

NABOR Revises Four Forms: Effective Date: August 14, 2008

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NABOR has recently revised the following four of its standard forms. The Effective Date of these revised four forms is August 14, 2008, and appears in the copyright line as (NABOR 8/14/2008):

- **Brokerage Relationship Disclosure Form: Transaction Broker Notice (NABOR 8/14/2008)**
- **Addendum to Sales Contract: VA/FHA Financing (NABOR 8/14/2008)**
- **Addendum to Listing Contract Exclusive Right and Authority to Sell: Short Sale (NABOR 8/14/2008)**
- **Addendum to Sales Contract: Short Sale (NABOR 8/14/2008)**

Following is an explanation of the revisions made in each form and the consequences of the revisions.

Brokerage Relationship Disclosure Form: Transaction Broker Notice (NABOR 8/14/2008)

As many licensees are aware, Florida law no longer requires that a written transaction broker disclosure notice be delivered to a buyer or seller with whom the licensee will be working exclusively as a transaction broker. The law now creates a presumption that unless otherwise agreed upon, all real estate licensees are acting as transaction brokers with all buyers and sellers with whom they engage in brokerage activities. A written brokerage relationship notice is now only required to be given to a buyer or seller with whom the licensee intends to work instead as a single agent, or as a non-representative, or as a designated sales associate in a non-residential transaction, rather than as a transaction broker.

NABOR has decided to retain the written transaction broker notice form for use by those REALTORS® who feel it is more prudent and less risky to continue to provide their buyers and sellers with written disclosure of their transaction brokerage relationship. The transaction broker notice remains set forth in Florida statute, so the wording of the notice itself cannot be changed. NABOR has, however, revised the prefatory explanatory material at the top of the notice form to reflect the recent changes in the law. In the revised transaction broker notice form, the explanatory preface now simply states: "This form does not establish the terms of any agency or brokerage relationship agreement between the broker and buyer or seller." In other words, while the notice describes the duties of a transaction broker, it remains for the licensee and the buyer or seller to agree that the licensee will in fact be operating as a transaction broker. Under the new brokerage relationship law, if a brokerage relationship is established the licensee will be presumed, however, to be acting as a transaction broker unless the parties affirmatively agree in writing upon some other form of brokerage relationship.

Providing the written transaction broker notice is no longer required for a licensee to act as a transaction broker. But NABOR has retained the transaction broker notice form for the use of those REALTORS® who feel it is safer to provide such written notice to buyers and sellers.

Addendum to Sales Contract: VA/FHA Financing (NABOR 8/14/2008)

This is the contract addendum form which should be added to any Sales Contract in which the buyer is contemplating obtaining VA or FHA mortgage financing. The addendum reflects a number of special provisions which VA and/or FHA lenders require to be added to any contract where they are to provide financing.

NABOR's form addendum has been revised to update several new requirements for VA and FHA financings. First, there have been some changes in the language of the VA and FHA amendatory clauses, which allow a buyer to terminate the contract in the event that the property fails to appraise for the purchase price unless the seller agrees to reduce the price to the VA or FHA appraised value. If the buyer is obtaining a VA loan, the clause also advises the seller that a seller may be required to pay for and provide inspections for well and septic systems and for wood-destroying organisms.

The contract addendum also adds a new required "real estate certification" in which the buyer, seller and the selling broker must affirm that the sales contract submitted to the VA or FHA lender is the true and complete agreement between the parties, subject to federal criminal penalties if it is not. A new requirement related to this certification is that this addendum is to be signed at bottom not just by the buyer and seller, but also by the selling sales associate on behalf of the selling broker. With the reborn popularity of FHA financing in particular, selling sales associates will need to observe this requirement.

Failing to add this VA/FHA Financing Addendum to a Sales Contract does not have the effect of invalidating the Contract, even if the buyer contemplates VA or FHA mortgage financing. But failing to include this Addendum upfront may lead to a subsequent problem. In that event, what would happen is that the VA or FHA lender would require both parties and the selling broker to sign a similar addendum form after the Contract has already been signed, a request that may have the seller balk about granting the buyer a VA or FHA appraisal contingency or possibly agreeing to pay for the noted VA inspections. For this reason, if it is known that a buyer may seek VA or FHA financing, it is preferable to present the VA/FHA Financing Addendum as part of the buyer's original contract offer to the seller and secure the seller's acceptance of those terms upfront.

Addendum to Listing Contract Exclusive Right and Authority to Sell: Short Sale (NABOR 8/14/2008)

A revised advisory and warning paragraph has been added to this Addendum which is to be added to a Listing Contract whenever the seller potentially faces a “short sale” situation, i.e. where the seller’s proceeds from a fair market priced sale will likely be insufficient to pay off the seller’s outstanding mortgage and/or lien balances.

No change has been made to the substantive provisions of this Addendum, which has the seller acknowledge and authorize the listing broker to disclose to perspective buyers and other brokers the existence of this short sale situation and the fact that any sales contract must be contingent upon the approval of the seller’s lienholder(s) and their agreement to release liens from the property for less than a full payoff of the lien balance.

Because of the many risks to the seller entailed with any short sale, including adverse credit and tax consequences as well as possible continuing personal liability for the unpaid loan or lien balances, there has always been a provision in this Addendum warning the seller of these matters and advising the seller to consult professional assistance before proceeding.

The only revision to the Listing Contract Short Sale Addendum is to expand upon and emphasize this advisory and warning to the seller. The material is now placed as a preface at the beginning of the Addendum, printed in capital letters and boldfaced for the seller’s attention. The preface is also an admonition to the listing broker and associate not to offer their own advice to the seller on these matters, but rather to refer the seller to legal counsel to supervise the short sale transaction and to financial and tax advisors for the financial consequences.

Addendum to Sales Contract: Short Sale (NABOR 8/14/2008)

Several notable revisions have also been made to the Addendum form which must be added to any Sales Contract for a property subject to a “short sale”, as that term has been defined in the preceding discussion of the companion Listing Contract Short Sale Addendum.

The revised Addendum coins a new defined term – “Lender Approval” – for all the various “short sale” contract contingencies including approval of the Sales Contract terms and the settlement statement by the seller’s lenders and lienholders, their agreement to accept less than a full balance payoff at closing and their agreement to release their liens on the property upon receipt of the agreed payments.

Another revision makes it clear that the buyer’s right to terminate the Sales Contract ceases to exist once the seller notifies the buyer either that this Lender Approval has been obtained or that the seller is waiving the benefit of the short sale contingencies. This waiver revision also allows the seller, for the first time, simply to waive the short sale contingency if the seller is now able to close without needing any discounted payoffs to lienholders, whether by the seller producing sufficient cash to close or perhaps upon discovering that the seller’s proceeds will in fact be adequate to pay off all liens without needing any discount.

A revision has also been made to the paragraph in the existing Addendum defining when the time periods commence for the buyer and seller to perform the Contract in the event of a short sale. The Addendum previously had two checkbox options for this – one for the contract performances not to commence until the seller notifies of lender approval of the short sale, and the other option for the time periods to commence right from the Effective Date the parties sign the Contract. The checkboxes are now gone. In all short sale transactions, the Addendum now provides that the time frames for the parties’ contract performances do not begin until Lender Approval is obtained for the Contract terms. The one obligation that must be performed at the Effective Date is, logically, that the buyer’s initial deposit still must be made in escrow.

The current provision for the parties to agree to extend the Closing Date, if the seller’s lender needs more time to consider the short sale, still has a fill-in blank for the amount of extended time the parties may agree upon. Now, however, there is added a default of 10 days for the Closing Date’s extension if the parties fail to add any other number in this closing extension clause.

Finally, a capitalized and boldfaced paragraph has been added to this Sales Contract Addendum, similar to the warning and advisory in the Listing Contract Short Sale Addendum, advising both parties to obtain legal counsel to supervise the short sale transaction, and again warning the seller about the possibility of credit risks, tax consequences and continued personal liability on lien obligations.