriate for the transaction. Every time you use one of our addenda, you and the consumer should review it to verify that it is appropriate and consistent with the consumer's intentions.

One feature of contracts is that they allocate risks between buyers and sellers. In some circumstances, contract provisions will work to the favor of the seller, and in other circumstances they will work to the benefit of the buyer. The Real Estate Commission has allocated risk as it has deemed best. Yet we know that sellers and buyers, from time to time, wish to alter these risk allocations. Many of our provisions simply give buyers and sellers options to make different risk allocations. We do not hold these provisions out as being necessarily "better" in any objective sense. They simply provide consumers with options and avoid the need for brokers to draft these options spontaneously.

Our addenda and clauses do not purport to include all the provisions which a broker may wish to use to structure a residential real estate transaction. Instead, we have attempted to address the most frequent requests for clauses from most of our clients. Some of our clients have developed addenda addressing their local concerns. Generally, our clauses do not attempt to address local concerns. Those of you who have repetitive local or regional concerns may wish to have us add provisions addressing those concerns, or approve your existing language.

The enclosed forms and clauses are designed for residential transactions. While some of the provisions in the enclosed documents may occasionally be useful in commercial transactions, some provisions are not appropriate for commercial transactions. Further, the addenda do not address many of the issues which frequently need to be addressed in commercial transactions. Commercial brokers should contact us to develop their own custom documents.

Our addenda and clauses may only be used with the forms the Real Estate Commission required brokers to use as of January 1, 2017. Any future changes in the Real Estate Commission approved forms or rules, and other changes in the real estate environment, may require a revision of the enclosed forms. You may engage us to make additional revisions at any time.

II. Addenda to Contract to Buy and Sell Real Estate (Residential)

A. General Comments

Addendum "A" includes three clauses that we believe most of our broker clients will find useful in deals where the Real Estate Commission approved form number CBS1-6-15 is used, regardless of whether they are working with buyers or sellers, as well as an *ala carte* menu of four other provisions addressing certain "hot topics" or issues that arise with some frequency. The broker can pick or reject those four *ala carte* clauses for the contract by checking, or not checking, the applicable boxes.

Clients also need a set of clauses which are deal specific, but which are used sufficiently frequently that it is worth developing standard language within the company for these clauses. The enclosed package includes a list of clauses (explained in more detail below) most of which are intended to be added to the buy-sell contract in a residential transaction, others of which are intended for the buyer or seller listing agreement.

A variety of the sections create contingencies. These provisions specify that if the contingencies are not satisfied, then the Contract will terminate. Many of our clients have asked us why the contingencies do not provide that upon termination, the buyer receives a refund of the buyer's earnest money.

The reason our contingencies do not call for the return of the earnest money if the contingency is not satisfied is that § 25.2 of Real Estate Commission approved form numbers CBS1-6-15 and CBS2-6-15 both provide: "*In the event this Contract is* ***terminated****, all Earnest Money received hereunder will be returned and the parties are relieved of all obligations hereunder,* ***subject to §§ 10.4, 22, 23 and 24.***" [Emphasis added.] None of the contingencies in those Real Estate Commission approved forms explicitly state that if the contingency is not satisfied or waived, then the earnest money is returned to the buyer. Instead, those Real Estate Commission approved contingency provisions rely upon § 25.2 to call for the return of the earnest money to the buyer.

Defining the effect of a "termination" in § 25.2 avoids the need to repeat the following phrase many times throughout the Real Estate Commission approved contract forms: ". . . all Earnest Money received hereunder will be returned and the parties are relieved of all obligations hereunder, subject to §§ 10.4, 22, 23 and 24." Perhaps more importantly, the system used in the Real Estate Commission approved forms (which we have copied) reflects the phenomenon that sellers and buyers disagree from time to time about whether the contract is terminated. If there is a disagreement about whether the contract is terminated, the broker needs to have the flexibility to interplead the earnest money (§ 24) and the Real Estate Commission wants the mediation clause (§ 23) to apply. **Even if the contract has been terminated, the buyer may still owe the seller money because of damage caused to the property during the buyer's property inspections (see § 10.4)**. For this reason, neither the Real Estate Commission, nor Frascona, Joiner, Goodman and Greenstein, P.C., call for the earnest money to be returned to the buyer after every contingency in the contract.

B. Addendum A. The following is a detailed explanation, paragraph by paragraph, of the Addendum "A".

1. I.R.C. § 1031 Exchange. Buyers acquiring property as part of an Internal Revenue Code (I.R.C.) Section 1031 tax-deferred exchange need to have the ability to assign the buyers' rights under the contract to a qualified intermediary. Yet § 2.2 of the contract prohibits the buyer from assigning the contract without the seller's consent. Buyers acquiring property to complete a Section 1031 exchange have strict time frames in which to do so. Such buyers may not want potential sellers to know of the buyers' need to complete a Section 1031 exchange. This paragraph requires both parties (including the seller) to cooperate with the other party's Section 1031 exchange, so long as cooperation is not to the detriment of the other party. This paragraph should not be deleted.

2. Inclusions Conveyed "AS IS". The last sentence of § 10.2 of the CBS1-6-15 and CBS2-6-15 forms indicates that, unless the Contract provides otherwise, the seller is conveying "the Property" in an "As Is" condition, "Where Is" and "With All Faults." This paragraph makes the same "As Is, Where Is, With All Faults" provision apply to the seller's conveyance of the Inclusions.

3. Possession. It is not unusual for a seller to retain possession of a property for some period of time after closing. Though it is highly undesirable for sellers, buyers occasionally take possession of a property before the transaction closes. Either situation creates risk for the buyer and seller. This paragraph advises the parties to obtain insurance and a lease or Post Closing Occupancy Agreement to insure against and allocate such risk.

4. Selection of Title Insurance Company and Payment of Premium(s) for Owner Title Insurance. Sections 8.1.1 and 8.1.2 of the Commission-approved forms set forth alternative provisions for either the seller (§ 8.1.1) or the buyer (§ 8.1.2) to select the title insurance company that will furnish the Title Commitment and owner's title insurance policy. Except for any additional premium for so-called owner's extended coverage, which is to be paid in accordance with the agreement set forth in § 8.1.3 of the Contract, §§ 8.1.1 and 8.1.2 specify that the seller will pay the premium for the owner's policy if the seller selects the title insurance company, and the buyer will pay the premium if the title insurance company is selected by the buyer. The buyer, however, may want to negotiate to have the seller pay the premium for the owner's title insurance policy, even if the buyer is selecting the title insurance company. This clause is an example of a provision the buyer might include in its offer to do that. This clause also indicates that the chosen title insurance company will designate the hour and place of

closing, essentially modifying any contrary language that may have been inserted at the end of § 12.3 of the CREC-approved contract form.

This clause is intended to supplement and amend § 8.1.2 of the Contract, so the broker using this clause would check the box in § 8.1.2 rather than the box at the beginning of § 8.1.1. If used, this clause includes a further check box for the broker to either state that the Earnest Money Holder (the party identified as the Earnest Money Holder in § 4.3 of the Contract) is the title company being selected by the buyer, or to specify the particular title company being selected by the buyer by completing the blank in this clause. Of course, the broker using this clause should check the "Earnest Money Holder" box only when it makes sense – only when the Earnest Money Holder identified in § 4.3 is a title insurance company rather than a real estate broker or brokerage firm, and only when that specified Earnest Money Holder is actually who the buyer has selected for issuance of the Title Commitment and policy and the conduct of the closing.

When using the clause, the broker would also need to complete § 8.1.3 of the CREC-approved contract form to indicate whether OEC coverage is to be obtained, and, if so, who is to pay any additional premium expense for that OEC.

It is our understanding that where the buyer is selecting the title insurance company, there is no RESPA problem or issue with having the seller pay the premium expense, or a portion of the premium expense. However, if this clause is not being used and under the Contract the seller is to select the title insurance company, then, to be sure to avoid any RESPA issues, if the "Will" box is checked in § 8.1.3 the broker may want to check the "Seller" box in § 8.1.3 – so that the seller pays all charges for the owner's title insurance policy if the seller is selecting the title insurance company.

5. Loan Commitment Necessary. Some buyers will make an informed decision to risk their earnest money even though they do not have a loan commitment. Other buyers will recklessly risk their earnest money without a loan commitment. Still other buyers, unaware of the workings of the financing contingency, will risk their earnest money without even realizing that they have done so. Under § 5.2 of the CREC-approved form, where the buyer does not exercise a right to terminate under § 5.2, the seller is stuck with the buyer, and the uncertainty of whether the loan will be funded and the deal closed, until the closing date. If/when checked, this paragraph requires the buyer to obtain and deliver to the seller by the Loan Objection Deadline a written loan commitment for each new loan contemplated by § 4.1 or § 4.5, and provides that a failure to deliver any such written loan commitment to the seller by the Loan Objection Deadline results in the automatic termination of the contract.

6. Lender Property Requirements. § 6.3 was new in the 2008 CREC-approved Contract to Buy and Sell Real Estate (although this provision was originally included as § 6.1 when introduced in the 2008 forms). The provision seems to be based on a premise that a seller has some underlying obligation to address or satisfy a lender's requirements – a premise not every seller may agree with. Given that, and the fact that this provision contains some ambiguities and potential problems that are discussed more fully below in the explanation regarding our "Additional Provisions" document, a broker may conclude that it is best in a particular transaction to simply delete this § 6.3 (see the discussion below about such a deletion). If not deleting § 6.3, however, the broker may want to consider checking the box for this provision in our Addendum "A" – to negate any implication that the seller has some obligation to address or satisfy a lender's requirements**.**

7. Earnest Money Dispute. Clause (3) of § 24 of the CREC-approved contract form sets forth an option for the Earnest Money Holder to initiate a procedure which results in the Earnest Money Holder being authorized to release the earnest money to the buyer if the Earnest Money Holder is not given notice of (and a copy of the complaint from) a pending buyer-seller lawsuit within 120 days after the Earnest Money Holder implements the procedure. This provision, if checked, would shorten that 120-day period to be 45 days.

C. Additional Provisions

ADDITIONAL PROVISIONS TO THE CONTRACT TO BUY AND SELL REAL ESTATE

On a case-by-case basis, brokers should consider inserting any of the following paragraphs into the Additional Provisions section of the Buy/Sell Contract.

Buyer – Designation of Form of Tenancy

1. § 2.1. Buyer. In virtually all transactions, the seller will not be affected by the form of tenancy in which buyer takes title. Many buyers will not have decisively determined how they wish to take title at the time they make an offer. This paragraph allows the buyer to re-designate the form of tenancy in which the buyer will take title. It also provides the default tenancy of "Tenants in Common" and equal ownership if the parties do not specify the type of tenancy in § 2.1 of the contract.

Cooperation Required for I.R.C. § 1031 Exchange

2. I.R.C. § 1031 Exchange. This clause – which negates the § 2.2 prohibition on buyer's assignment to a limited extent – is the same as the first clause contained in our Addendum "A," and is discussed above in ¶ II.B.1. of this explanation letter.

Assignment Permitted

3. § 2.2. No Assignability – Clause Permits Any Buyer Assignment. The contract forms adopted by the Commission for use beginning January 1, 2014, included check boxes that allowed the parties to specify whether the contract was or was not assignable by the buyer. The option afforded by those check boxes was eliminated by the Commission in the revised 2016 forms, which state that the contract **is not** assignable by the buyer. As a result of that change in the Commission-approved forms, a buyer who wants the right to assign the contract, without having to get the seller's consent, will need to include some additional provision in or make some other change to the Commission-approved form. This clause, and the two that follow, each create some right for the buyer to assign the contract without having to get further consent from the seller. This clause is the broadest of the three – essentially doing the same thing that the former "is assignable" check box did, in allowing the buyer to assign the contract to any third party without condition or qualification. Each of the next two clauses is more limited.

Assignment Permitted to Certain Affiliated Parties

4. § 2.2. No Assignability – Clause Permits Buyer Assignment to Certain Affiliated Parties. This clause creates a right for the buyer (without the need for further consent from the seller) to assign the contract only to a trust, limited liability company or other entity that controls, is controlled by, or under common control with the buyer.

Assignment Permitted to Certain Affiliated Parties Upon Compliance With Specified Conditions

5. § 2.2. No Assignability – Clause Permits Buyer Assignment to Affiliated Parties With Conditions. This more seller-oriented clause is the same as the preceding clause, except that the trust, limited liability company or other entity to whom the contract is assigned must expressly assume the obligations of the buyer in a written instrument that must be delivered to the seller as a condition to the effectiveness of the assignment. This clause goes on to also state that the assignee (the party to whom the contract is assigned) and the original buyer (or assignor) will then be jointly and severally liable for the obligations of the buyer under the contract, and that the original buyer is not released of liability. That non-release language is primarily educational, however, because the general law in Colorado is that an assignment (including an assignment made pursuant to one of the previous two clauses) does not operate to release the assignor absent an express agreement for such a release.

Seller Does Not Currently Own Property – But Has Contract to Purchase Property

6. § 2.3. Seller – Clause Addresses Situation Where Seller Does Not Yet Currently Own the Property. § 2.3 of the Commission-approved forms states that the seller "is the current owner of the Property…." This seller-oriented clause is included for use by a broker whose client has an existing contract to purchase the subject Property and wants to enter into a contract to sell that Property before it has closed on the purchase (that is, before actually being the owner of the Property as § 2.3 of the Commission-approved form contemplates). This is a very seller-oriented clause, and a broker working with a buyer should caution the buyer that entering into a contract with a seller in this situation involves additional risk and complication, and encourage the buyer to obtain an attorney to advise the buyer about the issues and additional risks. Although the particular risks and issues in this kind of situation can be quite transaction-specific, some that the buyer might want to consider include: whether the buyer is allowed to contact or communicate with the current owner (seller in the underlying contract); whether or to what extent the seller (purchaser in the underlying contract) is to be permitted to amend the underlying contract; whether the seller is free to exercise a contingency to terminate the underlying purchase contract without the buyer's approval; the consequences for the contract if the underlying purchase contract is terminated as a result of a default by the seller (as purchaser in the underlying contract); potential difficulties in obtaining access for the buyer to conduct inspections before the seller has acquired ownership of the Property; and providing for delivery to the buyer of copies of notices and other documents received by the seller from the current owner.

Well Transfers

7. § 2.7.3. Inclusions – Well Rights. The provisions of § 2.7.3 regarding the completion of a Change in Ownership or Registration of Existing Well form, are derived from the requirements of § 38-30-102(3)(b)(I), Colorado Revised Statutes, effective on and after January 1, 2009, when a buyer of residential real estate enters into a transaction that results in the transfer of ownership of the type of well referenced in § 2.7.3 of the contract. That statute goes on to provide that where a third party provides the closing service, as a title company usually does in residential real estate transactions, that closing company is required to submit the completed Change in Ownership or Registration of Existing Well form, as applicable, to the Division of Water Resources, and the closing company is not liable for delaying the closing in order to ensure that the required form is completed. Our clause regarding this § 2.7.3, then, is intended

to avoid the need for any such delay in the closing, by including an authorization for the seller to complete the required form at closing, as the buyer's attorney-in-fact, if the buyer fails or refuses to do so.

Seller Concession – Buyer Options Regarding Disallowed Seller Concession

8. § 4.2. Seller Concession. A buyer and a seller may strike a deal in which the Seller Concession to be given under § 4.2 of the contract is larger than the credit permitted by the buyer's lender. The language of that § 4.2 does not explicitly state what is to happen if the buyer's lender disallows some or all of the Seller Concession, although the "to the extent" phrase within § 4.2 suggests that the intent is for the Seller Concession to be reduced to the extent it exceeds the aggregate of what is allowed by Buyer's lender. This clause gives the buyer the express option of either accepting such a reduction in the Seller Concession "to the extent" it exceeds the amount allowed by the buyer's lender, or reducing the purchase price by the amount of any disallowed Seller Concession.

Additional Earnest Money Due

9. § 4.3. Earnest Money. Sellers sometimes negotiate for inclusion in the contract of a provision requiring the buyer to make an additional earnest money payment upon the satisfaction or waiver of certain buyer contingencies. This provision is an example of that. If checked, it obligates the buyer to make an additional earnest money payment upon expiration of either the Loan Objection Deadline or the Inspection Resolution Deadline, depending on which box is checked.

Additional Earnest Money Due on Expiration of Buyer Contingencies – Residential

10. § 4.3. Earnest Money. This provision is an alternative to the immediately preceding example, which provides that the buyer must make an additional earnest money payment upon expiration of all the buyer contingencies there specified (all those included in the CREC-approved form of Contract to Buy and Sell Real Estate (Residential)).

Additional Earnest Money Due on Expiration of Buyer Contingencies – Income-Residential

11. § 4.3. Earnest Money. This provision is functionally the same as the one described in the preceding paragraph, but is designed for use with the "Income-Residential" version of the CREC-approved form of Contract to Buy and Sell Real Estate (which has some additional buyer contingencies, relative to the "Residential" version).

Interest on Earnest Money

12. § 4.3. Earnest Money. In large dollar transactions, it is sometimes worthwhile for the earnest money to bear interest for the benefit of the parties. If interest rates increase, there should be more demand for interest on earnest money. Our clause provides for interest on earnest money.

Earnest Money to be Paid by Third Party

13. § 4.3. Earnest Money. Buyers sometimes obtain earnest money from relatives or other third parties, and in some of those situations the third parties make payment directly to the

Earnest Money Holder. This provision just identifies those facts, so the Earnest Money Holder won't have questions or concerns about accepting such a payment of earnest money from the third party.

Earnest Money Paid by, and Returnable to, Third Party

14. § 4.3. Earnest Money. This provision does the same thing as the preceding clause, but adds to that a direction for the return of the earnest money to the designated third party (for use, of course, when the buyer and the third party intend that the earnest money be returned to the third party).

Seller Carry Financing – Review of Buyer's Creditworthiness

15. § 4.7.1.1. Seller or Private Financing – Seller May Terminate. In the context of seller-carry financing, the Commission-approved forms no longer include any express agreement or obligation on the buyer's part to supply financial, credit and employment information to the seller, and the corresponding express right for seller to verify the buyer's financial ability and creditworthiness and express obligation of seller to keep such information confidential. It is also not clear that any provision of the Commission-approved forms gives the seller the right to terminate if not satisfied with the buyer's financial ability or creditworthiness. This provision restores those apparently missing pieces for use in a seller-carry context.

Buyer Fault Needed for Loan Liability

16. § 5.2. Loan Objection. The Real Estate Commission approved contract is not conditional upon buyer getting a loan. Under § 5.2, a buyer must notify the seller to exercise the buyer's right to terminate the contract because of buyer's dissatisfaction with a new loan. If a buyer is silent, the financing contingency is deemed waived. If the loan is not approved, or if it is approved and not funded, and the buyer cannot otherwise come up with the funds to close, the buyer will likely be in default under the contract unless the contract is terminated due to some other contingency, such as the appraisal, title or survey contingency provisions.

Under § 5.2, the burden is on the buyer to determine the reliability of any loan commitment obtained. The following may be a common scenario: (a) buyer obtains a loan commitment; (b) based upon the commitment, the buyer decides to proceed with the contract; and (c) the loan is not funded. If the contract is not terminated pursuant to some other contingency provision and the buyer cannot otherwise come up with the funds to close, the buyer will likely be in default, and such default will exist regardless of whether the failure to fund the loan is the fault of the buyer or someone else.

When a buyer does not provide notice to terminate under § 5.2, the buyer is essentially betting that the loan will be approved and funded. If the buyer bets wrong under a liquidated damages contract, then the buyer "only" loses the buyer's earnest money. Under a specific performance contract, the stakes are higher.

The financing contingency avoids arguments about whether the loan was "approved" or not. This CREC provision also avoids arguments about whether the buyer obtained a loan commitment. It also avoids arguments about whether the failure to fund was the fault of the buyer. Depending upon the amount of the earnest money, whether the contract is liquidated damages or specific performance, the hardship to a seller of a buyer breach, and other factors, the buyer may be making a reasonable bet.

However, some buyers will lose bets which they did not realize they had made. Even informed buyers will look to blame their lenders and the brokers who recommended those lenders, and the same brokers will also be accused of not informing buyers of the workings of § 5.2. Brokers working with buyers need to give those buyers an opportunity to make an informed choice about the bet.

This paragraph has the advantage of shifting some of the risk that the loan is not finally approved or funded away from the buyer, back to the seller. It has the disadvantage of raising questions about whether the failure of the loan was due to the fault of the buyer.

New Loan Parameters and Limitations on Buyer Right to Terminate

17. § 5.2. Loan Objection. Some previous versions of the Commission-approved form Contract to Buy and Sell Real Estate included provisions that specified the details of the new loan the buyer would seek to obtain. This provision does the same thing, if it is checked, although with fewer terms of the new loan set forth than in those previous CREC-approved forms. This provision also indicates that the buyer can terminate under the Loan Objection contingency (§ 5.2) only if the buyer timely applies for, pays required costs and uses reasonable efforts in good faith to obtain the specified new loan, but is unable to obtain a commitment for such new loan on or before the Loan Objection Deadline and Seller receives written notice of termination by the Loan Objection Deadline. If the buyer exercises such right to terminate, the buyer is also expressly required to cooperate to allow the seller to verify that these conditions to the right to terminate have been satisfied.

Loan Commitment Necessary

18. § 5.2. Loan Objection. This is the same as the second of the four *ala carte* (or check-box) clauses contained in our Addendum "A," and is discussed above in ¶ II.B.5. of this explanation letter.

Cap on FHA/VA Repairs

19. § 6.3. Lender Property Requirements. An FHA or VA appraiser will sometimes condition the appraisal upon certain repairs being made to the property. This clause allows the parties to identify a cap up to which the seller is obligated to make the repairs required by buyer's lender.

Deletion of Lender Property Requirements Provision

20. § 6.3. Lender Property Requirements. This provision of the CREC-approved Contract to Buy and Sell Real Estate seems to be based on a premise that a seller has some underlying obligation to address or satisfy a lender's Requirements – a premise not every seller may agree with. Although the provision has been revised slightly since its original appearance as § 6.1 in the 2008 CREC-approved form, it still contains some ambiguities and potential problems for the parties. For example, does verbal notice to a seller of the Lender Requirements constitute "receipt of the Lender Requirements" for purposes of this language? What must the "written agreement" contemplated by clause (1) of the second sentence of § 6.3 address or include to eliminate or void the seller's right to terminate? A buyer considering a written waiver of the Lender Requirements under clause (3) of the second sentence of § 6.3 should realize the waiver will not satisfy the Lender Requirements, and then consider the position the buyer will be in if such a waiver is given and the loan is not available at closing. Given the ambiguities and

potential problems, it may be best in many transactions to simply delete this § 6.3. This paragraph provides a means of deleting § 6.3. However, **given CREC Rule F-1(d), the broker intending to so delete § 6.3 from the contract is cautioned to do so only when the deletion results from negotiations or instruction(s) of a party to the transaction, and then, instead of inserting this clause the broker would be better to simply strike through § 6.3 in a legible manner that does not obscure the deletion being made as that Rule F-1(d) contemplates.** It being better to strike the provision from the contract in a legible manner, then, this clause is included here primarily for informational purposes.

Deletion of Lender Property Requirements Provision

21. § 6.3. Lender Property Requirements. This is the same as the third of the four *ala carte* (or check-box) clauses contained in our Addendum "A," and is discussed above in ¶ II.B.6. of this explanation letter.

Evidence of Record Title – Seller Pays Premium for Title Insurance but Buyer Selects Insurer

22. § 8.1. Evidence of Record Title. This is the same as the first of the four *ala carte* (or check-box) clauses contained in our Addendum "A," and is discussed above in ¶ II.B.4. of this explanation letter.

Off-Record Title – Improvement Location Certificates

23. § 8.3. Off-Record Title. § 8.3 in the CBS1-8-13 and CBS2-8-13 forms requires the seller to deliver to the buyer copies of all "existing surveys" in the seller's possession. Because an improvement location certificate is technically not a "survey" under applicable Colorado law, this paragraph clarifies that any improvement location certificate(s) pertaining to the Property that are in the seller's possession must be delivered to the buyer as part of this § 8.3 requirement.

Payment for New ILC or New Survey – Optional Clauses for Use in § 9.1.2 Blank re payment of New ILC or New Survey

24. When applicable (when a New ILC or New Survey is contemplated but neither the box for Buyer nor the box for Seller in § 9.1.2 is checked), the parties are to complete the blank in that § 9.1.2 to specify how the cost of the New ILC or New Survey is to be paid. This clause, and the two that follow it, set forth various alternative possibilities of how the parties may want to complete that blank. These three alternative clauses are not consistent with one another – only one of them should be used. This clause indicates that buyer pays for the New ILC or New Survey, but receives a credit against the Purchase Price in the amount specified in this clause if the transaction closes.

25. This clause indicates that the seller pays for the New ILC or New Survey, but is reimbursed by the buyer at closing in the amount specified in this clause, if the transaction closes.

26. This clause is based upon a similar clause in the survey provision of a former CREC-approved form (CBS1-8-10), and contains a more complicated means of specifying which party orders and pays for the New ILC or New Survey.

New ILC or New Survey – Buyer Remedies for Seller Breach

27. § 9.3. New ILC or New Survey Objection. Depending on whose obligation it is to order and pay for the New ILC or New Survey, § 9.3 of the CREC-approved forms may give the seller an argument that a buyer could have a problem with – that even if it is the seller's obligation to order and pay for the New ILC or New Survey, if the seller breaches its obligations in that regard the buyer's only remedy is either to terminate under § 9.3.1, or to object under § 9.3.2, in which case the contract will be terminated pursuant to § 9.3.3 if no resolution is reached and the buyer does not withdraw its objection within the specified time frame. This means that in such an event the buyer's only "remedy" is not much of a remedy at all – to walk away from the transaction and recover its earnest money even though the seller has breached its agreement. Certainly there may be situations where the seller timely orders and pays, or makes arrangements for the New ILC or New Survey, and the New ILC or New Survey is simply not completed in time because it requires the work of a third party who may not be able to fit that work within the time frame contemplated by the buyer and seller. That is not the situation this provision seeks to address, however, because that does not involve a default by the seller. This provision indicates that these (termination) remedies of § 9.3 are not the buyer's only remedies in the event of a default by the seller with respect to the ordering of or payment for the New ILC or New Survey – that the buyer will also have available to it in that event the remedies for a default by seller that are set forth in § 21.2.

Counterproposal Clause to Substitute Existing Recent ILC or Survey for Seller-Provided New ILC or New Survey

28. § 9. New ILC, New Survey – No Seller Obligation. A seller who has a recent ILC or survey may be reluctant to accept a buyer's offer that requires the seller to order and pay for a new ILC or new survey. This clause can be used in a counterproposal by such a seller. This clause deletes the provisions of the buyer's offer that require such a new ILC or new survey, and provides instead that the seller will deliver to the buyer a recent ILC or survey, the particulars of which are to be specified by completing the blank and check box selection in the clause. In some residential situations like this, a title company might provide the buyer with the extended coverage a buyer generally wants (referred to as "OEC" in the Commission-approved forms) if the seller signs an affidavit indicating there are no survey-related changes to the property since the date of that recent survey. Alternatively, as the text of this clause contemplates, the buyer can, at the buyer's expense, take that recent seller-provided ILC or survey and get it updated and re-certified to the buyer and the title company, which generally also allows the issuance of that OEC by the title company. This clause also indicates that objections related to such seller-provided ILC or survey, or any buyer update of it, must be made within the § 8.3 deadline (the Off-Record Title Objection Deadline).

Home Warranty

29. § 10. Property Disclosure, Inspection, Insurability, Due Diligence, Buyer Disclosure and Source of Water. This paragraph serves to educate buyers and sellers about the existence of pre-owned home warranty programs. It also allows the buyer to shift all or some of the cost of the warranty to the seller, and makes it clear that with this paragraph, the seller does not have the obligation to obtain the warranty; the buyer does.

30. § 10. Property Disclosure, Inspection, Insurability, Due Diligence, Buyer Disclosure and Source of Water. This alternative home warranty clause allows the Contract to obligate the listing or selling brokerage firm (described in the current CREC Contract to Buy and Sell Real Estate as either the "Brokerage Firm of Broker working with Seller" or the "Brokerage Firm of

Broker working with Buyer") to pay some or all the cost of the home warranty. One disadvantage of using this clause is that it makes the broker a party to the Contract. Among other things, this burdens the broker with the "loser pays attorneys fees" clause in the buy/sell contract.

Seller Disclosure of Previous Damage

31. § 10.1. Seller's Property Disclosure. There are times when a seller has experienced, or knows of, significant previous damage to the Property that, even if repairs have been made, the seller would be best-advised to disclose (the law regarding "repaired defects" probably does not afford the seller a "free pass" to non-disclosure in all repaired defect situations just because the seller believes, in good faith, that the problem or defect has been repaired). This provision is intended simply as an outline or pattern that a seller might follow in making such a disclosure, and the bracketed, italicized portions of the provision are instructions on the use or completion of the provision. The key to any such disclosure, of course, will be the substance that gets disclosed by the completion of the blanks and the attachment of receipts or other relevant documents.

Inclusions Conveyed "As Is"

32. § 10.2. Disclosure of Latent Defects; Present Condition. This is the same as the second clause contained in our Addendum "A," and is discussed above in ¶ II.B.2. of this explanation letter.

Due Diligence – Documents – and Assignment of Warranties

33. § 10.6.1. Due Diligence Documents. § 10.6.1 of the Commission-approved form Contract to Buy and Sell Real Estate (Residential) contemplates that, if the box in § 10.6.1.2 is checked, the buyer and seller will insert in § 10.6.1.2 a list of "due diligence documents" that the seller will deliver to the buyer. This paragraph lists certain such documents that most buyers will want included as part of the due diligence documents to be provided by the seller in any event. The broker using this form, however, should always consider what other documents the client may want included as part of the due diligence documents.

This paragraph is one example illustrating that our forms are designed for use primarily in conjunction with the Commission-approved form Contract to Buy and Sell Real Estate (Residential) (CBS1-6-15). The "Residential-Income" Commission-approved form (CBS2-6-15) contains an extensive list of due diligence documents within its version of § 10.6.1 that makes this paragraph largely superfluous or unnecessary if used in conjunction with that CBS2-6-15 form. This paragraph also indicates that the bill of sale to be delivered at closing will be deemed to assign to the buyer all assignable warranties regarding the Property or Inclusions.

It may also be worth noting that the documents to be provided under the language of this paragraph are only those specified documents "to the extent [they] exist and are in Seller's possession." A broker working with a seller may want to consider whether any language inserted into the blank in § 10.6.1.2 of the CBS1-6-15 form has or should have a similar qualifying phrase. Similarly, a broker working with a seller in a transaction using the CBS2-6-15 form may want to consider whether some of the numerous § 10.6.1 subsections describing due diligence documents the seller is to provide should be revised to add a similar qualification.

Due Diligence Documents – Buyer Remedies for Seller Breach

34. §§ 10.6.2 & 10.6.3. Due Diligence Documents Review and Objection & Due Diligence Document Resolution. The provisions of § 10.6 in the CBS1-6-15 and CBS2-6-15 forms contain objection and termination rights similar to the termination and objection/resolution/termination provisions applicable with respect to the buyer's inspection rights and title review rights (§§ 10.3 and § 8.4). And as with the provisions regarding a New ILC or New Survey, this language regarding the Due Diligence Documents may give the seller an argument that a buyer could have a problem with – that even if the seller defaults in its obligation to deliver Due Diligence Documents it agreed to provide, the buyer's only remedy is either to terminate under § 10.6.2.1, or to object under § 10.6.2.2 and then terminate if no resolution is reached under § 10.6.3. As with the New ILC or New Survey provisions, this means in either event that the buyer's only "remedy" is not much of a remedy at all – to walk away from the transaction and recover its earnest money even though the seller has breached its agreement. Certainly there may be situations where the seller agrees only to provide documents of a certain type that are in the seller's possession, and the seller does not deliver any such documents because, in good faith, none of such documents are in the seller's possession. That is not the situation this provision seeks to address, however, because that does not involve a default by the seller. This provision indicates that these (termination) remedies of §§ 10.6.2 and 10.6.3 are not the buyer's only remedies in the event of a default by the seller with respect to the delivery or provision of Due Diligence Documents – that the buyer will also have available to it in that event the remedies for a default by seller that are set forth in § 21.2.

Conditional Upon Sale of Property – Seller Termination Rights

35. § 10.7. Conditional Upon Sale of Property. It is not uncommon for a buyer to submit an offer that makes the buyer's obligations contingent upon the buyer selling an existing home, as contemplated by § 10.7 of the CBS1-6-15 form. In many transactions containing such a contingency, the buyer works diligently, reasonably and in good faith to accomplish the sale of buyer's existing home, and both transactions are ultimately completed. In many other transactions involving such a contingency, however, the transactions are not completed, the result being that the seller has been tied up and at the mercy of the buyer through the specified Conditional Sale Deadline. This paragraph gives the seller a right to terminate the contract if by the date to be specified in this paragraph the buyer does not have its existing property under contract (and a copy of that contract delivered to the seller), or if any such contract is subsequently terminated or cancelled without closing, or if the closing of buyer's property does not occur by the Conditional Sale Deadline stated in the dates and deadlines chart.

While this paragraph gives the seller the option and right to terminate if the sale of buyer's existing home has not been closed by the Conditional Sale Deadline, if a sale of buyer's existing home has not closed by that Conditional Sale Deadline and the buyer does not exercise its right to terminate, the seller will want to give some serious consideration to whether to exercise the seller's termination option under this paragraph – because if the buyer hasn't exercised its option to terminate at that point, the buyer will have waived that sale contingency, and if the buyer has no remaining unsatisfied contingencies the earnest money could be non-refundable (whereas the seller's exercise of the termination option would have the effect of returning the earnest money to the buyer).

This paragraph does not include any provisions regarding the buyer's effort to sell the property – for example, no provisions mandating the ongoing listing of the buyer's property or insertion into a multiple listing service. The covenant of good faith and fair dealing may assist somewhat in that regard, but, among other things, a listing broker and seller faced with an offer

that contains a § 10.7 contingency may want to consider rejecting the offer unless the buyer has already listed its property or lists it concurrently with the creation of the contract for the buyer's purchase of the new property.

A listing broker faced with an offer containing a § 10.7 sale contingency may also want to consider using one of the alternative kick out (or "right of first refusal") options/documents discussed below in Section IV of this explanation letter.

Source of Water

36. § 10.8. Source of Potable Water (Residential Land and Residential Improvements Only). Given the statutory requirements regarding disclosure of the source of potable water in residential transactions, listing brokers should make the Source of Water Addendum available on the property for showings, so that buyers can submit such Addendum with offers. In spite of the best efforts of listing brokers to educate selling brokers to submit offers with the Source of Water Addendum attached, many brokers working with buyers will not do so. This clause, then, provides a means for a listing broker to correct that oversight in a counterproposal. (A similar provision for the Lead-Based Paint Disclosure (Sales) form is not included here because, although the same problem does occasionally arise in that context, § 10.10 of the CREC-approved Contract form contains the buyer's acknowledgment of receipt of the Lead-Based Paint Disclosure (Sales) form, whereas that acknowledgment is not contained in § 10.8 regarding the Source of Water Addendum unless the check-box provision is filled out to reflect such receipt. In spite of that § 10.10 language acknowledging receipt of the Lead-Based Paint Disclosure (Sales) form, however, if the listing broker knows that the buyer submitting an offer has not yet received such form, the listing broker should provide the required form and related documents (such as the EPA pamphlet) and then have the parties sign or re-sign as necessary to assure compliance.

Methamphetamine Disclosure

37. § 10.11. Methamphetamine Disclosure. Under currently applicable Colorado law, a Seller is not required to disclose information regarding methamphetamine contamination if the Property has been remediated to state standards and certain other requirements have been met, and § 10.11 of the CBS1-6-153 form is consistent with that law. Remediation to state standards does not mean that all contamination has been removed, and some individuals may have chemical sensitivities that make it reasonable and even necessary to know of any such contamination and clean-up, even if remediation has been performed to specified state standards. This paragraph is designed for individuals with that concern. It includes a contractual agreement for the seller to disclose any known information about such contamination, even if remediation to state standards has been completed and the seller would not otherwise be required to make such disclosure. This paragraph also includes an express acknowledgment that the buyer's right to object and/or terminate under § 10.3 and/or § 10.6.2 (a) includes the buyer investigating and being satisfied with any such information, and (b) applies even if meth contamination has been remediated to state standards.

Disclosure of Psychologically Stigmatizing Events or Circumstances

38. § 10. Property Disclosure, Inspection, Insurability, Due Diligence, Buyer Disclosure and Source of Water – Psychologically Stigmatizing Events or Circumstances. Colorado law provides that facts or suspicions regarding psychologically stigmatizing events, such as a Property being the site of a homicide or other felony or of a suicide, "are not material facts subject to a

disclosure requirement in a real estate transaction." This paragraph is designed for those buyers who nonetheless want to know about such matters. It includes a contractual commitment by the seller to disclose any such psychologically stigmatizing events or circumstances relating to or having occurred on the Property of which the seller has actual knowledge, and it also includes an express acknowledgment that the buyer's right to object and/or terminate under § 10.3 and/or § 10.6.2 includes the buyer investigating and being satisfied with any such information.

Due Diligence – Expansion and Coordination of Inspection & Due Diligence Provisions

39. § 10. Property Disclosure, Inspection, Insurability, Due Diligence, Buyer Disclosure and Source of Water. The Real Estate Commission's provisions limit the buyer's inspection and termination rights to the "physical condition" of the Property and Inclusions, the other specific matters listed in clauses (1) through (5) in § 10.3 of the contract, and to the due diligence matters described in § 10.6, and the Commission's provisions contemplate that there may be a different objection deadline for the § 10.3 matters than for the § 10.6 due diligence matters. Our paragraph expands the inspection and termination rights to anything related to the Property, the Inclusions or the transaction contemplated by the contract. It lists a variety of other items which serve as a good check list for a buyer. Given the expansion of the inspection and termination rights in this paragraph, and because the subject matters of § 10.3 and § 10.6 often overlap, this paragraph also includes language indicating that the objection deadlines for both (the Inspection Objection Deadline and the Due Diligence Documents Objection Deadline) will be the same – and the later of the deadlines specified for such matters in the dates and deadlines chart. The paragraph does not add a separate contingency for buyer dissatisfaction about wells and septic systems. Buyers have an opportunity to evaluate these features of a property as part of the buyer's § 10 inspection. However, the Additional Provisions section of our system does include a separate well and septic clause requiring the seller to deliver certain reports or tests regarding a well or septic system which a buyer may find desirable. This paragraph also indicates that if the condition of the Property or Inclusions changes from the date the Property went under contract, the seller is obligated to disclose any changes to the buyer as those changes occur.

Well and Septic

40. § 10. Property Disclosure, Inspection, Insurability, Due Diligence, Buyer Disclosure and Source of Water. Buyers do not need to add language to the contract to give the buyer the right to inspect the well or septic system which may service the Property, as § 10 of the CREC-approved Contract already gives the Buyer such rights. Selling brokers simply need to make the Inspection Objection Deadline late enough for the buyer to have a realistic opportunity to have the well and septic system inspected. However, in addition to inspection rights, buyers sometimes want, and have the market clout to compel, the seller to do such things as pump the septic tank and test the water's potability. This paragraph requires the seller to do certain things, and provide certain documentation on or before the earlier of the Due Diligence Documents Delivery Deadline or the third calendar day prior to the Inspection Objection Deadline.

Transfer of Title – No Warranty Regarding Survey Matters

41. § 13.6. Transfer of Title. Most sellers are not surveyors, and if they think about it, may not want to make absolute warranties, beyond their knowledge or expertise, regarding survey-related matters. Because a warranty deed includes such an absolute warranty by the seller, the seller may want to exclude from the warranties of the deed not only the matters contemplated

by § 13.3, but also all other facts or matters which an inspection or a complete and accurate survey of the property would disclose – placing the burden on the buyer to obtain whatever survey the buyer decides it needs to investigate survey matters, rather than rely on a seller warranty regarding such matters. This clause does that. To the extent a seller has actual knowledge of an Off-Record Title matter, the seller should still disclose that Off-Record Title matter in writing in accordance with § 8.3, even when this clause is used.

Transfer of Title – No Warranty Regarding Building, Zoning and Other Land Use Laws

42. § 13.6. Transfer of Title. Certain violations of law, including for example a zoning violation created by a previous owner's unpermitted and wrongful conversion of a garage into living space, can constitute a breach by the seller of a covenant or warranty contained in a warranty deed – even if the legal violation was not created by and is unknown to the seller. Some sellers may not want to assume that sort of risk, choosing instead to narrow such deed warranties or covenants by use of this clause. Of course, to the extent the seller has actual knowledge of any such legal violation or non-compliance, the seller should still make a timely written disclosure of such fact, even if using this clause.

Transfer of Title – No Warranty Regarding Survey Matters or Land Use Laws

43. § 13.6. Transfer of Title. This clause is simply a combination of the disclaimers contained in the two previous clauses – for use by a seller who wants to utilize the concepts of both those clauses.

Possession Date Other than the Closing Date

44. § 17. Possession. This is the same as the third clause contained in our Addendum "A," and is discussed above in ¶ II.B.3. of this explanation letter.

Counterproposal Clause for Changing Possession Date & Possession Time

45. §§ 17 & 3. Possession. Sellers, for various reasons, are sometimes reluctant to accept offers providing for the delivery of possession at closing. This clause is one a listing broker might consider using in a counterproposal for some such reluctant sellers – it provides for delivery of possession on the third business day after closing unless the buyer satisfies certain conditions shortly before closing, including the delivery of an unconditional, written loan commitment for any new loan contemplated by the contract. If the specified conditions are satisfied, the seller agrees to deliver possession upon the completion of the closing.

Escrow for Property Condition

46. § 19. Causes of Loss, Insurance; Damage to Inclusions and Services; Condemnation; and Walk-Through. From time-to-time, sellers will only provide possession of the property after the closing. This clause allows the buyer to request the seller to establish an escrow to secure the seller's obligation to leave the property in the condition required by the contract.

Property Condition

47. § 19. Causes of Loss, Insurance; Damage to Inclusions and Services; Condemnation; and Walk-Through. This paragraph requires the seller to leave the property in clean condition for the buyer.

48. § 19. Causes of Loss, Insurance; Damage to Inclusions and Services; Condemnation; and Walk-Through. In addition to the duties of the preceding paragraph, this paragraph obligates the seller to have the Property professionally cleaned.

49. § 19. Causes of Loss, Insurance; Damage to Inclusions and Services; Condemnation; and Walk-Through. This paragraph is similar to the preceding paragraph, but also obligates the seller to remove all the personal property that is not intended to be transferred to the buyer from the Property at least three calendar days prior to closing.

Extension for Lender Delay (Simple)

50. § 21. Time for Performance. This provision calls for an extension of time for delay caused by the buyer's lender, including, **but not limited to**, the lender's delay in timely providing final Closing Disclosure documents in accordance with the TILA-RESPA Integrated Disclosure (TRID) reporting requirements. We recommend that it be used sparingly and for short periods only. The advantage of including this provision in a contract is that it prevents the seller or the buyer from terminating the transaction because of a delay caused by the buyer's lender. However, such a clause has many disadvantages. Among them are that this clause could work to delay a seller, through no fault of the seller. Though the delay of the buyer's lender may be through no fault of the buyer, it will not be through the fault of the seller either. Many sellers will not want to subject themselves to a risk which is beyond their control. Another disadvantage of such a clause is that it can lead to arguments about whether the delay is caused by the buyer's lender. Yet another disadvantage is that such a clause may work to make lenders lazier than they otherwise would be if there were hard deadlines. If and when the clause is used, we recommend, given the TRID requirements, that the time period inserted into the blank in this provision be **at least** three (3) business days, and as many as seven (7) business days if the market will tolerate it.

51. § 21. Time for Performance. This clause is identical to the preceding one, but only creates an extension if the delay is "through no fault of buyer." It has the same advantages and disadvantages of the preceding paragraph but is somewhat more seller oriented. Again, it has the ambiguity that in some situations reasonable people can disagree about whether the lender delay was without the fault of the buyer. We provide both of these clauses because clients want them, but the law firm discourages their use.

Extension for Lender Delay (Optional Selections)

52. § 21. Time for Performance. This paragraph is an alternative to the preceding paragraph and allows the parties to be more specific about which deadlines are extended due to lender delay.

Possession not Affected by Mediation Clause

53. § 23. Mediation. The alternative dispute resolution clause of the Real Estate Commission approved contract requires the mediation of any disputes related to the contract or the property. Parties are only free to litigate after 30 days passes from the first written request for the mediation. When a seller fails to deliver possession on the date specified in the contract, the mediation clause could work a hardship to the buyer and this clause excludes these types of disputes from the delay of mediation.

Earnest Money Dispute – Shortening of Time Period for Implementation of § 24, Clause (3) Option

54. § 24. Earnest Money Dispute. This is the same as the last of the four *ala carte* (or check-box) clauses contained in our Addendum "A," and is discussed above in ¶ II.B.7. of this explanation letter.

TRID-motivated Extension & Extension Fee Clauses

55. Buyer Option to Extend. Clauses 50, 51 and 52, discussed above, set forth alternative ways of providing for an extension of time for delay caused by the buyer's lender, including the lender's delay in providing final Closing Disclosure documents in accordance with the new TRID reporting requirements. While those clauses all have the advantage for a buyer of preventing the termination of the contract due to a lender-caused delay, we pointed out disadvantages of those generic extension clauses above, and offered our recommendation that such clauses be used sparingly and for short periods only. This clause provides a narrower extension right for a buyer – limited to situations involving the buyer's lender's delay in timely providing final Closing Disclosure documents as required by the TRID rule or such lender's delay in satisfying any other aspect of the TRID requirements. Limiting the scope of the extension right like that to TRID-related delays caused by the lender may make this clause more palatable to a seller. This clause also provides that if the Closing Date is extended pursuant to the clause, then the Possession Date is automatically extended by the same number of days. A broker using this clause will need to complete the blank in the clause for the extension period. We recommend up to seven (7) business days for that blank if the market will tolerate it, but no fewer than three (3) business days.

56. Automatic Extension. Unlike the preceding clause, which gives the buyer the unilateral option to extend the Closing Date for up to a specified number of days in the event of a TRID-related delay caused by the buyer's lender, this clause provides for an automatic extension of the Closing Date for the specified number of days upon the occurrence of such a lender-caused, TRID-related delay (and an extension of the Possession Date by the same number of days). Like the preceding clause, a broker using this clause will need to complete the blank for the extension period, and, again, we recommend up to seven (7) business days for that blank if the market will tolerate it, but no fewer than three (3) business days. Because there are likely to be times when any such extension will be futile, our law firm prefers the preceding clause to this automatic extension provision, but we have included both versions here because they can both work and our broker clients have found them useful.

57. Extension Fee. As should be apparent from the opening phrase, this clause is intended for use when the broker is negotiating an extension of the Closing Date that will be documented in an Agreement to Amend/Extend Contract. It is not a clause for use when writing an initial offer. This clause provides for the buyer's payment of an Extension Fee, the amount of which is to be inserted in the blank in the clause. The Extension Fee under this clause is not additional earnest money and is not credited against the purchase price at closing. It is money paid by the buyer as consideration for the seller agreeing to extend the closing, and as an incentive to obtain that agreement from the seller. While the idea of TRID-related delays was the motivation for this clause (and the reason for its inclusion in this place in the document), its use is not necessarily limited to extensions needed because of such TRID-related delays, or any other lender-caused delays. Rather, the clause could be used by a broker working with a buyer when negotiating a Closing Date extension for most any reason.

Additional TRID-motivated Clauses

58. Buyer to Authorize Disclosure of Loan Status Information. The Colorado Inter-Industry TRID Task Force (CIITTF) published a document in 2015 intended to guide its members on best practices relating to the new TRID requirements. This clause, requiring the buyer to authorize buyer's lender and other settlement service providers to furnish information about the status of the buyer's loan to the broker working with seller, relates to one of the recommendations from that publication relating to so-called "stacked" or "domino" or contingent sequential closings.

59. Buyer's Walk-Through Right. Another of the CIITF's best practices recommendations was that brokers schedule final walkthroughs at least seven (7) days prior to closing, because such walkthroughs may result in changes to the lender's Closing Disclosure (for example, in the event of a change in the condition of the Property or a change in appraisal conditions), and allow for an additional walkthrough to ensure that needed repairs have been satisfactorily completed. This clause attempts to give a broker working with a buyer the explicit right under the contract to implement that best practices recommendation.

Additional "Hot Market" Clauses

60. Disclosure of Buyer's Need to Sell Existing Property to Complete This Transaction. Before the existing property sale contingency that is now § 10.7 was added to the Commission-approved contract forms, those contract forms included a provision by which a buyer would disclose whether the buyer needed to sell an existing property to complete the purchase contemplated by the contract. In order to make their offers more attractive to sellers in the current seller market, some buyers who need to sell an existing property in order to close on the purchase of another are choosing to omit the § 10.7 contingency from their offers, and are not disclosing their need to sell another property. The nondisclosure risks allegations of fraudulent concealment if the buyer is ultimately unable to close on the purchase because the existing property is not sold. This clause provides for the disclosure of that need to the seller, as the earlier Commission-approved contract forms did, while also allowing the buyer to inform the seller whether the buyer does or does not already have a contract pending for the sale of the buyer's existing property.

61. Threshold for Exercise of Appraisal Condition Set Below Purchase Price. This clause addresses a situation where the buyer can get a loan and has some extra cash that could be used to close if the property does not appraise for the full purchase price, but the buyer doesn't have unlimited extra cash and needs the property to appraise for some minimal amount (less than the purchase price). For example, consider a situation where the list price of a property is $300,000. Due to a bidding war, the contract price gets bid up to $330,000. The pre-printed contingency in the Commission-approved contract gives the buyer an out if the property doesn't appraise for $330,000. This substitute contingency only gives the buyer an out if the property fails to appraise for some lower amount (the amount to be specified in the blank), such as $300,000. In this provision, the buyer commits to bring the extra cash needed to close if the property appraises above the minimum threshold but for less than the full purchase price. The buyer is also making a representation that the buyer has the funds to bring that extra cash to closing. This is a clause that a buyer could use in order to make an offer more attractive to the seller than it would be with the standard appraisal contingency of the Commission-approved form. It is also a clause the listing broker could use in a counterproposal to make a contract better for a seller.

62. Effect of No Appraisal Condition on Exercise of Loan Condition. This provision carves valuation issues out of the loan objection contingency. It is intended to address a frustration for some sellers and listing brokers when a buyer submits an offer without an appraisal contingency,

but then the buyer seems to use appraisal issues to back out of the contract by using the loan objection contingency. This language makes it clear that any loan objection must be based upon "reasons other than the value or appraised value of the property." This is a provision that could be used by buyers who sincerely do not care whether the property appraises for the purchase price. It is also a provision that can be used by listing broker to counter an offer that omits an appraisal contingency but contains a loan objection contingency. It is more useful to sellers in situations where the buyer has sufficient funds to bring more cash to close if the property doesn't appraise for the full purchase price. It may be a hard clause for seller to take advantage of in an earnest money skirmish, because sellers may find it hard to prove that a buyer is using the loan objection because of appraisal issues, when the buyer uses the loan objection without providing any reason or a reason other than valuation. This clause gives the seller something to argue if the seller perceives that the buyer is terminating because of appraisal issues, but some sellers will conclude that the fight about whether the buyer is properly using the loan objection contingency is not worthwhile.

63. Effect of No Inspection Objection. Some sophisticated buyers (perhaps mostly investors) are willing to risk their earnest money if the buyer's due diligence does not turn out as expected. The buyer, for example, may be willing to put up some earnest money without a loan or appraisal contingency, but still intend to finance the purchase of the property. This clause makes it clear that the seller still has an obligation to provide access to the property to an appraiser from the buyer's lender. Another, even more aggressive buyer may submit an offer without any contingencies other than the record title objection contingency. That buyer may still intend to have an inspection done on the property. This clause would obligate the seller to provide access to the inspector and others (including an appraiser). This is a clause, then, to be used by buyers who are waiving contingencies, but who still intend to make the inspections or take the other action associated with the contingencies being waived.

64. Seller Replacement Property Contingency. One of the things that inhibits some sellers from entering into a contract to sell a property is fear that the seller will not be able to find suitable replacement property. This clause makes the seller's obligation to close on the contract contingent upon the seller not only entering into a contract to purchase a replacement property by the "Replacement Property Contract Deadline," but also closing on the replacement property by a later deadline (the "Replacement Property Closing Deadline"). This is a very seller-oriented provision because it gives the seller an out until late in the transaction. If the Replacement Property Closing Deadline is the same date as the Closing Date for the seller's sales contract, then the seller has an out as late as the date of closing with the seller's buyer. This clause might be used in an offer from a buyer to make the buyer's offer especially attractive to the seller, especially in situations where the offering broker has reason to know that the replacement home contingency would be especially valuable to the seller. It is also a clause for a listing broker to use in a counterproposal when this is an important term for the seller.

65. Seller Replacement Property Contingency. This clause is an alternative, more balanced version of the preceding replacement home contingency clause. The seller's obligation to close on the sale of the seller's home is contingent upon the seller going under contract on a replacement home by the Replacement Property Deadline. If the contingency is not satisfied, then the seller can terminate the contract so long as the seller provides notice to the buyer that the contingency was not satisfied by the deadline. In this version of the contingency, however, the seller's obligation to close on the sale is not contingent on the seller actually closing on the replacement property. Using this clause, it is important for listing brokers to educate the seller so that the seller knows that the seller might be obligated to close on the sale even if the closing on the purchase of the seller's replacement home contract does not happen. Sellers would use this contingency, rather than the prior contingency, when the seller is willing to take the risk

that the seller does not close on the replacement property, in order to make the deal with the buyer who is not willing to take the risk that the seller does not actually close on the replacement property.

Federal and Colorado Withholding

66. Federal and Colorado Withholding. The Federal Foreign Investment in Real Property Tax Act (FIRPTA) and Colorado's statute calling for withholding on transfers of Colorado real property can require the withholding of a percentage of the sales price or seller's proceeds in non-exempt transactions. This paragraph alerts the buyer and seller to these withholding provisions.

Back Up Conditions (select one)

67. Buyer in Back Up Position. This clause provides a back-up contingency for the seller. It contemplates a situation where the seller is already under contract with buyer number one. This clause would be inserted into a contract with buyer number two (perhaps in a counterproposal to an offer from buyer number two) making the seller's obligation to buyer number two contingent upon buyer number one acknowledging, in writing, the termination of contract number one. It does not give the seller the ability to extend deadlines in contract number one.

68. Buyer in Back Up Position. This clause is identical to the preceding clause but has explicit language allowing the seller to extend any deadlines in the first contract without diminishing the contingency in the second contract.

69. Buyer in Back Up Position. This back-up contingency provides more flexibility for the second buyer. Until the first contract is terminated, the second buyer has the ability to terminate the second contract.

In back-up situations, the second buyer will generally not want to commence his or her evaluation of the property until the first contract is terminated. This desire can be accommodated by identifying dates and deadlines in the second contract which are triggered by the termination of the first contract.

70. CLUE Report. Properties now have claims histories like borrowers have credit reports. Claims histories are maintained by the Comprehensive Loss Underwriting Exchange property database (CLUE). This clause obligates the seller to provide the buyer with a CLUE report by the Seller's Property Disclosure Deadline.

71. Deadlines Expire Before Midnight. Although the Commission-approved forms may not be as explicit on this point as a buyer, seller or broker might prefer, the deadlines under those forms probably run all the way to midnight on the applicable date (except for the hour of Closing, which should be as established pursuant to § 12.3, and the Possession Time and Acceptance Deadline Time, each of which will be as stated in the § 3 chart). A Record Title Objection delivered electronically at 11:59 pm on the Record Title Objection Deadine, then, in the manner specified in the contract, should be effective as timely delivered. This clause allows a party to establish an earlier time for the expiration of those deadlines. Use of this clause (which requires inserting in the blank the time that is to be the "Expiration Time" for such deadlines) will then mean, for example: that if a party fails to deliver required documents by the specified Expiration Time on the date the documents are to be delivered, that party will be in default; and if a party has a right to object or terminate by a specific date, that objection or termination right will have been waived if not exercised in the required manner by the Expiration Time on the applicable date.

72. Unresolved Issue. It is not unusual for a buyer and seller to desire to form a contract even though there is some significant unresolved issue at the time the contract is formed. For example, the parties may know that the neighbor's garage encroaches onto the subject property. The buyer and seller wish to form a contract and figure out how to deal with the garage encroachment if the contract proceeds. The unresolved issue clause allows the parties to identify some unresolved issue to be addressed later. If the unresolved issue is not addressed later, the contract dies. Using this clause has the disadvantage of creating an out for both the seller and the buyer. But § 10 of the Colorado Real Estate Commission approved contract already provides a significant "out" clause for a buyer. Because the "Unresolved Issue" needs to be resolved, or not, by the same date as the Inspection Resolution Deadline, it does not extend the uncertainty for the seller or buyer who still wishes to consummate the transaction.

73. Litigation. It is not unusual for sellers or owners' associations to participate in lawsuits, the results of which can have a significant impact on the value of the Property. This clause requires the seller to make certain representations about seller's awareness (or not) of such suits, and obligates the seller to provide certain information to buyers about such lawsuits if the seller is aware of them.

74. Legal Review by Buyer. This clause provides an attorney review contingency for the buyer.

75. Legal Review by Each Party. While the Legal Review by Buyer clause only provides an out for the buyer, this second legal review clause provides a legal review contingency for both parties.

76. Environmental Matters. Certain environmental laws make a property owner liable for environmental contamination on their property, regardless of whether that owner was the cause of the contamination. This clause seeks to elicit disclosure from the seller about environmental problems and also may serve to enhance the likelihood that a buyer of a contaminated property would be considered an "innocent owner" of contaminated property under the environmental laws. Both these things tend to have some risk reduction benefit for buyers.

77. Limitation on Buyer's Publication or Distribution of Photos or Videos of Property. Sellers are sometimes troubled to learn that photos or videos of their home, or of particular contents in their home, have been put on the Internet or otherwise published. Brokers and sellers probably cannot realistically expect to preclude the taking of any photos or videos by buyers – the means of doing so are now ubiquitous, and the taking of photos or videos can be a means for a buyer to protect its legitimate rights and interests in a transaction. However, it does not seem unreasonable to ask a buyer to commit to certain limitations and restrictions on the publication or distribution of any such photos or videos, and that is the focus of this clause.

78. Contingency Regarding Material Adverse Changes – Right to Terminate. With events like the 2013 Black Forest Fire and the September 2013 floods in several front range counties, buyers and their brokers have had occasion to learn that the casualty and condemnation provisions of the Commission-approved forms do not always adequately address matters. In the Black Forest Fire, for example, some houses were untouched by the fire but the value of such houses were significantly adversely affected by the devastation to the surrounding community – and a buyer under contract to buy one of those untouched houses would be contractually obligated to proceed with closing (subject to any other unexpired contingency provisions, which, of course, are supposed to be exercised, if at all, in good faith for the limited purposes for which they were intended). This clause gives the buyer a right to terminate if a significant adverse

change occurs affecting the property or the subdivision or surrounding area or community in which the property is located. If this clause is used, we recommend using it in conjunction with a clause like ¶ 39 of this Additional Provisions document. Whether any change has "materially adversely affect[ed]" the property or such surrounding community will not always be clear in the particular facts or circumstances. However, the intent is not to provide the buyer with an easy walk clause, but to get a provision which affords some protection for the buyer in the event of significant adverse changes and which the seller may find acceptable.

79. Generic Contingency–Right to Terminate. The Real Estate Commission provides parties at least five pre-printed contingencies for things such as loan availability and terms, title, off-record and survey review, appraisal, property condition and insurability. It is not unusual, however, for one or both of the parties to have a need for a deal-specific contingency. For example, the seller may have a need for a contingency that a job transfer is approved. This generic contingency is written so that if a party benefited by the contingency does not provide the written Notice to Terminate by the deadline (to be inserted into this clause), then, pursuant to § 25.2, the contingency is waived and the contract lives.

80. Generic Contingency–Right to Terminate if no Written Resolution. This clause is motivated by the same phenomenon which motivated the preceding contingency. The difference is that a notice from the party benefited by the contingency does not automatically lead to a termination of the contract. Instead, the parties have an opportunity to resolve the issue by the contingency resolution deadline. This paragraph might be used, for example, to allow the contract to be contingent upon the buyer's satisfaction with the state of a lawsuit brought by the property's HOA.

ADDITIONAL PROVISIONS TO THE EXCLUSIVE RIGHT-TO-BUY LISTING CONTRACT

81. Purchase of Distressed Property. This clause can be used by the Broker to educate buyers interested in acquiring "distressed" properties about some of the difficulty and complication, and resulting need for patience and legal advice, often associated with such transactions.

82. Psychologically Stigmatizing Events or Circumstances. This paragraph can be used by the Broker to educate buyers about the fact that under currently applicable Colorado law, facts or suspicions regarding psychologically stigmatizing events, such as a Property being the site of a homicide or other felony or of a suicide, "are not material facts subject to a disclosure requirement in a real estate transaction."

83. TRID Risk. This clause can be used by the Broker to educate buyers about: risks associated with the requirements of the new TILA-RESPA Integrated Disclosure (TRID) rule, which may slow down the loan approval process and make loan "approvals" more precarious (for example, if the Closing Disclosure documents are not delivered when required in advance of closing, the loan cannot be made on the closing date); options for managing those risks, such as later loan objection deadlines and extension rights for loan delays; the effect some such tools for risk management may have on a seller's perception or likely acceptance of the buyer's offer (in a seller market, for example, pushing back loan objection deadlines and including closing extension options may tend to make a buyer's offer less desirable to a seller, compared to an offer with quicker pacing, an earlier loan objection deadline, and no closing extension option); and the need for the buyer to make decisions about how much TRID risk the buyer is willing to accept.

84. Pitkin County and Aspen Regulations Regarding Carbon Monoxide Detectors. The Colorado statute regarding carbon monoxide alarms, where applicable, requires a seller offering the property for sale to assure that an operational carbon monoxide alarm is installed within fifteen feet of the entrance to each bedroom or in a location as required by the applicable building code. The Pitkin County Code and the Aspen Municipal Code are each examples of an "applicable building code" referenced in the state statute, and those Codes also impose an obligation on the owner – which a buyer will be when it acquires property – relative to the installation and maintenance of carbon monoxide detectors. Our clause serves to educate buyers about these applicable local code requirements. This clause, of course, is specific to Aspen and Pitkin County. Other counties and municipalities may also have codes that should be considered in conjunction with the state law regarding carbon monoxide alarms, and clients assisting buyers with the purchase of properties within other jurisdictions having similar codes may contact us if they would like assistance creating a provision tailored to the specific regulation of another county or municipality.

ADDITIONAL PROVISIONS TO THE EXCLUSIVE RIGHT-TO-SELL LISTING CONTRACT

85. Broker as Buyer. This clause addresses the scenario where the Designated Broker for the seller, or other licensees within the Brokerage Firm, may wish to purchase the listed property.

86. Broker's Lien. Although with the 2010 enactment of H.B. 10-1288, Colorado now has a broker lien law, the lien provided by that law is limited to situations where a building owner fails to pay a **leasing commission** owed pursuant to a written listing or written compensation agreement between the broker and that building owner or his agent. As a result, in the residential transactions for which the enclosed forms and clauses are designed, a Brokerage Firm will have no lien rights against the listed property if the Seller breaches the listing agreement, unless an express agreement is made between the Seller and the Brokerage Firm which provides such a lien right for the Brokerage Firm. Among other things, this means that it is slander of title for a broker to record a listing agreement which doesn't provide for lien rights. This clause provides such an express lien. Use of this clause would be especially appropriate in situations where a developer expects a broker to front substantial marketing expenses and time before the broker has a realistic opportunity to close on sales.

87. Variable or Reduced Commission if Only One Broker. Occasionally sellers will negotiate a variable listing commission. We discourage brokers from acquiescing to variable listing commissions and encourage brokers to educate their sellers that most multiple listing services require disclosure of a variable commission. Potential showing brokers will know that their buyers are at a competitive disadvantage. A variable listing can actually hurt a seller by discouraging offers. Nevertheless, if a seller wishes to have a variable listing arrangement, our clause provides for one.

88. Reduced Commission for Two Deals. Sometimes a broker will agree to a reduced listing commission if the client agrees to buy a replacement property through broker. These arrangements are problematic unless the replacement transaction closes at the same time, or before, the sale transaction. Our clause helps listing brokers address these issues.

89. Listing Syndication. This clause attempts to help brokers obtain the informed consent from sellers to allow the listing broker to make the choices about listing syndication in light of the complex and fast changing considerations related to listing syndication. It is a clause designed to start a conversation with the seller on the topic. If the seller instead wants to control the choices, then the broker should confirm those choices with the seller in writing.

90. Local Transfer Tax. This clause helps disclose to a seller the existence of a local transfer tax which exists for communities such as Aspen, Avon, Breckenridge, Crested Butte, Cripple Creek, Frisco, Gypsum, Minturn, Ophir, Snowmass Village, Telluride, Vail and Winter Park.

91. Short Sale Addendum – Effect of §4.1. There exists some confusion about the meaning or effect of §4.1 of the Short Sale Addendum (Seller Listing Contract) (SSA38-10-11). The purpose of this clause is to dispel some of that confusion, clarifying that such §4.1 relates only to the provision of the mortgage assistance relief services that are the subject of §4 in the Short Sale Addendum (Seller Listing Contract), and that such §4.1 does not operate to give a seller a general right to terminate the Seller Listing Contract to which the Short Sale Addendum is a part.

92. Freddie Mac Short Sale Affidavit or Addendum. To address problems with fraudulent or other abusive practices in short sale transactions, Freddie Mac has developed an affidavit or agreement that all participants to a short sale transaction are being asked to sign. In the view of many brokers and their legal advisors, the form is overly broad from the broker's perspective, creating inappropriate liability for a broker. This clause makes it clear to the client that the broker will not be obligated to sign such a form. Refusing to sign, of course, may jeopardize the completion of such a transaction; but the clause **might** be used by a broker to insist on changes to the form that make it more palatable.

93. Authorization. Brokers will occasionally list property held by an entity, rather than individuals. With this clause, the listing broker can have the person with whom they are dealing warrant that he or she has the authority to act on behalf of the entity or trust which owns the property.

94. Existing Financial Distress – No Authorization to Disclose Seller's Financial Condition. Brokers often list property owned by Sellers in some sort of financial distress. This clause, and the two that follow, are alternative clauses that may be helpful in three different kinds of such financial distress. A broker may be engaged to list a property owned by a seller who has lost a job or had some other situation that results in an inability to pay the mortgage(s). However, in many such situations there is still plenty of equity in the Property with which the seller can, at the closing of a sale, completely pay off the mortgage(s) as well as any other closing costs, and thereby preserve the remaining equity in the property for itself. It can hurt a seller in such a situation to disclose its financial situation. In general, listing brokers cannot disclose the seller's financial condition or the seller's motivation to sell a property. However, it is sometimes assumed that brokers can or must disclose whether a seller is in default or in foreclosure. In our opinion, though, neither the Colorado Foreclosure Protection Act nor other currently applicable law obligates a seller in the circumstances contemplated here (with equity in the property more than sufficient to pay at closing all existing liens and any other costs or expenses associated with a sale) to disclose the fact that the seller is in default or in foreclosure. We believe, for example, that this kind of situation is not an adverse material fact that requires disclosure under the common law applicable to a seller or the statutory disclosure obligations of the listing broker, nor does the Colorado Foreclosure Protection Act expressly obligate a seller to make such a disclosure. If this clause is used, the Broker and Brokerage Firm are instructed that they are not authorized to disclose the financial condition of a seller in this situation. A broker should not use both this clause and the one immediately below, because the underlying assumptions regarding those two clauses are inconsistent.

95. Existing Financial Distress – Authorization to Disclose Seller's Financial Condition and Negotiate Short Sale. As indicated above, listing brokers generally cannot disclose the seller's financial condition or the seller's motivation to sell a property. However, when a seller has financial distress, it is sometimes in the seller's best interest to so inform the market. Among the reasons are that financial distress of a seller might attract buyers. Another reason is that some of these transactions require speed and special buyers. The seller may not want to invest time and other resources with buyers who cannot conform to the seller's needs. Moreover, at times it may be undeniable that a seller cannot sell the property free of existing liens without the agreement of one or more lenders to accept a short payoff, and we believe that is an adverse material fact which, if known to the listing broker, the listing broker is required to disclose, notwithstanding the general rule about non-disclosure of a seller's financial condition or motivation. In those situations, use of the Commission-approved Short Sale Addendum (Seller Listing Contract) (SSA38-10-11) is needed. In addition, use of the Commission-approved form of Short Sale Addendum with a Contract to Buy and Sell is also important for a seller in such circumstances, to avoid putting the seller in a default position. This clause allows a seller to commit, in writing, to permit the listing broker to disclose the seller's financial distress to the market, and also authorizes the listing broker to negotiate a short sale. It is designed to save time by avoiding the need for the listing broker to obtain a separate authorization outside of the listing agreement. A broker should not use both this clause and the one immediately above, because the underlying assumptions regarding those two clauses are inconsistent.

96. Existing Financial Distress – Multiple Liens. This clause is for situations when there are multiple liens on the property, the amount of which exceeds any net proceeds the seller can be expected to receive from a sale, and when the parties desire to create the possibility of completing a sale by effecting a junior lien redemption from a foreclosure by the first lienor, after one or more intervening junior liens elect not to redeem. The broker's deed of trust created pursuant to this section would be used to accomplish such a redemption. The seller's representation in this section that, to the seller's knowledge, none of the existing liens is presently in foreclosure, is included because **the approach contemplated by this section cannot work where a Notice of Election and Demand has already been recorded to begin a foreclosure and such foreclosure proceeds to sale**. However, this concept may be available if such a pending foreclosure is withdrawn for some reason – such as when the subject default is cured – and then another foreclosure by the first lienor is subsequently begun by the recording of a new Notice of Election and Demand after the Deed of Trust to the Broker has been created and recorded. That possibility, then, is something the prospective listing broker may want to keep in mind. The process or transaction contemplated by this clause is complicated, and a broker attempting to use this clause is advised to seek advice from counsel before and during any implementation of the approach contemplated by this clause.

97. Jefferson County Regulations Regarding Individual Sewage Disposal Systems. Jefferson County currently places burdens on an owner who is selling a property, which is not connected to a public sewage disposal system, to comply with certain requirements. Generally, a seller needs to have the independent sewage disposal system (ISDS) permitted. In order to obtain such a permit, the owner must generally first arrange for the pumping of the ISDS. Our clause serves to educate the seller about these needs at the time the listing is taken.

98. Boulder County Septic Smart Regulations. Since Jefferson County created its regulations regarding individual sewage disposal systems in 2004, other counties have enacted similar regulations, and Boulder County is one of those. The preceding clause regarding the Jefferson County regulations summarizes some of the specifics of the Jeffco regulations. This clause regarding the Boulder County regulations uses a different approach, instead referring the seller

to Boulder County websites where the seller can learn about the requirements to be satisfied when selling property served by such an individual sewage disposal system. Like the preceding clause, however, this one also encourages and advises the seller to consult with an attorney regarding the county requirements. Our law firm has not attempted to catalogue and create clauses for all the counties that have now adopted regulations like this. Clients listing property in other counties with similar regulations may contact us if they would like assistance creating a provision tailored to the specific regulation of another county.

99. Pitkin County and Aspen Regulations Regarding Carbon Monoxide Detectors. The Colorado statute regarding carbon monoxide alarms, where applicable, requires a seller offering the property for sale to assure that an operational carbon monoxide alarm is installed within fifteen feet of the entrance to each bedroom or in a location as required by the applicable building code. The Pitkin County Code and the Aspen Municipal Code are each examples of an "applicable building code" referenced in the state statute. Our clause serves to educate sellers about these applicable local code requirements. This clause, of course, is specific to Aspen and Pitkin County. Other counties and municipalities may also have codes that should be considered in conjunction with the state law regarding carbon monoxide alarms, and clients listing properties within jurisdictions having similar codes may contact us if they would like assistance creating a provision tailored to the specific regulation of another county or municipality.

III. Addenda to Listing and Exclusive Right-to-Buy Agreements

A. General Comments

Real Estate Commission Rule F-4 states: "*No contract provision, including modifications permitted by Rules F-1 through F-3, shall relieve a broker from compliance with the real estate license law, section 12-61-101, et. seq., or the Rules of the Commission.*"

Some members of the public, and their lawyers, blame brokers for everything that goes wrong in a real estate transaction. Though brokers cannot exculpate themselves from their intentional wrongs, whether a broker is "negligent" in a particular instance can be subject to much debate. Many brokers find the need to clarify their relationships with their buyers and sellers. Our liability reduction addenda attempt to address this need.

Another theme of the Real Estate Commission's Rule F is that it is inappropriate for brokers to use the contract to buy and sell to address issues between the broker and the consumer. Real Estate Commission Rule F-3(c) states: "*A broker who is not a principal party to the contract may not insert personal provisions, personal disclaimers or exculpatory language in favor of the broker in an addendum.*" Our package of forms addresses issues between the buyer and the seller in the contract addenda, while clarifying the issues between the broker and consumers in two other addenda, one for the exclusive right-to-sell listing contract, and the other for the exclusive right-to-buy listing contract.

B. Buyer Addendum to Exclusive Right-to-Buy Listing Contract or Brokerage Disclosure to Buyer Form

Sometimes brokers work with buyers under a written agreement, specifying either buyer agency or transaction-brokerage. Other times, the selling licensee has no written agreement with the buyer, and is working with the buyer after having made appropriate disclosures to the buyer under the Commission's Brokerage Disclosure to Buyer form. Our Buyer Addendum is designed to work in either of these situations.

1. Buyer Due Diligence. This section attempts to clarify the nature of the broker/buyer relationship. The provision encourages buyers to thoroughly investigate property. It also identifies many (but not all) of the checklist items that the buyer should evaluate before purchasing a home.

2. Use of Professionals. This provision advises buyers to seek the advice of licensed or registered professionals to evaluate and pursue the property, including registered mortgage brokers. Again, this provision helps clarify the nature of the relationship between the buyer and the selling licensee.

3. MLS. The information age and the Internet have greatly expanded the networks through which properties are marketed. This paragraph makes it clear that the broker is only obligated to search for property in multiple listing services in which the brokerage firm is a member.

4. Property Repairs/Improvements. This paragraph educates buyers about how buyers should address property condition issues which arise prior to closing.

5. Homeowner's Warranty. This provision informs buyers of the existence of homeowners warranty programs which can help reduce the risks buyers take when purchasing property. It contains a disclaimer making it clear that the broker is not liable for the financial integrity of the warranty company, which also serves to educate buyers that a warranty company might be financially infirm.

6. Possession, Lease and Insurance. The risks associated with any real estate transaction are increased when the possession date is other than the closing date. This paragraph advises buyers to monitor their casualty and liability insurance if the possession date is other than the closing date, and to address possession issues through a lease or Post Closing Occupancy Agreement.

7. Broker Purchases. It is not unusual for licensees in a company to purchase property available on the market. Arguably, these broker purchases conflict with the interest of buyers who have engaged the entire brokerage as a buyer's agent. This paragraph may help protect brokers and their licensees from such conflicts.

8. Loan Conditions. This provision is a warning to buyers that the financing contingency in the buy/sell contract (§ 5.2) does not make the buyers' obligations under the contract contingent upon the buyers obtaining a loan (see discussion of the buy/sell contract § 5.2 in this explanation above).

9. Loan Fraud. A slow real estate market puts more pressure on buyers to participate in "creative" transactions. Also, a flattening or declining market tends to reveal more loan fraud. Brokers sometimes find themselves pressured to participate in transactions which may be misleading to lenders, particularly in such slow or declining markets. This paragraph serves as a warning to buyers and explains the consequences if the broker discovers fraud.

10. Seller Concessions. This clause is designed to educate buyers that they may be able to negotiate a seller credit which the buyer's lender treats as a price concession from the seller. This typically does not prevent the buyer from taking the full value of the credit, but some buyers will not be able to take all the credit in cash. Instead, some of the credit may reduce the

buyer's loan amount. This clause is designed to create reasonable expectations on the part of a buyer.

11. Property Contaminated with Methamphetamine or Other Contaminants. This clause informs buyers of their statutory right to test a property for meth and the ramifications of positive tests, including the buyer's ability to terminate the contract for meth contamination. It also informs the buyer that under currently applicable Colorado law a seller is not required to disclose information regarding methamphetamine contamination if the Property has been remediated to state standards and certain other requirements have been met, and advises the buyer, among other things, to inform the broker of any chemical or environmental sensitivities buyer has that may be affected by the presence of contamination that is within state standards.

12. Breach or Nonperformance by Buyer–Success Fee Due. Occasionally buyers sneak around their buyer's broker. This clause identifies the amount of the damages for an exclusive broker whose buyer has breached the exclusive brokerage agreement.

13. Increased Success Fee When Dealing With Unlisted Property or Limited Service Listing Broker. Publication of the Commission Position on Minimum Service Requirements (CP-36) has not eliminated all experimentation by listing brokers with alternative lower service arrangements. Selling brokers can find themselves doing more work for FSBO, limited service listings, and list only listings. This clause calls for an increase in the fee due to a selling broker who helps a buyer pursue a property which is not listed, or which is listed with a limited services broker. We provide this form not with the expectation that buyers will want to pay the excess. Instead, the selling broker can use this as leverage to have the buyer address the commission issue at the time the buyer makes an offer to the seller.

14. Affiliated Business Arrangements. Some of our clients have affiliated business arrangements with other real estate related companies such as mortgage, title insurance or home warranty companies. If, when placing your request for the addenda, you indicated that you had such an affiliated business arrangement and you wanted to so disclose it on your Buyer and Seller Addenda, then we added such a paragraph in your Buyer Addendum. If you do want this disclosure in your Buyer and Seller Addenda, though, you should keep in mind that this paragraph is intended just as a reminder – this clause does not satisfy your statutory disclosure and document requirements when an affiliated business arrangement exists and disclosure is needed. If you did not request such a clause, then disregard this explanation paragraph.

C. Seller Addendum to Exclusive Right-to-Sell Listing Contract

1. Use of Professionals. This paragraph attempts to clarify the nature of the broker/seller relationship. The clause advises sellers to seek the advice of other professionals.

2. Possession, Lease and Insurance. The risks associated with any real estate transaction are increased when the possession date is other than the closing date. This paragraph advises sellers to monitor their casualty and liability insurance if the possession date is other than the closing date, and to address possession issues through a lease or Post Closing Occupancy Agreement.

3. Loan Fraud. A slow real estate market puts more pressure on sellers to participate in "creative" transactions. Also, a flattening or declining market tends to reveal more loan fraud. Brokers find themselves pressured to participate in transactions which may be misleading to

lenders, particularly in such slow or declining markets. This paragraph serves as a warning to sellers and explains the consequences if the broker discovers fraud.

4. Brokerage Duties – Disclosure of Prices in Competing Offers. § 5.8 of the Commission-approved form Exclusive Right-to-Sell Listing Contract allows the parties to check a box to indicate whether the listing broker "will" or "will not" disclose to prospective buyers and cooperating brokers the existence of competing offers on the seller's property and whether the competing offers were obtained by the listing broker, by another broker in the listing broker's company, or by another broker. In situations where the "will" box is checked in that § 5.8, this paragraph then allows the parties to specify further whether the listing broker is or is not authorized, in the broker's discretion, to disclose the various purchase prices in such competing offers, or whether such authorization for the listing broker to disclose is to be obtained only after consultation with the seller on a case-by-case basis.

5. Cooperative Broker Compensation and Arbitration. Brokers sometimes find themselves in procuring cause and other disputes with multiple selling brokers. The selling brokers who are REALTORS® are bound to arbitrate those disputes. Selling brokers who are not REALTORS® need not arbitrate. This exposes the listing broker to inconsistent decisions from the arbitration panel (which hears the REALTOR® to REALTOR® dispute) and the court (which hears the REALTOR® to non-REALTOR® dispute). This provision provides that the listing broker is not required to compensate selling brokers unless the selling broker agrees to REALTOR® arbitration in advance of any contract negotiations or showings.

6. Compensation for Out of Area Co-operating Brokers. This provision allows the listing broker, on a case-by-case basis, to specify a reduced cooperative fee to licensees who are not members of the listing broker's local board. This provision should not be used as a tool to routinely discourage out-of-area licensees. It is a provision which can only be agreed to by the seller, after the seller provides informed consent. A rationale for using such a provision is that with out-of-area selling brokers, the listing broker must do more work than with in-area licensees. In general, brokers should not discuss the terms of their listings with competing brokers. It is especially important for brokers to not speak to other brokers about how they use this section.

7. Broker Advertising; Compliance with MLS. Although sellers benefit from the listing of their property in the MLS, MLS rules create some disadvantages for sellers. For example, MLS rules require a listing broker to report when a property has gone under contract. This tends to discourage back-up offers. With this paragraph, the seller is agreeing to accept the burdens associated with listing a property in the MLS. This paragraph also includes an express authorization for the listing broker to advertise and market the seller's property to the extent determined by the listing broker, and using any means, including newspaper ads, multiple listing services of which the brokerage firm is a member, and the Internet.

8. Previous Listing of Property. When the seller's property was previously listed under an exclusive agreement with another brokerage firm and the "will" (formerly "shall") box was checked in the holdover provision of that previous listing agreement, potential seller liability for two commissions – one under each listing agreement – becomes an issue (with respect to sales occurring during the holdover period to a party with whom the previous broker negotiated and whose name was submitted in writing during the listing period of that previous listing agreement). Because such double liability is a problem or concern for the seller, it can also be a problem or concern for the listing broker. This paragraph includes alternative check-box provisions by which the seller can inform the listing broker whether this might be an issue, and

the part of this provision that applies if the property was previously listed and the "will" or "shall" box was checked in the holdover provision includes (a) seller's acknowledgment of that potential double liability, (b) seller's representation that it has provided the listing broker with a complete copy of the previous listing agreement and all information in the seller's possession regarding names (of parties with whom the former listing broker negotiated) submitted in writing by the former broker, and (c) a provision through which the regular commission due to the (second) listing broker in such a double liability situation is adjusted (the intended concept being to adjust the regular commission down in that situation).

9. Additional Documents. Many listings are sold through in-house transactions. In these transactions, the listing company might present the buyer with our Addendum "A." Some, but not all, of the Addendum "A" provisions are for the benefit of a buyer, and it is useful for the listing broker to disclose to the seller, at the time the listing is taken, that the listing broker will provide a copy of Addendum "A" to buyers in a single-licensee transaction.

10. Tax Consequences. Sellers may be able to defer or avoid paying taxes on the sale of property. This clause identifies two key IRS provisions and advises seller to seek tax counsel.

11. Seller to Comply with Association Obligations. Senate Bill 100, enacted in 2005, and Senate Bill 89, enacted in 2006, require the seller to provide certain governing and financial documents to buyers. This clause educates sellers about these burdens and the need for the seller to begin gathering the necessary documents at the time the listing is taken.

12. Open Houses. Sellers perceive that Open Houses are a useful way of marketing property. Yet Open Houses enhance the risk of theft and other dangers for sellers. This is a clause which a broker can use to inform the seller of the risks associated with Open Houses and to obtain protection from the seller regarding such risks.

13. Breach or Nonperformance by Seller - Commission Due. There is much uncertainty in current Colorado law about the amount of compensable damages to which a listing broker is entitled in the event of a breach of the listing agreement by the seller. This clause is an attempt to resolve that ambiguity by providing that a breach of the listing agreement by the seller causes damages to the listing broker in the amount of the commission which would otherwise have been due.

14. Affiliated Business Arrangement. Some of our clients have affiliated business arrangements with other real estate related companies such as mortgage, title insurance or home warranty companies. If, when placing your request for the addenda, you indicated that you had such an affiliated business arrangement and you wanted to so disclose it on your Buyer and Seller Addenda, then we added such a paragraph in your Seller Addendum. If you do want this disclosure in your Buyer and Seller Addenda, though, you should keep in mind that this paragraph is intended just as a reminder – this clause does not satisfy your statutory disclosure and document requirements when an affiliated business arrangement exists and disclosure is needed. If you did not request such a clause, then disregard this explanation paragraph.

D. Seller Coming Soon Addendum to Exclusive Right-to-Sell Listing Contract

Not long ago, the Colorado Real Estate Commission issued its Commission Position 44, in response to growing industry concerns about the increased use of "coming soon" marketing, by which the listing broker withholds a property from the MLS and from general showings for some specified period of time, while posting a "coming soon" sign on the property and marketing the

property narrowly, often only to buyers working with the listing broker or to buyers working with other brokers in the listing brokerage firm. A listing broker considering any such "coming soon" marketing should of course review that CP-44 in its entirety, but it includes the following statements:

> *During the negotiation of the listing contract, and as part of the broker's obligation to exercise reasonable skill and care, a broker is responsible for advising the seller or landlord "of any* ***material benefits or risks of a transaction*** *which are actually known by the broker." This* ***includes limiting a property's market exposure by delaying access for showings or open houses, or limiting the amount of time that the seller or landlord will consider offers. Motivation for limiting exposure of the property should be carefully considered****. Is the property being marketed as "coming soon" because the seller is prepaing it for sale or lease? This would be a legitmate use of that particular marketing method.*[1] *However, if the property is being marketed as "coming soon" in an effort for the listing broker to acquire a buyer and "double end" the transaction, this would be a violation of the license law because the broker is not exercising reasonable skill and care…. [A] broker who places the importance of his commission above his duties, responsibilities or obligations to the consumer who has engaged him is practicing business in a manner that endangers the interest of the public.*
>
> *Ultimately, it is the seller or landlord's decision how, when and where the property will be marketed.* ***A broker who fails to advise a seller or landlord of the material benefits or risks, or does not allow the seller or landlord to decide how the property will be marketed, may be subject to license discipline by the Commission****. The manner in which the broker and seller or landlord agree to market the property must be memorialized in writing in the listing contract prior to any marketing being performed.*

[footnote and emphasis added]

As contemplated by that discussion in CP-44, brokers and their brokerage firms often have a financial stake in encouraging "coming soon" marketing. Among other things, brokers and brokerage firms tend to net higher commissions when they avoid a need to pay coop commissions to other brokerage firms. There are other less direct financial benefits to brokerage firms. Among these are that brokerage firms that have a practice of favoring inside buyers might use the practice as a means of recruiting new agents. There may be other non-financial benefits such as boosting the "sides" and other statistics for the brokerage firm.

This financial stake creates a potential conflict of interest between the listing broker and the seller. Listing brokers must disclose this conflict of interest to the sellers pursuant to Colorado Real Estate Commission Rule E-25. While we feel that brokers can inform their clients of the disadvantages of initially marketing a property to inside buyers, we do not feel that a

[1] The concerns expressed in the discussion of our Coming Soon Addendum in this explanation letter do not apply to a true "coming soon" situation in which the seller and listing broker are trying to build pent up demand, perhaps before a property is ready for showing, prior to showing the property to anyone, including potential buyers in the listing broker's sphere of influence. Situations in which the listing broker's buyers or buyers from other agents within the listing company do not have the first opportunity to view the property compared to general market buyers do not present the same conflicts of interest and the more common phenomenon that prefers inside buyers.

listing broker who has a stake in the outcome can help a seller weigh the advantages and disadvantages of merely marketing to inside buyers.

Our form attempts to reduce risk by disclosing the disadvantages of "coming soon" marketing to the seller (in paragraph 3 of the addendum) and the conflict of interest (in paragraph 4 of the addendum). Because this situation is so fraught with risk for the listing broker, we have designed the form so that the listing broker can (and should) obtain initials from the seller documenting awareness of the disadvantages and conflict of interest. In order to further reduce the risks of "coming soon" marketing, a listing broker might want to consider a modified version of our "Coming Soon" Addendum form that would include a variable listing commission (for example, a 2% discount for a sale procured by the listing broker and a 1% discount on the gross listing commission for a sale to an "in-company" buyer). We feel that such a variable listing commission could significantly reduce the listing broker's risk by more closely aligning the seller's interest with the listing broker's interests when properties are initially marketed to just the listing broker's or listing company's sphere of influence. If your brokerage firm wants to consider such a modified version of our "Coming Soon" Addendum, then contact our law firm and we can discuss that option with you and create a customized version of that form for your use.

Of course, before using our "Coming Soon" Addendum, the broker should make sure that the addendum paragraph 1 language about the manner in which the property is to be marketed reflects accurately the agreement of the broker and seller about such marketing.

IV. Kick Out (or "Right of First Refusal") Addenda

A. General Comments

Listing brokers sometimes receive otherwise desirable offers on listings from buyers with questionable credit qualifications. The seller is inclined to accept the offer, but wants to preserve the flexibility of replacing the purchaser with another one, if a better offer comes along. Many brokers respond to the first buyer's offer with a counterproposal containing a so-called "right of first refusal."

The headings of both versions of our "kick out" addenda include the phrase "right of first refusal," because that is how brokers have conventionally referred to this type of agreement. However, it is important to understand that these provisions are not actually "rights of first refusal." A right of first refusal would create in some grantee the ability to meet a bona fide offer on a property. (For example, a homeowners association might hold the right of first refusal to match offers on units within the subdivision.) It would be more accurate to label these clauses "kick out" or "fish or cut bait" clauses. For purposes of these materials, then, we will refer to such clauses as "kick out" clauses although they have different labels on the forms themselves.

There are certain issues which all good kick out clauses must address. A kick out clause provides that upon the occurrence of some event (seller's acceptance of a new offer, seller's notice to buyer of its intent to accept a new offer . . . etc.) the buyer has a specific period of time to act to avoid contract termination. Any kick out clause must specify what the seller must do to invoke its rights under it. (For example, must seller accept a new offer, must seller simply notify purchaser of seller's intent to accept an offer, must that notice be in writing, and how much time does the buyer have to perform?) A kick out clause must also address what the purchaser must do to avoid being "kicked out."

We have enclosed two types of kick out clauses. One would require that upon the seller's invocation of his kick out rights, the buyer must perform (i.e., close) within a short period of time to be specified in the document (the Accelerated Closing Addendum) to avoid being kicked out of the deal. The second type requires that upon the seller's invocation of the kick out rights, the buyer must, within a short period of time to be specified in the document (the Removal of Conditions Addendum), waive all the buyer's contract contingencies and deposit the amount of additional earnest money specified in the document (although if the parties do not intend to require the payment of such additional earnest money for the buyer to stay in the deal, they can effect that intent by simply inserting "$0.00" in the applicable blank in the top half of this document).

B. Accelerated Closing ("Right of First Refusal") Addendum

With this form, the Seller may accelerate the closing with Buyer #1 if the Seller notifies Buyer #1 that the Seller intends to accept an offer from a competing buyer. Upon receiving the notice, Buyer #1 has a specific period of time (the "Decision Period") – which period is to be specified by the user of the form by inserting the particular length of time (in hours) in the blank in the top half of the document – to either allow the contract to terminate, or to amend the contract to call for an accelerated closing date on the first business day after expiration of the Decision Period.

This form is in two parts. The top half of the form is the agreement which allows the seller to kick out Buyer #1, unless the buyer agrees to an accelerated closing date. It is crucial that the blank for the applicable number of hours the buyer is to have for its Decision Period be inserted in the blank in this top half of the form. The bottom half of the form can then be used as the notice from the Seller to the Buyer #1 informing Buyer #1 that the Seller is invoking the Seller's kick out rights. Buyer #1 must sign the bottom half of the form to agree to the accelerated closing and avoid being kicked out of the deal.

C. Removal of Conditions ("Right of First Refusal") Addendum

To avoid being kicked out of the transaction under this Addendum, Buyer #1 must remove all conditions in the contract for the benefit of the Buyer. This Addendum also allows the parties the option to require Buyer #1 to put up additional earnest money to stay in the deal. If the parties do not intend to require additional earnest money from Buyer #1, insert $0.00 in the applicable blank in the top half of the Addendum.

Like the Accelerated Closing Addendum, the Removal of Conditions Addendum is in two parts. The top half is the agreement which allows the Seller, under some circumstances, to kick out Buyer #1, unless the Buyer waives the conditions. Again, it is crucial that the blank for the applicable number of hours the buyer is to have for its Decision Period be inserted in the blank in this top half of the form. The bottom half serves the dual purpose of: (a) providing notice from the Seller to Buyer #1 that the Seller is invoking the Seller's kick out rights; and (b) allowing the Buyer to sign and thereby waive the Buyer contingencies (and increase the Buyer's earnest money if applicable).

When listing brokers use the Removal of Contingencies Addendum, they should be careful to avoid creating false expectations in sellers. Buyer #1 may waive all of the contingencies in a contract, but still not have the ability to close. If a buyer has waived the financing contingency, but can't qualify for the loan, it is unlikely that the contract will close. Your seller may be limited

to pursuing breach remedies. With an unmodified Real Estate Commission approved form, this should allow the seller to keep Buyer #1's earnest money. As a practical matter, in the type of seller's oriented market which permits kick out clauses, it is unlikely that a seller would want to bring a specific performance lawsuit against the first purchaser. Consequently, with this removal of conditions kick out clause, it is especially important that the amount of earnest money be sufficient to satisfy your seller in the event the first contract doesn't close.

V. Mold Disclosure

The theme of our mold disclosure addendum is that all properties have mold in them, to some degree or another. This form is not useful to disclose mold which a seller is aware of to a buyer. If the seller is aware of mold, the seller should use the Real Estate Commission approved Seller's Property Disclosure form to disclose the known mold to buyer, and use our form as it is useful for reducing risk in situations where the mold is worse than the seller was aware of. If the seller is not aware of any mold, our form is a useful risk reduction tool for sellers, listing brokers, and selling brokers.

VI. Notice to Seller

Our Notice to Seller form is designed to implement certain waiver options and notice requirements that are contained or set forth in the Commission-approved form Contract to Buy and Sell Real Estate, and not addressed by the Commission's Inspection Objection or Notice to Terminate forms or by any other Commission-approved form. The form has three sections, to be used by the broker selectively, as applicable.

Brokers may use Section 1 of this form to provide notice to the seller of Lender Requirements that have been imposed by the buyer's lender, as contemplated by § 6.3 of the CREC-approved Contract to Buy and Sell Real Estate.

Brokers may use Section 2 of this form where, as contemplated by clause (3) of the second sentence of § 6.3 of the CREC-approved Contract to Buy and Sell Real Estate, the buyer wants to waive the satisfaction of Lender Requirements in order to eliminate the Right to Terminate a seller otherwise has under that § 6.3 following seller's receipt of the Lender Requirements.

Brokers would use Section 3 of this form to notify the seller of the buyer's test results, as Colorado law obligates the buyer to do, when those test results indicate the property has been contaminated with methamphetamine or other contaminants for which standards have been established pursuant to § 25-18.5-102, C.R.S., and has not been remediated to meet state standards established by the State Board of Health.

VII. Brokerage Disclosure Regarding New Construction

Contracts for the sale of new construction are generally prepared by the builder's attorney. Unlike the relatively neutral buy/sell contracts prepared by the Colorado Real Estate Commission, most high volume builder contracts are very seller-oriented. This disclosure is designed to educate buyers, and reduce a broker's risk for new construction transactions.

VIII. Broker Rebate to Buyer

It is not unusual for buyers to negotiate rebates from their selling brokers. So long as such rebates are disclosed to the buyers' lender and reflected on the Closing Disclosure documents, such rebates can be legal. This form educates buyers, and serves to memorialize the lender's consent, for these situations.

IX. Termination of Marketing Efforts Without Terminating Listing

From time to time a seller informs a listing broker that the seller has changed his or her mind and no longer wishes to sell the property. Technically, this is a breach of the listing agreement as it robs the listing broker of an opportunity to earn a commission selling the property. However, most of our clients will acquiesce to the seller's request to cease the marketing of a property, so long as this is not a ruse for the seller to sneak around the listing broker. Our form helps the broker memorialize that the broker is no longer required to market the property, but that the listing agreement remains in effect, so that if the seller closes on a sale during the listing period, the listing broker is still entitled to a commission.

X. Notice to Parties Regarding Earnest Money

If there is a dispute about the earnest money, one of the options that § 24 of the Contract to Buy and Sell gives to the Earnest Money Holder is to initiate a "put up or shut up" process to resolve the issue. Essentially, the Earnest Money Holder can send out a notice giving the Seller a 120-day period to file a law suit claiming the earnest money, and if the Seller does not do so, the Earnest Money Holder will turn the earnest money over to the buyer. More precisely, § 24(3) allows the Earnest Money Holder to notify the buyer and seller that unless the Earnest Money Holder receives a copy of the Summons and Complaint, with a court case number, for a suit between them within 120 days of the date of the notice, the Earnest Money Holder will be authorized to return the earnest money to the buyer. The top half of our form is the notice and the bottom part of the form contains tracking information to aid the Earnest Money Holder through the process. Because our form of Addendum "A" to Contract to Buy and Sell Real Estate (Residential) includes a provision allowing a buyer and seller to shorten the above-described 120-day period to 45 days, the top half of our form includes a parenthetical clause that contemplates such an amendment of the 120-day period.

XI. Homeowner Warning Notice – Right to Cancel (Foreclosure Protection Act)

Where English is not the homeowner's (seller's) principle language, the Foreclosure Protection Act has previously required (when it applies) that the entire contract be translated into the language principally spoken by the seller. In 2010, the legislature recognized that such a requirement would make it more challenging for non-native English speakers to sell their homes, and amended the Foreclosure Protection Act to require such a translation only of a specific warning notice. Our law firm believes that the translation brokers are most often going to need is one into Spanish. Our form is the CREC-approved form, Homeowner Warning Notice – Right to Cancel (HWN65-8-10) with a Spanish translation inserted.

XII. Contract Assignments

A. General Comments

The need or desire arises in many different situations for a buyer to assign the buyer's rights in a Contract to Buy and Sell Real Estate to a third party, which third party may or may not be related to or affiliated with the buyer. No single form of Assignment of Contract can

adequately address all the various circumstances in which such need or desire to assign the buyer's rights may arise, but we have enclosed two forms of assignment that might be usable in the two different circumstances described below.

B. Agreement to Amend/Extend Contract (Substitution of Buyer) - for Assignment of Contract with Consent of Seller and Release of Buyer

Short payoff transactions often unfold over many months. From time to time, the original buyer becomes fatigued with the process and seeks to terminate the contract. In the meantime, the seller and listing broker have invested much time and energy moving the original contract through the short payoff process. The termination of the original contract jeopardizes the original contract's place in the processing queue of the seller's lender. An alternative to the termination of the original contract is the assignment of the initial contract from the original buyer to a substitute buyer. Assigning the contract in such a situation can decrease the likelihood of an adverse impact on the contract's place in the short payoff processing queue.

Our form of Agreement to Amend/Extend Contract (Substitution of Parties) is designed for this situation. It provides, among other things, for the assignment of the contract to a substitute buyer who assumes the contract, with a return of the earnest money to the original buyer and with the seller's consent and express release of the original buyer (who is unlikely to be willing to participate without a release of liability along with the return of the earnest money). This form also provides for the delivery by the substitute buyer to the Earnest Money Holder of replacement earnest money (as a substitute for the earnest money returned to the original buyer).

C. Assignment of Contract

Our Assignment of Contract form is designed for a situation in which the contract permits assignment without further permission of the seller (a situation that, in light of the Commission's change to § 2.2 of the form contracts for 2016, can exist only if some additional provision is included or some other change is made to the Commission-approved form to permit assignment by the buyer without further consent from the seller), to an entity owned or controlled by the individual or individuals identified as the buyer in the contract. This form contemplates that the assignor (individual(s) identified as the buyer in the contract) assigns the contract to the assignee (the related entity), including all the assignor's rights in the earnest money, rights of access to the property, and rights to remedies if the seller defaults, and the assignee assumes all contract obligations to be performed on or after the date of the assignment and agrees to reimburse the assignor for sums expended by the assignor in connection with the contract, including but not limited to reimbursement for the earnest money deposit paid by the assignor.

While we have found this form useful in many such situations involving an assignment permitted by the contract from one or more named individuals to an entity owned or controlled by such individuals, anyone using this form should consult with the attorney and/or CPA assisting with the creation or funding of the entity as to whether this form is suitable for the particular situation.

XIII. Commission Split Settlement Agreement

Disputes about entitlement to a commission sometimes occur among brokers. Our form is an example of a document brokers might use to evidence their settlement or resolution of such a dispute. No form like this can fit every possible fact situation, however, and even in situations

for which the form seems appropriate, some risk or potential difficulty may still exist. For example, the form does not address how the settling parties' rights or obligations would be affected if, after entering into such an agreement, another broker – not a party to the agreement – successfully asserted a claim to a commission. As a result, we encourage brokers to seek advice from legal counsel before using this form in any particular situation, and, in any event, before using this form a broker must evaluate whether the applicable facts can be adequately addressed by the form.

XIV. Seller-Carry Talking Points Article

The purpose of this article is to fill in for buyers and sellers some of the information gap about seller-carry financing in residential transactions. It is a brief discussion of some of the basic elements of a seller-financed loan.

Brokers should do no more than deliver this article to buyers or sellers. If you have questions about this article, please contact our office.

* * * * *

We strive to meet your requests and still keep the forms short. This is a complex business. Thank you for requesting our forms. We appreciate your business.