2025 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. 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 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.

Before using the enclosed forms and clauses, you should re-familiarize yourself with Chapter 7 of the Real Estate Commission's rules, including this requirement of Rule 7.2.J: *"A broker must explain all permitted modifications, deletions, omissions, insertions, additional provisions and addenda to the principal party and must recommend that the parties obtain expert advice as to the material matters that are beyond the expertise of the broker."*

Our addenda and clauses were prepared for your office and are not to be given to other offices or used in violation of our copyright. In addition, our addenda and clauses may only be used with the forms the Real Estate Commission required brokers to use as of August of 2024.

Any future changes in the Real Estate Commission approved forms or rules, and other changes in real estate laws or the real estate environment, may require a revision of the enclosed forms. Your purchase of these forms does not include any duty on our part to provide continuing revisions or updates of these forms or to inform you of such changes. You may engage us at any time to make additional revisions or to consult about any such changes. The limited services engagement created by your purchase of these forms also does not preclude our law firm or its attorneys from selling this same package to other brokers and brokerage firms, or from representing other clients who have interests adverse to you.

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

A. General Comments

Addendum "A" includes a 1031 exchange clause as part of an addendum with other optional, and reasonably generic, clauses. Over the decades, the Division of Real Estate has improved its form system allowing the law firm to reduce the number of optional clauses to two. Presently, the main purpose of our Addendum A is to avoid drawing undue attention to a party's special motivation to accomplish a 1031 exchange.

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 is that § 24.2 of Real Estate Commission approved form numbers CBS1-8-24 and CBS2-8-24 both provide: "*In the event this Contract is **terminated**, all Earnest Money received hereunder must be timely returned to Buyer and the parties are then relieved of all obligations hereunder, **subject to §§ 10.4 and 21.***" [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 § 24.2 to call for the return of the earnest money to the buyer.

Defining the effect of a "termination" in § 24.2 avoids the need to repeat the termination clause. 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 (§ 23) and the Real Estate Commission wants the mediation clause (§ 22) 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 of the three paragraphs in 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 unless otherwise specified in the Additional Provisions. 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 requires no expenditure of money by the other party. This paragraph should not be deleted.

2. 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 New Loan Availability 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 New Loan Availability Deadline results in the automatic termination of the contract.

3. Earnest Money Dispute. Clause (3) of § 23 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. When utilizing any of these clauses, the broker should keep in mind the provisions of CREC Rule 7.3.A, stating that, *"Any 'Additional Provision' which by its terms serves to delete or modify portions of a standard form, as set forth in Rule 7.1 must result from negotiations or the instruction(s) of a party the transaction"* and the following provisions of CREC Rule 7.3.B: *"A Broker who uses a transaction-specific clause or clauses drafted by the Broker's, Employing Broker's, or Brokerage Firm's licensed Colorado attorney must ensure that the Broker understands the clause, and the clause is used and completed appropriately. The Broker must retain the clause(s) prepared by the Broker's, Employing Broker's, or Brokerage Firm's licensed Colorado attorney for four (4) years from the date that the clause was last used by the Broker. The Broker must provide those clause(s) and the name of the licensed Colorado attorney or law firm that prepared the clause(s) upon request by the Commission."*

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. Prior to 2016, the contract forms adopted by the Commission included check boxes that allowed the parties to specify whether the contract was or was not assignable by the buyer. The Commission removed the option in 2016, stating that the contract **is not** assignable by the buyer. A buyer who wants the right to assign the contract without having to subsequently negotiate an amendment to the contract with the seller, 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 negotiate such an amendment or 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 any 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 the seller 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 inquiries 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.

Home Warranty

7. § 2.5.4. Property Disclosure, Inspection, Insurability, Due Diligence 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.

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 happens 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 additional earnest money payment(s) (after the initial earnest money payment) upon the satisfaction or waiver of certain buyer contingencies. This provision is an example of that. It obligates the buyer to make an additional earnest money payment upon expiration of either the New Loan Availability Deadline or the Title Resolution Deadline, depending on which box is checked.

Additional Earnest Money Due on Expiration of Buyer Contingencies

10. § 4.3. Earnest Money. This provision is an alternative to the immediately preceding example, which provides that if the contract has not been terminated, then the buyer must make an

additional earnest money payment upon the last to occur of any objection, resolution, examination, availability, or termination deadline contained in contract.

Interest on Earnest Money

11. § 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. Our clause provides for interest on earnest money.

Earnest Money to be Paid by Third Party

12. § 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 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

13. § 4.3. Earnest Money. This provision does the same thing as the preceding clause, but adds direction for the return of the earnest money, if the contract terminates, to the third party.

Seller Carry Financing – Review of Buyer's Creditworthiness

14. § 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. This provision restores those apparently missing pieces for use in a seller-carry context.

Buyer Fault Needed for Loan Liability

15. § 5.2.2. New Loan Availability. The Real Estate Commission approved contract is not conditional upon buyer getting a loan. Under § 5.2.2, a buyer must notify the seller to exercise the buyer's right to terminate the contract because of buyer's dissatisfaction with the availability of 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 § 5.2.2, the burden is on the buyer to determine the reliability of any loan commitment. 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 § 5.2.2, 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.

§ 5.2.2 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 disadvantages of making the offer less attractive to a seller and 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

16. § 5.2.2. New Loan Availability Review. This is a seller-oriented clause. 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. This provision also indicates that the buyer can terminate under the New Loan Terms; New Loan Availability contingency (§ 5.2.2) 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 New Loan Availability Deadline and Seller receives written notice of termination by the New Loan Availability 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

17. § 5.2.2. New Loan Availability Review. This is the same as the first of the two *ala carte* (or check-box) clauses contained in our Addendum "A," and is discussed above in ¶ II.B.2. of this explanation letter.

Association Documents

18. § 7.2. Association Documents to Buyer. This provision clarifies that a seller's obligation under § 7.2 to provide to the buyer the Association Documents that are listed and defined in § 7.3 applies only to the extent that, as of the Association Documents Deadline, those specified Association Documents actually exist or obtainable from the association.

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

19. § 8.1. Evidence of Record Title. 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.

Off-Record Title – Improvement Location Certificates

20. § 8.3. Off-Record Title. § 8.3 in the CBS1-8-24 and CBS2-8-24 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

21. 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.

22. 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.

23. 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.

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

24. § 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).

Seller Disclosure of Previous Damage

25. § 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.

Due Diligence – Documents

26. § 10.6.1. Due Diligence Documents. Similar to our clause regarding a seller's obligation to provide specified Association Documents to the buyer, discussed above, this provision clarifies that a seller's obligation under § 10.6.1 to deliver to the buyer the Due Diligence Documents there specified applies only to the extent that, as of the Due Diligence Documents Delivery Deadline, such Due Diligence Documents actually exist and are in the seller's possession or control.

Due Diligence – Documents Disclaimer

27. The Colorado Real Estate Commission Approved Contract places many disclosure obligations on sellers. These two sentences are for a part of the listing broker's email or other "cover letter-like" transmission of disclosure documents and due diligence documents to the buyer's side of the transaction. Unlike virtually every other clause in this suite of clauses this clause is meant for the transmission of documents.

Due Diligence – Documents – and Assignment of Warranties

28. § 10.6.1. Due Diligence Documents. § 10.6.1.6 allows buyers to list document beyond documents included in the preprinted list of documents in § 10.6.1. This paragraph identifies additional examples of documents that a buyer might request from a seller. 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) (CBS1-8-24). The "Residential-Income" Commission-approved form (CBS2-8-24) contains an extensive list of due diligence documents within its version of § 10.6.1 that makes this paragraph largely unnecessary if used in conjunction with that CBS2-8-24 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.

Conditional Upon Buyer Sale of Property – Seller Termination Rights

29. § 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 CBS1-8-24 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

30. § 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 ideally should make the Source of Water Addendum available to buyers and their brokers before 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.

Methamphetamine Disclosure

31. § 10.12. 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 § 10.12 of the CBS1-8-24 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 (i) includes the buyer investigating and being satisfied with any such information, and (ii) applies even if meth contamination has been remediated to state standards.

Disclosure of Psychologically Stigmatizing Events or Circumstances

32. § 10. Property Disclosure, Inspection, Indemnity, Insurability, Due Diligence 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 includes the buyer investigating and being satisfied with any such information.

Due Diligence – Expansion of Inspection & Due Diligence Provisions

33. § 10. Property Disclosure, Inspection, Indemnity, Due Diligence and Source of Water. The Real Estate Commission's provisions limit the buyer's general objection 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 or termination deadlines 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. 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.

Well and Septic

34. § 10. Property Disclosure, Inspection, Indemnity, Insurability, Due Diligence 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 and Inspection Termination 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 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 earliest of the Due Diligence Documents Delivery Deadline, the third calendar day prior to the Inspection Objection Deadline, or the third calendar day prior to the Inspection Termination Deadline. It is especially useful in situations in which § 10.6.1.5 of the CREC Contract does not apply (i.e. in jurisdictions in which the applicable government entity does not require a Septic Use Permit as a property sells).

Association Fees and Required Disbursements – Time for Request of Status Letter if Closing Date Is Set in Less Than Fourteen Days But No Sooner Than Two Business Days After MEC – Clause for Use in Contract or Counterproposal

35. § 15.3. Association Fees and Required Disbursements. The first sentence of § 15.3 of the CBS1-8-24 form – specifying that "At least fourteen days prior to Closing Date, Seller agrees to promptly request that the Closing Company or the Association deliver to Buyer a current Status Letter" – assumes there will be at least fourteen days between MEC and the Closing Date. Occasionally, however, the time period between MEC and the Closing Date will be less than fourteen days, and this clause – which accelerates the time for the seller to make that request of the Association to no later than two business days after MEC – is intended for use in those occasional situations. Of course, this clause contains its own assumption – that there will be at least two business days between MEC and the Closing Date.

Association Fees and Required Disbursements – Time for Request of Status Letter if Closing Date Is Accelerated in Amend/Extend to be in Less Than Fourteen Days But No Sooner Than Two Business Days – Clause for Use in That Amend/Extend

36. § 15.3. Status Letter and Record Change Fees. If in an Agreement to Amend/Extend Contract a buyer and seller accelerate the Closing Date to within fourteen days of the execution and delivery of such amend/extend, and the seller has not already requested the delivery of a Status Letter from the Association, then this clause could be used to give the seller two business days from the execution and delivery of the amend/extend to make that request of the Association. This clause assumes there will be at least two business days between the execution and delivery of the amend/extend, and the Closing Date.

Possession Date Other than the Closing Date

37. § 17. 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.

Counterproposal Clause for Changing Possession Date & Possession Time

38. §§ 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.

Property Condition

39. § 18. 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.

40. § 18. 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.

41. § 18. 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.

Possession Not Affected by Mediation Clause

42. § 22. 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 § 23, Clause (3) Option

43. § 23. Earnest Money Dispute. This is the same as the last of the three *ala carte* (or check-box) clauses contained in our Addendum "A," and is discussed above in ¶ II.B.3. of this explanation letter.

44. 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.

Additional TRID-motivated Clauses

45. 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 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 seller's broker, relates to one of the recommendations from that publication relating to so-called "stacked" or "domino" or contingent sequential closings.

46. 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

47. 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.

48. Appraisal Gap. 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 $400,000. Due to a bidding war, the contract price gets bid up to $430,000. The pre-printed contingency in the Commission-approved contract gives the buyer an out if the property doesn't appraise for $430,000. 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 $400,000. 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. 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.

49. 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 for buyers who are waiving contingencies, but who still intend to make the inspections or take the other action associated with the contingencies being waived.

50. 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.

51. 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.

Coordination of Contract with Separate Agreement for Additional Personal Property – Clause for Use in Real Estate Contract

52. Coordination of Contract with Separate Agreement for Additional Personal Property. The CREC-approved form of Personal Property Agreement ("PPA") includes some language to coordinate that separate PPA with the CREC-approved form of Contract to Buy and Sell Real Estate (the "Real Estate Contract"). The PPA form states that the PPA terminates "[u]pon termination of the Real Estate Contract...," and the acceptance provisions of the PPA's § 11 are tied to the deadline for acceptance of the Real Estate Contract (or acceptance of a Counterproposal to the Real Estate Contract). Such provisions of the PPA, however, may not always address every such issue of coordination or relationship between the two contracts that could arise. For example, while the

PPA §11 acceptance provisions are tied to the same date as the acceptance provision of the Real Estate Contract, the language does not expressly state that acceptance of one of the two contracts is conditional upon a concurrent acceptance of the other. And a cancellation of the Real Estate Contract by one party because of a default by the other party is not a "termination" of the Real Estate Contract as that term is defined in and used throughout the CBS1-8-24 form, so the form PPA does not clearly address the effect such a cancellation of the Real Estate Contract has on the PPA; nor does the PPA or the CBS1-8-24 form indicate what effect a default under the PPA (such as a refusal of the seller to convey the contemplated additional personal property under the PPA as contemplated) has on the Real Estate Contract. This clause, and the clause which follows, address some of those other issues, in an effort to clarify the relationship and further coordinate the two contracts when a PPA is used. If one of these two clauses is used, then they should both be used – this one would be included in the Real Estate Contract, and the one which follows would be included in the PPA.

Coordination of Contract with Separate Agreement for Additional Personal Property – Clause for Use in the PPA

53. Coordination of Contract with Separate Agreement for Additional Personal Property. As discussed in the preceding paragraph, this clause would be used, if at all, in conjunction with the use of the preceding clause when a separate PPA form is used – this clause would be included in the PPA and the preceding clause would be included in the Real Estate Contract.

Back Up Conditions (select one)

54. 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.

55. 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.

56. 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 their 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.

57. 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.

58. 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 represent that the seller is not aware of such suits. If the seller is aware of such suits, then that should be disclosed and addressed on a case-by-case basis.

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

60. 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.

61. 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.

62. 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.

63. Contingency Regarding Material Adverse Changes – Right to Terminate. With events like the 2013 Black Forest Fire, the September 2013 floods in several front range counties, and the 2021 Marshall Fire, 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 one of the above in this Additional Provisions document under the heading "Due Diligence – Expansion and Coordination of Inspection and Due Diligence Provisions." 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.

64. VRBO, AirBnB or Similar Arrangements. Some sellers of residential property will have entered into VRBO, AirBnB or similar arrangements which cannot be unilaterally cancelled or terminated by the seller before closing. In such situations the seller will want to convey the property subject to such arrangements and have the buyer assume the seller's obligations for them. A broker might consider listing such arrangements in § 10.6.1.1, as "other occupancy agreements pertaining to

the Property that survive Closing," – in doing that it would seem that the other provisions of the CBS1-8-24 form regarding "Leases" would apply to the so-listed VRBO, AirBnB or similar arrangements. This clause is an alternative to handling the issue in that way, addressing such VRBO, AirBnB or similar arrangements explicitly, and with similar effect to the form contract's handling of Leases.

65. 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 the contract lives.

66. 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

67. 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.

68. FIRPTA. This clause can be used by the Broker to educate buyers about the issues and risks associated with the Foreign Investment in Real Property Tax Act (FIRPTA), some of which issues and risks may not always be covered by the provisions of § 15.9.1 of the CBS1 form in the way a buyer would want them to be.

69. Property Insurance. This clause can be used by the Broker to educate buyers about the fact that insurers are refusing homeowners' insurance, or charging higher premiums, and that a buyer should consult the buyer's prospective insurer before the Property Insurance Termination Deadline to make sure the insurer will insure the property on terms acceptable to the buyer and the buyer's lender.

70. 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."

71. 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. Our clause serves to educate buyers about these applicable local code requirements.

72. Broker Due Diligence. Many malpractice claims against real estate brokers arise from brokers conducting less than perfect due diligence on a property. Examples include brokers' evaluation of a property for use as a short term vacation rental, its convertibility from a single family use to a residential style office building, and a property's conversion from one use to another. On the other hand, some brokers' business model depends upon buyers perceiving that the broker has expertise in evaluating such things. This clause is intended to reduce broker risk should the analysis be incomplete or wrong. This paragraph explains that any due diligence conducted by a broker was solely done to help the buyer determine whether it was worthwhile to pursue a property. Broker due diligence is not sufficiently reliable for buyers to close upon. This clause will provide little benefit to brokers who believe or represent otherwise to their buyers.

73. Danger of Buying a "Hot" Property. Buyers sometimes accept elevated risk when attempting to buy a property for which there is competition from other buyers. After the fact, some of this buyer risk taking may seem foolish. This clause is designed to reduce exposure to buyer's remorse type risk.

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

74. 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.

75. Variable Reduced Compensation if Only One Broker. If a seller wishes to have a variable reducing listing arrangement, our clause provides for one. Offering sellers the option to save money when the buyer gives up the opportunity to work with a buyer-side broker to work directly with the listing broker reduces antitrust risk for the listing brokerage firm.

76. Reduced Compensation for Two Transactions. Sometimes a broker will agree to reduced listing compensation 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.

77. 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.

78. 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) (SSA39-10-11). 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.

79. 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.

80. Encumbered Inclusions or Leased Items. This clause can be used by the broker to educate a seller regarding the different issues and risks the seller should consider if certain Inclusion items to be included in a Sale (such as solar panels, satellite dishes or systems, or security systems) are encumbered by debt or leased, rather than owned out-right by the seller, and to advise the seller to consult an attorney regarding the management of such issues and risks.

81. 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 they have the authority to act on behalf of the entity or trust which owns the property.

82. 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.

83. 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) (SSA39-10-11) 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.

84. Jefferson County Regulations Regarding On-Site Wastewater Treatment 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 on-site wastewater treatment system ("OWTS") permitted. In order to obtain such a permit, the owner must generally first arrange for the pumping and inspection of the OWTS. Our clause serves to educate the seller about these needs at the time the listing is taken.

85. Boulder County Septic Smart Regulations. The preceding clause regarding the Jefferson County regulations summarizes some of the specifics of those 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 (or on-site wastewater treatment 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.

86. 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.

87. Seller Does Not Want to See Love Letters. When sellers see love letters, it enhances Fair Housing risk for sellers and perhaps buyers. (It is not possible for our law firm to calibrate this risk because we have yet to see a Fair Housing case that turned on or was driven by love letters.) Also, if buyers perceive that buyers can obtain some advantage based upon things revealed in a love letter, that perception might induce buyers to offer less favorable terms. Inserting this clause in listing agreements enables listing brokers to not only decline to pass love letters on to sellers, the clause enables brokers to so indicate in the MLS. Perhaps the MLS entry will both discourage the use of love letters and produce better offers.

III. Addenda to Exclusive Right-to-Sell and Exclusive Right-to-Buy Listing Contract

A. General Comments

Real Estate Commission Rule 7.4.A states: "*No contract provision, including modifications or additional provisions permitted by Rules 7.2 and 7.3, will relieve a Broker, Employing Broker, or Brokerage Firm from compliance with section 12-10-201, C.R.S., et. seq., or these Rules.*"

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 Chapter 7 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 7.4.B states: *"A Broker who is not a principal party to the contract may not have personal provisions, personal disclaimers or exculpatory language in favor of the Broker, Employing Broker, or Brokerage Firm inserted into a Standard Form. A Broker may, at the direction of a principal party, include language regarding the payment of the Broker's or Brokerage Firm's commission if this is a negotiated term between the principal parties of the Commission-Approved "Contract to Buy and Sell Real Estate" Form."* 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 contains a disclaimer making it clear that the broker is not liable for the financial integrity of a pre-owned home 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 obtain casualty and liability insurance if the possession date is other than the closing date.

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. New Loan Terms; New Loan Availability. 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 at ¶ II.C.14 in this explanation above). This provision also informs buyers that such financing contingency cannot be used to terminate the buy/sell contract based on a problems for which there could have been a separate contingency, such as appraisal problems, insurability of the property or the failure of the buyer to sell another property.

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-28) has not eliminated all experimentation by listing brokers with alternative lower service arrangements. Buyer-side 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 compensation 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.

15. Broker Due Diligence. Brokers sometimes conduct preliminary due diligence on a property to ensure that it can be used for a Buyer's intended use. This could include whether the property is suitable as an AirBnB, marijuana grow operation, or conversion to a different use. The risk of conducting preliminary due diligence is that a Buyer may rely on the Broker's findings to their detriment. This clause is meant to act as a disclosure stating that the Buyer should not rely on the Broker's due diligence. The clause directs Buyers to conduct their own due diligence and to consult the advice of professionals before the expiration of any contingency period.

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 obtain casualty and liability insurance if the possession date is other than the closing date.

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 law firm 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. 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, including the "Clear Cooperation" rule requiring broker to enter the Property in the MLS once the Broker publicly markets it. 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.

6. Previous Listing of Property. When the seller's property was previously listed under an exclusive agreement with another brokerage firm and the "will" box was checked in the holdover provision of that previous listing agreement, potential seller liability for two Seller compensation

obligations – 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" 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 compensation due to the (second) listing broker in such a double liability situation is adjusted (being to adjust the regular compensation down in that situation).

7. 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.

8. 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.

9. Seller to Comply with Association Obligations. Certain Colorado statutes require the seller to provide certain governing and financial documents to buyers. This clause educates sellers about these burdens, and in light of such requirements the broker may want to encourage the seller to begin gathering the necessary documents at the time the listing is taken.

10. 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.

11. Breach or Nonperformance by Seller - Compensation 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 compensation which would otherwise have been due.

12. 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

The Colorado Division of Real Estate addresses the legal issues surrounding "coming soon" marketing in its Commission Position 26 on "Reducing the Buyer Pool." A theme of CP-26 is that broker efforts to encourage sellers to reduce the buyer pool may be a conflict of interest and a violation the broker's duty to exercise reasonable skill care

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 compensation (for example, a 2% discount for a sale procured by the listing broker and a 1% discount on the gross listing compensation for a sale to an "in-company" buyer). We feel that such a variable listing compensation 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 their 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 most all conditions in the contract for the benefit of the Buyer (exceptions are set forth in ¶2 of the bottom half of this form). 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 (except those described in ¶2) 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 contingencies in a contract,

but still not have the ability to close. For example, 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. 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.

VII. 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.

VIII. Termination of Marketing Efforts Without Terminating Listing

From time to time a seller informs a listing broker that the seller has changed their 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 compensation 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 compensation.

IX. Notice to Parties Regarding Earnest Money

If there is a dispute about the earnest money, one of the options that § 23 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 lawsuit 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, § 23(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.

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

Where English is not the homeowner's (seller's) principal 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.

XI. 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.

XII. 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.

XIII. Risks of iBuyer Purchase Contracts

iBuyer purchase contracts forms are often prepared by the iBuyers. iBuyer purchase contracts may contain features that (a) burden the seller more than the contract forms created by the Colorado Real Estate Commission or (b) may surprise sellers. This form explains some of the undesirable features of iBuyer contracts for sellers. This form could be used by a listing broker who was initially engaged by the seller to broadly market the property and the listing broker just happened to receive an offer from an iBuyer. It can also be used by a listing broker who is initially soliciting offers from iBuyers in conjunction with the "'iBuyer' Solicitation Addendum to Exclusive Right-to-Sell Listing Contract" (described below).

XIV. iBuyer Solicitation Addendum

This form addresses the needs of some sellers who do not want to publicly market a property and instead only want a broker (at least initially) to solicit offers from iBuyers. In this form, the term "iBuyers" means buyers who utilize technology to make instant cash offers on properties, sometimes referred to as "instant buyers" or "internet buyers." The form discloses some of the potential advantages of initially marketing only to iBuyers and some of the disadvantages. If the seller moves to the stage where the seller is considering accepting an offer from an iBuyer, then the listing broker would use the "Brokerage Disclosure to Seller Regarding iBuyer Purchase

Contracts" (described in the preceding section XIV) to disclose the risks of iBuyer contract forms. These disclosures are broken into two separate forms partly to make the disclosures less daunting and more digestible to sellers.

XV. Single Buyer Listing Addendum

This form addresses the needs of some sellers who desire the assistance of a broker in situations which the buyer has been identified before the property has been marketed. Some in the industry might call these situations a "Single Party Listing." Among the transactions in which this form would be useful are deals in which the seller has identified a buyer before contracting a broker, or in situations in which the seller has been unwilling to generally list the property and market it to the public. The seller, however, informs the broker that the seller will use and pay broker when broker finds a buyer to purchase on seller's terms. This form is an addendum to the Colorado Real Estate Commission approved seller listing contract. It discloses to the seller that without exposing the Property to the whole market through the multiple listing service and other means, Seller cannot have confidence that the seller is selling the Property to the highest and best buyer. The form modifies the CREC listing agreement narrowing the exclusivity of the listing to the one buyer (the Single Buyer") identified in the form. The listing broker uses the CREC listing agreement to address the other terms of the listing (such as broker compensation and the duration of the listing).

XVI. Buyer Broker Compensation Agreement

In response to the settlement of the antitrust lawsuits versus the National Association of Realtors® and others in the brokerage industry (the "Settlement Agreement"), the Colorado Division of Real Estate created a new third page of the Division's Broker Disclosure to Buyer form and labeled the third page "Buyer's Broker's Compensation Agreement." The Division intend that this third page would satisfy a provision in the Settlement Agreement requiring a written agreement between buyers and their broker before the broker "toured" property with the buyer. The Division's experiment has presented challenges for buyers and brokers, including:

1. The Division's combination of three-forms-in-one confuses brokers and buyers, and therefore contradicts the clarity sought by the settlement agreement.

2. The Division's experiment does not have a clear way of limiting the Compensation Agreement to one property, or a small number of properties.

3. The Division's experiment does not allow the broker to disclose how much of the broker's compensation will be paid by the seller's side.

4. The Division's experiment contains the following sentence benefiting brokers: "If any transaction fails to close as a result of Buyer's default, in whole or in part, the Success Fee will not be waived; such fee is due and payable upon Buyer's default, but not later than the date that the closing the transaction was to have occurred." This clause intimidates buyers.

Each of the above decreases the likelihood that the Buyer will feel comfortable signing the form, decreasing the opportunity for buyers to receive assistance from a licensed real estate broker. Since developing its one-page addition, the Division has confirmed that it does not require such an agreement and has announced that it has no intention of enforcing the Settlement Agreement's requirement of a compensation agreement.

Our one-page standalone Buyer Broker Compensation Agreement:

- eliminates the "three-forms-in-one problem;
- contains an additional provisions section allowing the broker to limit the agreement to one property or a small number of properties;
- allows brokers to use it to disclose how much the broker expects to be paid from the seller's side of a transaction (if the broker has that information);
- eliminates the intimidating sentence.

In short, our one-page form allows brokers to use it in much the same way that medical professionals commonly require patients to sign a form essentially stating that the medical professional will seek to recover everything it can from insurance and that the patient is responsible for any charges not covered by insurance. Our form makes buyers more comfortable signing the form enabling the buyer to receive broker services.

Brokers should still use the first two pages of the Division's Broker Disclosure to Buyer to disclose their relationships with buyers as required by Colorado law. Then, instead of using the Division's third-page, Brokers can use our one-page standalone Buyer Broker Compensation Agreement.
Does Colorado license law allow brokers to use our one-page form when the Division has provided its own solution? We think it does for the reasons stated above. We have also run our one-page form by Executive Director of the Division of Real Estate who has signaled that she does not have a problem with our form.

* * * * *

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 our relationship.