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Colorado Residential Contracts ADDENDA PACKAGE Explanation

I. General Comments for All Our Forms

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

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

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

Our addenda and clauses do not purport to include all the provisions which a broker may wish to use to structure a residential real estate transaction. Instead, we have attempted to address the most frequent requests for clauses from most of our clients. Some of our clients have developed addenda addressing their local concerns. Generally, our clauses do not attempt to address local concerns. Those of you who have repetitive 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 sporadically be useful in commercial transactions, some provisions are not appropriate for commercial transactions. Further, the addenda do not address many of the issues which frequently need to be addressed in commercial transactions. Commercial brokers should contact us to develop their own custom documents.

Our addenda and clauses may only be used with the forms the Real Estate Commission required brokers to use as of January 1, 2012. Any future changes in the Real Estate Commission approved forms or rules, and other changes in the real estate environment, may require a revision of the enclosed forms. You may request additional revisions at any time.

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

A. General Comments

Addendum "A" includes three clauses that we believe most of our broker clients will find useful in deals where the Real Estate Commission approved form number CBS1-10-11 is used, regardless of whether they are working with buyers or sellers, as well as an *ala carte* menu of four other provisions addressing certain "hot topics" or issues that arise with some frequency. The broker can pick or reject those four *ala carte* clauses for the contract by checking, or not checking, the applicable boxes.

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

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

The reason our contingencies do not call for the return of the earnest money if the contingency is not satisfied is that § 25.2 of Real Estate Commission approved form numbers CBS1-10-11 and CBS2-10-11 both provide: "*In the event this Contract is* ***terminated****, all Earnest Money received hereunder shall be returned and the parties shall be relieved of all obligations hereunder,* ***subject to §§ 10.4, 22, 23 and 24.***" [Emphasis added.] None of the contingencies in those Real Estate Commission approved forms explicitly state that if the contingency is not satisfied or waived, then the earnest money is returned to the buyer. Instead, those Real Estate Commission approved contingency provisions rely upon § 25.2 to call for the return of the earnest money to the buyer.

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

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

1. 1031 Exchange. Buyers acquiring property as part of a 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 often – depending on which box is checked – prohibits the buyer from assigning the contract without the seller's consent. Buyers acquiring property to complete a Section 1031 exchange have strict time frames in which to do so. Such buyers may not want potential sellers to know of the buyers' need to complete a Section 1031 exchange. This paragraph requires both parties (including the seller) to cooperate with the other party's Section 1031 exchange, so long as cooperation is not to the detriment of the other party. This paragraph should not be deleted.

2. Inclusions Conveyed "AS IS". The opening sentence of § 10.2 of the CBS1-10-11 and CBS2-10-11 forms indicates that, unless the Contract provides otherwise, the seller is conveying "the Property" in an "as is" condition, "where is" and "with all faults." This paragraph makes the same "as is, where is, with all faults" provision apply to the seller's conveyance of the Inclusions.

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

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

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

Conditions 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.

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

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

C. Additional Provisions

ADDITIONAL PROVISIONS TO THE CONTRACT TO BUY AND SELL REAL ESTATE

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

Buyer – Designation of Form of Tenancy

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

Inclusions – Carbon Monoxide Alarms

2. § 2.5. Inclusions. Although Commission approved forms CBS1-10-11 and CBS2-10-11 include in § 10.10 a disclosure regarding the requirements of the Lofgren and Johnson Families Carbon Monoxide Safety Act, those forms do not list carbon monoxide alarms among the Inclusions identified in § 2.5 This paragraph provides that unless they are explicitly excluded by another provision of the contract, or by a subsequent agreement of the parties, any carbon monoxide alarms on the Property on the date of the Contract are part of the Inclusions to be transferred to the buyer.

Well Transfers

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3. § 2.5.4. Inclusions – Water Rights. The provisions of § 2.5.4 regarding the completion of a Change in Ownership or Registration of Existing Well form, are derived from the requirements of § 38-30-102(3)(b)(I), Colorado Revised Statutes, effective on and after January 1, 2009, when a buyer of residential real estate enters into a transaction that results in the transfer of ownership of the type of well referenced in § 2.5.4.2 of the contract. That statute goes on to provide that where a third party provides the closing service, as a title company usually does in residential real estate transactions, that closing company is required to submit the completed Change in Ownership or Registration of Existing Well form, as applicable, to the Division of Water Resources, and the closing company is not liable for delaying the closing in order to ensure that the required form is completed. Our clause regarding this § 2.5.4.2, then, is intended to avoid the need for any such delay in the closing, by including an authorization for the seller to complete the required form at closing, as the buyer's attorney-in-fact, if the buyer fails or refuses to do so.

Additional Earnest Money Due on Expiration of Buyer Contingencies – Residential

4. § 4.2. Earnest Money. As noted above in the discussion of our Addendum "A," Sellers sometimes negotiate for inclusion in the contract of a provision requiring the buyer to make an additional earnest money payment upon the satisfaction or waiver of certain buyer contingencies. Our Addendum "A" includes an example of such a provision. If checked, that Addendum "A" provision obligates the buyer to make an additional earnest money payment upon expiration of either the Loan Conditions Deadline or the Inspection Resolution Deadline, depending on which box is checked. This provision is an alternative example, providing that the buyer must make an additional earnest money payment upon expiration of all the buyer contingencies there specified (all those included in the CREC-approved form of Contract to Buy and Sell Real Estate (Residential)).

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

5. § 4.2. Earnest Money. This provision is functionally the same as the one described in the preceding paragraph, but is designed for use with the "Income-Residential" version of the CREC-approved form of Contract to Buy and Sell Real Estate (which has some additional buyer contingencies, relative to the "Residential" version).

Interest on Earnest Money

6. § 4.2. Earnest Money. In large dollar transactions, it is sometimes worthwhile for the earnest money to bear interest for the benefit of the parties. If interest rates increase, there should be more demand for interest on earnest money. Our clause provides for interest on earnest money.

Earnest Money to be Paid by Third Party

7. § 4.2. Earnest Money. Buyers sometimes obtain earnest money from relatives or other third parties, and in some of those situations the third parties make payment directly to the Earnest Money Holder. This provision just identifies those facts, so the Earnest Money Holder won't have questions or concerns about accepting such a payment of earnest money from the third party.

Earnest Money Paid by, and Returnable to, Third Party

8. § 4.2. Earnest Money. This provision does the same thing as the preceding clause, but adds to that a direction for the return of the earnest money to the designated third party (for use, of course, when the buyer and the third party intend that the earnest money be returned to the third party).

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Seller Concession

9. § 4.4. Seller Concession. A buyer and a seller may strike a deal in which the Seller Concession to be given under § 4.4 of the contract is larger than the credit permitted by the buyer's lender. Under the final sentence of that § 4.4, the Seller Concession "shall be reduced to the extent it exceeds the amount allowed by Buyer's lender…." This clause gives the buyer the additional option of reducing the purchase price by the amount of any disallowed Seller Concession. This clause also obligates the buyer to allow the seller to verify the lender's treatment of the Seller Concession, directly with the buyer's lender.

Buyer Fault Needed for Loan Liability

10. § 5.2. Loan Conditions. The Real Estate Commission approved contract is not conditional upon buyer getting a loan. Under § 5.2, a buyer must notify the seller to exercise the buyer's right to terminate the contract because of buyer's dissatisfaction with a new loan. If a buyer is silent, the financing contingency is deemed waived. If the loan is not approved, or if it is approved and not funded, and the buyer cannot otherwise come up with the funds to close, the buyer will likely be in default under the contract unless the contract is terminated due to some other contingency, such as the appraisal, title or survey contingency provisions.

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

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

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

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

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

Cap on FHA/VA Repairs

11. § 6.1. Lender Property Requirements. An FHA or VA appraiser will sometimes condition the appraisal upon certain repairs being made to the property. This clause allows the parties to identify a cap up to which the seller is obligated to make the repairs required by buyer's lender.

Deletion of Lender Property Requirements Provision

12. § 6.1. Lender Property Requirements. § 6.1 was new in the 2008 CREC-approved Contract to Buy and Sell Real Estate. The provision seems to be based on a premise that a seller has some underlying obligation to address or satisfy a lender's Requirements – a premise not every seller may agree with. Although the provision has been revised slightly since its original appearance in the CREC-approved form, it still contains some ambiguities and potential problems for the parties. For example, does verbal notice to a seller of the Requirements constitute "receipt of the Requirements" for purposes of this language? What must the "written agreement" contemplated by clause (1) of the second sentence of § 6.1 address or include to eliminate or void the seller's right to terminate? A buyer considering a written waiver of the Requirements under clause (3) of the second sentence of § 6.1 should realize the waiver will not satisfy the lender's Requirements, and then consider the position the buyer will be in if such a waiver is given and the loan is not available at closing. Given the ambiguities and potential problems, it may be best in many transactions to simply delete this § 6.1. This paragraph provides a means of deleting § 6.1. However, **given CREC Rule F-1(d), the broker intending to so delete § 6.1 from the contract is cautioned to do so only when the deletion results from negotiations or instruction(s) of a party to the transaction, and then, instead of inserting this clause the broker would be better to simply strike through § 6.1 in a legible manner that does not obscure the deletion being made as that Rule F-1(d) contemplates.** It being better to strike the provision from the contract in a legible manner, then, this clause is included here primarily for informational purposes.

Extension of Appraisal Deadline and Appraisal Objection Deadline

13. § 6.2.1. Appraisal Condition – Conventional/Other. § 6.2.1 in the CBS1-10-11 and CBS2-10-11 forms indicate that to exercise the right to terminate under the appraisal contingency, the buyer must not only deliver a written notice to terminate, but also cause the Seller to receive **"either a copy of such appraisal or written notice from lender that confirms the Property's valuation is less than the Purchase Price**." [emphasis added] The highlighted portion of that language is a potential problem for a buyer who has done what the buyer can to obtain the appraisal or such written lender confirmation but for reasons outside the buyer's control that appraisal or written lender confirmation has not been delivered to buyer by the Appraisal Objection Deadline. This paragraph gives the buyer a one-time extension of the Appraisal Deadline and Appraisal Objection Deadline in such a situation. The Additional Provisions section of our system includes three other clauses providing for extensions of various deadlines in the event of a delay caused by Buyer's lender, with the Appraisal Objection Deadline being one of the extended deadlines; and this paragraph would probably be unnecessary if one of those other three clauses is used (although in one of those three other clauses, a box would need to be checked for this Appraisal Objection Deadline to be so extended).

Homeowners' Association Documents

14. § 7.3. Homeowners' Association Documents. § 7.3.2 in the CBS1-10-11 and CBS2-10-11 forms contains check boxes permitting the parties to chose between the § 7.3.2.1 or § 7.3.2.2 option. With the § 7.3.2.1 option, the Seller "shall cause the Association Documents to be provided to Buyer . . . ." With the § 7.3.2.2 option, the Seller authorizes the Association to provide the Association Documents. There will be situations where the § 7.3.2.2 option is selected and the Association will not follow through and provide the documents. This paragraph makes it clear that the choice of the § 7.3.2.2 box within § 7.3.2 does not relieve

Seller of the responsibility of following through and providing the Association Documents if the owner's association does not do so.

Off-Record Title Matters – Improvement Location Certificates

15. § 8.2. Off-Record Title Matters. § 8.2 in the CBS1-10-11 and CBS2-10-11 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 § 8.2 requirement.

Other Survey – Optional Clauses for Insertion in Blank in § 9.1.2

16. When applicable (when the box for § 9.1.2 is checked), the parties are to complete a blank in that § 9.1.2 to specify which party orders, and which party pays for, the "Other Survey" contemplated by that section (that is, a survey other than an Improvement Location Certificate). This clause, and the several four that follow it, set forth various alternative possibilities of how the parties may want to complete the blank. These five alternative clauses are not consistent with one another – only one of them should be used. This clause indicates that buyer orders and pays for the Other Survey.

17. This clause indicates that the buyer orders and pays for the Other Survey, but receives a credit against the Purchase Price in the amount specified in this clause if the transaction closes.

18. This clause indicates that the seller orders and pays for the Other Survey.

19. This clause indicates that the seller orders and pays for the Other Survey, but receives a credit against the Purchase Price in the amount specified in this clause if the transaction closes.

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

Home Warranty

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

22. § 10. Property Disclosure, Inspection, Insurability, Due Diligence, Buyer Disclosure and Source of Water. This alternative home warranty clause allows the Contract to obligate the listing or selling brokerage firm (described in the current CREC Contract to Buy and Sell Real Estate as either the "Brokerage Firm of Broker working with Seller" or the "Brokerage Firm of Broker working with Buyer") to pay some or all the cost of the home warranty. One disadvantage of using this clause is that it makes the broker a party to the Contract. Among other things, this burdens the broker with the "loser pays attorneys fees" clause in the buy/sell contract.

Due Diligence – Documents – and Assignment of Warranties

23. § 10.6. Due Diligence – Documents. § 10.6 of the Commission-approved form Contract to Buy and Sell Real Estate (Residential) contemplates that the buyer and seller will insert in § 10.6.2 a list of "due diligence

documents" that the seller will deliver to the buyer. This paragraph lists certain such documents that most buyers will want included as part of those due diligence documents to be provided by the seller. The broker using this form, however, should always consider what other documents the client may want included in this list of 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) (CBS1-10-11). The "Residential-Income" Commission-approved form (CBS2-10-11) contains an extensive list of due diligence documents within its version of § 10.6 that makes this paragraph largely superfluous or unnecessary if used in conjunction with that CBS2-10-11 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.

Methamphetamine Disclosure

24. § 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 CBS1-10-11 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 § 10.2 and/or § 10.7.1 (a) includes the buyer investigating and being satisfied with any such information, and (b) applies even if meth contamination has been remediated to state standards. In the CBS2-10-11 form, this meth disclosure provision is § 10.13 rather than § 10.12, so if using this clause in connection with the CBS2-10-11 form, the references in the clause to § 10.12 should be changed to § 10.13.

Disclosure of Psychologically Stigmatizing Events or Circumstances

25. § 10. Property Disclosure, Inspection, Insurability, Due Diligence, Buyer Disclosure and Source of Water – Psychologically Stigmatizing Events or Circumstances. Colorado law provides that facts or suspicions regarding psychologically stigmatizing events, such as a Property being the site of a homicide or other felony or of a suicide, "are not material facts subject to a disclosure requirement in a real estate transaction." This paragraph is designed for those buyers who nonetheless want to know about such matters. It includes a contractual commitment by the seller to disclose any such psychologically stigmatizing events or circumstances relating to or having occurred on the Property of which the seller has actual knowledge, and it also includes an express acknowledgment that the buyer's right to object and/or terminate under § 10.2 and/or § 10.7.1 includes the buyer investigating and being satisfied with any such information.

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

26. § 10. Property Disclosure and Inspection. The Real Estate Commission's provisions limit the buyer's inspection and termination rights to the "physical condition" of the Property and Inclusions, the other specific matters listed in clauses (1) through (5) in § 10.2 of the contract, and to the due diligence matters described in § 10.7, and the Commission's provisions contemplate that there may be a different objection deadline for the § 10.2 matters than for the § 10.7 due diligence matters. Our paragraph expands the inspection and termination rights to anything related to the Property, the Inclusions or the transaction contemplated by the contract. It lists a variety of other items which serve as a good check list for a buyer. Given the expansion of the inspection and

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termination rights in this paragraph, and because the subject matters of § 10.2 and § 10.7 often overlap, this paragraph also includes language indicating that the objection deadlines for both (the Inspection Objection Deadline and the Due Diligence Documents Objection Deadline) will be the same – and the later of the deadlines specified for such matters in the dates and deadlines chart. The paragraph does not add a separate contingency for buyer dissatisfaction about wells and septic systems. Buyers have an opportunity to evaluate these features of a property as part of the buyer's § 10 inspection. However, the Additional Provisions section of our system does include a separate well and septic clause requiring the seller to deliver certain reports or tests regarding a well or septic system which a buyer may find desirable. This paragraph also indicates that if the condition of the Property or Inclusions changes from the date the Property went under contract, the seller is obligated to disclose any changes to the buyer as those changes occur.

Well and Septic

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

Source of Water

28. § 10.9. Source of Potable Water (Residential Land and Residential Improvements). Given the statutory requirements regarding disclosure of the source of potable water in residential transactions, listing brokers should make the Source of Water Addendum available on the property for showings, so that buyers can submit such Addendum with offers. In spite of the best efforts of listing brokers to educate selling brokers to submit offers with the Source of Water Addendum attached, many brokers working with buyers will not do so. This clause, then, provides a means for a listing broker to correct that oversight in a counterproposal. (A similar provision for the Lead-Based Paint Disclosure (Sales) form is not included here because, although the same problem does occasionally arise in that context, § 10.11 of the CREC-approved Contract form contains the buyer's acknowledgment of receipt of the Lead-Based Paint Disclosure (Sales) form, whereas that acknowledgment is not contained in § 10.9 regarding the Source of Water Addendum unless the check-box provision is filled out to reflect such receipt. In spite of that § 10.11 language acknowledging receipt of the Lead-Based Paint Disclosure (Sales) form, however, if the listing broker knows that the buyer submitting an offer has not yet received such form, the listing broker should provide the required form and related documents (such as the EPA pamphlet) and then have the parties sign or re-sign as necessary to assure compliance. The section numbers set forth above in this paragraph relate to the CBS1-10-11 form. In the CBS2-10-11 form, the Source of Potable Water provision is § 10.10, and the Lead-Based Paint provision is § 10.12.

Escrow for Property Condition

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

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Property Condition

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

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

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

Extension for Lender Delay (Simple)

33. § 21. Time for Performance. This provision calls for an extension of time for lender delay. We recommend that it be used sparingly and for short periods only. The advantage of including this provision in a contract is that it prevents the seller or the buyer from terminating the transaction because of a delay caused by the buyer's lender. However, such a clause has many disadvantages. Among them are that this clause could work to delay a seller, through no fault of the seller. Though the delay of the buyer's lender may be through no fault of the buyer, it will not be through the fault of the seller either. Many sellers will not want to subject themselves to a risk which is beyond their control. Another disadvantage of such a clause is that it can lead to arguments about whether the delay is caused by the buyer's lender. Yet another disadvantage is that such a clause may work to make lenders lazier than they otherwise would be if there was a hard loan commitment deadline.

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

Extension for Lender Delay (Optional Section)

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

Possession not Affected by Mediation Clause

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

37. CLUE Report. Properties now have claims histories like borrowers have credit reports. Claims histories are maintained by the Comprehensive Loss Underwriting Exchange property database (CLUE). This clause obligates the seller to provide the buyer with a CLUE report by the Seller’s Property Disclosure Deadline, the date by which the seller must also provide the buyer with a title commitment.

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38. Sale of Buyer’s Existing Home. It is common for contracts to contain provisions making the buyer's obligations contingent upon the buyer selling an existing home. This clause provides a home sale contingency. You may require additional language to properly outline the needs and desires of the parties. Use caution when drafting such multiple contract conditions.

Federal and Colorado Withholding

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

Back Up Conditions (select one)

40. 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.

41. 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.

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

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

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

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

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

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46. 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.

47. 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.

48. Generic Contingency–Right to Terminate. The Real Estate Commission provides parties at least five pre-printed contingencies for things such as loan commitment, title 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 modeled after the appraisal contingency. If a party benefited by the contingency does not provide the written Notice to Terminate by the deadline, then, pursuant to § 25.2, the contingency is waived and the contract lives.

49. 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 was modeled after the Real Estate Commission's inspection contingency. It 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

50. 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.

51. 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."

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

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similar codes may contact us if they would like assistance creating a provision tailored to the specific regulation of another county or municipality.

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

53. 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.

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

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

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

57. 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.

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

59. 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

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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.

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

61. Jefferson County Regulations Regarding Individual Sewage Disposal Systems. Jefferson County currently places burdens on an owner who is selling a property, which is not connected to a public sewage disposal system, to comply with certain requirements. Generally, a seller needs to have the independent sewage disposal system (ISDS) permitted. In order to obtain such a permit, the owner must generally first arrange for the pumping of the ISDS. Our clause serves to educate the seller about these needs at the time the listing is taken. Since Jefferson County created its regulations in 2004, other counties have enacted similar regulations. Clients listing property in counties with similar regulations may contact us if they would like assistance creating a provision tailored to the specific regulation of another county.

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

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

A. General Comments

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

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

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

B. Buyer Addendum to Exclusive Right-to-Buy Listing Contract or Brokerage Disclosure to Buyer/Tenant 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/Tenant form. Our Buyer Addendum is designed to work in either of these situations.

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

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

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

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

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

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

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

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

9. Loan Fraud. The slower real estate market is putting more pressure on sellers to participate in "creative" transactions. Also, a flattening or declining market tends to reveal more loan fraud. With increasing frequency, brokers find themselves pressured to participate in transactions which may be misleading to lenders. 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

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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. As listing brokers experiment with alternative lower service arrangements, selling brokers find themselves doing more work for FSBO, limited service listings, and list only listings. This clause calls for an increase in the fee due to a selling broker who helps a buyer pursue a property which is not listed, or which is listed with a limited services broker. We provide this form not with the expectation that buyers will want to pay the excess. Instead, the selling broker can use this as leverage to have the buyer address the commission issue at the time the buyer makes an offer to the seller.

14. Affiliated Business Arrangements. Some of our clients have affiliated business arrangements with other real estate related companies such as mortgage, title insurance or home warranty companies. If, when placing your request for the addenda, you indicated that you had such an affiliated business arrangement and you wanted to so disclose it on your Buyer and Seller Addenda, then we added such a paragraph in your Buyer Addendum. If you did not request such a clause, then disregard this explanation paragraph.

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

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

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

3. Loan Fraud. The slower real estate market is putting more pressure on buyers to participate in "creative" transactions. Also, a flattening or declining market tends to reveal more loan fraud. With increasing frequency, brokers find themselves pressured to participate in transactions which may be misleading to lenders. 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 "shall" or "shall 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 "shall" box is checked in that § 5.8, this paragraph then allows the parties to specify further whether the listing broker is or is not authorized, in the broker's discretion, to disclose the various purchase prices in such competing offers, or whether such authorization for the listing broker to disclose is to be obtained only after consultation with the seller on a case-by-case basis.

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

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

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

8. Previous Listing of Property. When the seller's property was previously listed under an exclusive agreement with another brokerage firm and the "shall" box was checked in the holdover provision of that previous listing agreement, potential seller liability for two commissions – one under each listing agreement – becomes an issue (with respect to sales occurring during the holdover period to a party with whom the previous broker negotiated and whose name was submitted in writing during the listing period of that previous listing agreement). Because such double liability is a problem or concern for the seller, it can also be a problem or concern for the listing broker. This paragraph includes alternative check-box provisions by which the seller can inform the listing broker whether this might be an issue, and the part of this provision that applies if the property was previously listed and the "shall" box was checked in the holdover provision includes (a) seller's acknowledgment of that potential double liability, (b) seller's representation that it has provided the listing broker with a complete copy of the previous listing agreement and all information in the seller's possession regarding names (of parties with whom the former listing broker negotiated) submitted in writing by the former broker, and (c) a provision through which the regular commission due to the (second) listing broker in such a double liability situation is adjusted (the intended concept being to adjust the regular commission down in that situation).

9. Additional Documents. Many listings are sold through in-house transactions. In these transactions, the listing company will likely 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

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the listing is taken, that the listing broker will provide a copy of Addendum "A" to buyers in a single-licensee transaction.

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

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

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

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

14. Affiliated Business Arrangement. Some of our clients have affiliated business arrangements with other real estate related companies such as mortgage, title insurance or home warranty companies. If, when placing your request for the addenda, you indicated that you had such an affiliated business arrangement and you wanted to so disclose it on your Buyer and Seller Addenda, then we added such a paragraph in your Seller Addendum. If you did not request such a clause, then disregard this explanation paragraph.

D. Seller Financial Distress Supplement to Seller Addendum to Exclusive Right-to-Sell Listing Contract

Brokers often list property owned by Sellers in some sort of financial distress. Our Seller Financial Distress Supplement to Seller Addendum provides clauses that may be helpful in three different kinds of such financial distress.

1. Existing Financial Distress – No Authorization to Disclose Seller's Financial Condition. 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 the box for this Section 1 of the Supplemental Seller Addendum is checked, then, the Broker and Brokerage Firm are instructed

that they are not authorized to disclose the financial condition of a seller in this situation. In using this Addendum, the broker should not check both Sections 1 and 2, because the underlying assumptions regarding those two sections are inconsistent.

2. 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 new Commission-approved Short Sale Addendum (Seller Listing Contract) (SSA38-10-11) is needed. In addition, use of the Commission-approved form of Short Sale Addendum with a Contract to Buy and Sell is also important for a seller in such circumstances, to avoid putting the seller in a default position. This clause in our Supplemental Seller Addendum 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. In using this Addendum, the broker should not check both Sections 1 and 2, because the underlying assumptions regarding those two sections are inconsistent.

3. Existing Financial Distress – Multiple Liens. As the italicized language at the beginning of Section 3 indicates, this section is for situations when there are multiple liens on the property, the amount of which exceeds any net proceeds the seller can be expected to receive from a sale, and when the parties desire to create the possibility of completing a sale by effecting a junior lien redemption from a foreclosure by the first lienor, after one or more intervening junior liens elect not to redeem. The broker's deed of trust created pursuant to this section would be used to accomplish such a redemption. The seller's representation in this section that, to the seller's knowledge, none of the existing liens is presently in foreclosure, is included because the approach contemplated by this section cannot work where a Notice of Election and Demand has already been recorded to begin a foreclosure and such foreclosure proceeds to sale. However, this concept may be available if such a pending foreclosure is withdrawn for some reason – such as when the subject default is cured – and then another foreclosure by the first lienor is subsequently begun by the recording of a new Notice of Election and Demand after the Deed of Trust to the Broker has been created and recorded. That possibility, then, is something the prospective listing broker may want to keep in mind. The broker attempting to implement this section should bear in mind the italicized caution to seek advice from counsel.

IV. 72 Hour 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 "right of first refusal."

It is important to understand that these provisions are not "first rights of refusal." A first right of 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 first right of 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, we will refer to such clauses as "kick out" clauses although they have different labels on the forms themselves.

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

We have enclosed two types of kick out clauses. One would require that upon the seller's invocation of his kick out rights, the buyer must perform (i.e., close) within a short period of time (the "72 Hour 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 waive all of its contract contingencies (the "72 Hour Removal of Conditions" addendum).

B. 72 Hour Accelerated Closing 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 72 hours, or some other period of time (the "Decision Period"), to either allow the contract to terminate, or to amend the contract to call for an accelerated closing date – the day after the 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. 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 reflect the accelerated closing date.

C. 72 Hour Removal of Conditions Addendum

To avoid being kicked out of the transaction under this Addendum, Buyer #1 must remove all conditions in the contract for the benefit of the Buyer. This Addendum also allows the parties the option to require Buyer #1 to put up additional earnest money to stay in the deal. If the parties do not intend to require additional earnest money from Buyer #1, insert $0.00 in the 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. The bottom half serves the dual purpose of: (a) providing notice from the Seller to Buyer #1 that the Seller is invoking the Seller's kick out rights; and (b) allowing the Buyer to sign and thereby waive the Buyer contingencies (and increase the Buyer's earnest money if necessary).

When listing brokers use the 72 Hour Removal of Contingencies Addendum, they should be careful to avoid creating false expectations in sellers. Buyer #1 may waive all of the contingencies in a contract, but still not have the ability to close. If a buyer has waived the financing contingency, but can't qualify for the loan, it is unlikely that the contract will close. Your seller may be limited to pursuing breach remedies. With an unmodified Real Estate Commission approved form, this should allow the seller to keep Buyer #1's earnest money. As a practical matter, in the type of seller's oriented market which permits kick out clauses, it is

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unlikely that a seller would want to bring a specific performance lawsuit against the first purchaser. Consequently, with this removal of conditions kick out clause, it is especially important that the amount of earnest money be sufficient to satisfy your seller in the event the first contract doesn't close.

V. Mold Disclosure

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

VI. Notice to Terminate with Release of Earnest Money

The Real Estate Commission approved Notice to Terminate form (NTT44-10-11) was developed for use by either a buyer or a seller when such party desires to exercise a specific right to terminate that is set forth in the Commission's form Contract to Buy and Sell Real Estate. The Commission approved forms also include a separate Earnest Money Release form which, when signed by both parties, can provide instructions to the Earnest Money Holder regarding the distribution of the Earnest Money upon termination.

Our form combines both of these functions into one form. This form is the Commission's Notice to Terminate form, but with additional language added so that if the non-terminating party also signs, the document will then contain the acknowledgment and agreement of both parties that the contract has been terminated and a direction to the Earnest Money Holder to return the Earnest Money to the buyer.

VII. Notice to Seller

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

Brokers may use Section 1 of this form in one of two situations: (a) where the buyer wants to waive a lender's Requirements and resurrect a contract that otherwise would have been terminated as a result of a seller's notice of termination under § 6.1 of the contract (as contemplated by clause (3) of the second sentence of that § 6.1); or (b) where a previous Notice of Title Objection given by the buyer has not been resolved to the buyer's satisfaction, but the buyer wants to exercise its § 8.3.1 right to waive the objection and keep the contract in effect.

Brokers may use Section 2 of this form to provide notice to the seller of Requirements that have been imposed by the buyer's lender, as contemplated by § 6.1 of the CREC-approved Contract to Buy and Sell Real Estate.

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

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VIII. 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.

IX. 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 HUD-1 settlement statements, such rebates can be legal. This form educates buyers, and serves to memorialize the lender's consent, for these situations.

X. Termination of Marketing Efforts Without Terminating Listing

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

XI. Notice to Parties Regarding Earnest Money

If there is a dispute about the earnest money, one of the options that § 24 of the Contract to Buy and Sell gives to the Earnest Money Holder – provided the Earnest Money Holder is one of the Brokerage Firms identified in § 33 or § 34 of the contract – is to initiate a "put up or shut up" process to resolve the issue. Essentially, the Earnest Money Holder can send out a notice giving the Seller a 120-day period to file a law suit claiming the earnest money, and if the Seller does not do so, the Earnest Money Holder will turn the earnest money over to the buyer. More precisely, § 24(3) allows the Earnest Money Holder to notify the buyer and seller that unless the Earnest Money Holder receives a copy of the Summons and Complaint, with a court case number, for a suit between them within 120 days of the date of the notice, the Earnest Money Holder shall 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.

This form is to be used only by a Brokerage Firm acting as the Earnest Money Holder, since the last sentence of § 24 specifically states that its provisions apply only if the Earnest Money Holder is one of the Brokerage Firms identified in § 33 or § 34 of the contract (and this form references that § 24). If, however, the Earnest Money is held by a title company and the title company and the parties have signed the CREC-approved Closing Instructions (which includes a provision virtually identical to § 24 of the Contract to Buy and Sell), then a similar notice could be given by the title company, although the references to the contract would have to be changed appropriately in such a notice.

XII. Notice of Title Objection

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One of the changes made in the new Contract to Buy and Sell Real Estate forms, including the CBS1-10-11 and CBS2-10-11, relates to the buyer's right to make title objections – whether to "record" or "off-record" title matters. Like the options given a buyer in § 10.2 regarding physical inspections (to either terminate the contract immediately or make an objection and try to reach a resolution that will keep the contract in effect), the new contract forms, in § 8.3, now do a similar thing with respect to a buyer's objections regarding record or off-record title matters. With respect to § 10.2 objections, the Commission has promulgated a form (NTC43-10-11) for the buyer to make an objection under §10.2.2 of the contract (regarding physical matters), without immediately terminating the contract, but it appears that the Commission has not yet promulgated a similar form to implement the title objection concept of §8.3.1 (use of the Commission's Notice to Terminate form (NTT44-10-11 would seem to result in the immediate termination of the contract as contemplated by §8.3.2 – although that Notice to Terminate form, relative to title, refers only to §8.3 rather than either 8.3.1 or 8.3.2, immediate termination as contemplated by §8.3.2 would seem to be the necessary result of that form in a title context given the language that precedes the check-box chart, which reads, "Buyer notifies Seller that the Contract is terminated…because the following are unsatisfactory…."). This form, then, attempts to fill that void by giving the broker a form to make a title objection under § 8.3.1 that allows the parties to try to resolve the objection without immediately terminating the contract. Like the NTC43-10-11 form, our form includes a section at the bottom allowing the buyer to waive objection and keep the contract in effect if the objection is not resolved to the buyer's satisfaction by the Title Resolution Deadline but the buyer wants to continue with the contract anyway.

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

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

XIV. 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. Assignment of Contract with Consent of Seller and Release of Buyer (Substitution 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, 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.

XV. Counterproposal (Multiple Offers)

When a property generates a lot of interest and multiple offers, the listing broker may sometimes find that it is not in the seller's best interest to respond to those offers in the traditional one-at-a-time manner where only one offer is selected for a counterproposal, with all other offerors being put on hold while the seller and listing broker attempt to get the property under contract with that one selected offeror. Our "Counterproposal (Multiple Offers)" form is an example of an alternative approach that a listing broker in such a situation may want to consider. Dealing with multiple offers is always complicated, and the use of this form, involving as it does the possibility of two or more counterproposals being submitted by a seller and outstanding at the same time, can be particularly complicated. Consequently, THE LISTING BROKER SHOULD USE EXTREME CARE AND CAUTION WHEN USING THIS FORM.

XVI. Commission Split Settlement Agreement

Disputes about entitlement to a commission sometimes occur among brokers. Our form is an example of a document brokers might use to evidence their settlement or resolution of such a dispute. No form like this can fit every possible fact situation, however, and even in situations for which the form seems appropriate, some risk or potential difficulty may still exist. For example, the form does not address how the settling parties' rights or obligations would be affected if, after entering into such an agreement, another broker – not a party to the agreement – successfully asserted a claim to a commission. As a result, we encourage brokers to seek advice from legal counsel before using this form in any particular situation, and, in any event, before using this form a broker must evaluate whether the applicable facts can be adequately addressed by the form.

XVII. Agreement for Purchase and Sale of Personal Property

At times, a buyer's lender does not want to have substantial items of personal property included in the real estate contract. This form is intended to accommodate those situations, allowing the parties to carve out related personal property and deal with it in a separate contract with its own consideration. Separate contracts like this, however, have sometimes been used for inappropriate conduct that is or may be loan fraud (for example, by understating the true value of the real estate while seeking a short sale, paying to the seller outside of the real estate closing and without the short sale lender's knowledge an amount that is purportedly for the personal property the lender has no lien on, but which in reality is significantly in excess of the true fair market value of the personal property). Of course, the broker should not use, or participate in the use of, this form in that kind of situation.

XVIII. Post-Closing Occupancy Agreement

For use beginning January 1, 2012, the Commission has adopted a new Post-Closing Occupancy (Seller Rent-Back Agreement) (PCO70-10-11). The Commission has indicated it is intended only for short-term lease-backs (or post-closing possessions) by a seller, and addresses only some of the issues parties to a residential lease may want to cover. At the outset of this explanation letter, we pointed out that the Commission has allocated risk as it has deemed best, but we know sellers and buyers sometimes want to alter those risk allocations – so many of our provisions or forms simply give buyers and sellers options to make different risk allocations. Our form of Post-Closing Occupancy Agreement is an example of that. It provides an alternative form that some parties may prefer. A key difference in our Post-Closing Occupancy Agreement relates to the parties' respective obligations to maintain the property during the post-closing occupancy by the seller. The Commission's form (PCO70-10-11) imposes some obligation on the buyer in that regard (see § 5 of that form). That concept may not be consistent with a buyer's expectations or desires in that regard. Among other things, §11 of our form changes that concept.

* * * * *

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

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