

SPRING 2011

ARIZONA REALTOR®

QUARTERLY

Overview of 2011 Form Changes

RESIDENTIAL RESALE REALTOR®
PURCHASE CONTRACT

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NEW & REVISED
FORMS LAUNCHED
FEBRUARY 28, 2011

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SELLER'S NAME(S)

BUYER'S NAME(S)

INAUGURAL ISSUE



ARIZONA
association of
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A MESSAGE FROM THE PRESIDENT

Welcome to the inaugural issue of *Arizona REALTOR® Quarterly!*



Duane Fouts,
2011 AAR President

Quality information is critical to your business success. In today's information-overload environment, you want the most important facts delivered right into your hands. You want to learn about key real estate issues on your timeline and without spending another hour in front of a computer screen.

That's why you are holding this issue of *Arizona REALTOR® Quarterly* in your hands. In it, we distill the past three months of AAR's most crucial online offerings—on legal issues, regulatory changes and other important topics—into one print product.

We'd love your feedback on the format and content. Send your comments to editor@aaronline.com, post them on the AAR Blog at blog.aaronline.com or send them to us by snail mail:

**ATTN: Editor | *Arizona REALTOR® Quarterly*
255 E. Osborn Road, Suite 200 | Phoenix, AZ 85012**

We hope that when this publication lands in your (physical) mailbox each quarter, you find it packed with the useful information and resources you crave. *



PASSAGE OF THE "JOBS BILL"

Residential Property Tax Impacts

BY NICOLE LASLAVIC, AAR GOVERNMENT AFFAIRS DIRECTOR

During the 50th Second Special Session the Arizona state legislature passed HB 2001, more commonly referred to as the "Jobs Bill." The promoted intent of this bill is to create a more business-friendly state, which will attract all types of businesses both large and small, create jobs, and provide tax relief to businesses. The legislation focused on several key areas: corporate income, businesses property tax cuts, job training, the Arizona Competes Fund, and the newly formed Arizona Commerce Authority. Though this legislation has been touted as a solution to get Arizona back on its economic feet, one has to wonder at what and whose expense, specifically as it relates to the cost associated with the tax cuts for businesses.

One such solution buried within the 214-page bill is to shift the cost to Arizona homeowners in the form of increased property taxes. Currently, many homeowners are unaware that their residential property taxes are lowered by a payment made from the State General Fund directly to the county in which the property is

located. This payment is paid to residential properties in Class Three of the property tax code. Class Three properties include owner-occupied primary residences and second/vacation homes. Currently, the rebate happens automatically without the homeowner having to apply for the tax reduction. To note, rental properties are required to be registered as Class Four of the property tax code and are not eligible for the homeowners rebate. Each homeowner can locate their home's annual rebate by looking at a past year's property tax bill for the words, "State Aid."

Under the new legislation, owners of second or vacation property would be disqualified from receiving the homeowner's rebate, which normally saves the homeowners up to \$600 a year—their property taxes will go up. On top of automatically disqualifying some properties from the rebate, the bill further complicates the process of obtaining the rebate by requiring the homeowner to go through the cumbersome process of signing an affidavit beginning in 2012 and subsequent

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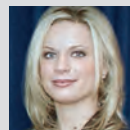
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PASSAGE OF THE "JOBS BILL" – CONTINUED

even-numbered years, under penalty of perjury, that they are living in the home or that the home is being leased or rented to a relative. The affidavit will be mailed along with the annual Notice of Full Cash Value sent to owners of Class Three Property. The forms must be completed and returned to the County Assessor within 60 days or the residential property will be reclassified as Class Four and the property taxes will go up as much as \$600 depending on the home's value. The problem with the affidavit is that it treats the property as a rental until the homeowner can prove otherwise. As Tom Farley, CEO of the Arizona Association of REALTORS® stated in Senate testimony "the new affidavit requirements may be overlooked or mishandled by homeowners who are entitled to the rebate. They are going to throw it in the trash and the next thing they know their taxes will increase substantially."

AAR's concerns lie in the fact that the original intent of the homeowners rebate was to go to all Class Three Residential Property and this bill picked winners and

losers. Business wins, while Arizona's struggling homeowners lose both with increased taxes and bureaucratic paperwork. Although AAR met with individuals from both the Governor's office and members of the Legislature to voice our strong concerns with the cost shift to homeowners, the "Jobs Bill" was signed into law by the Governor on February 17, 2011. ✱



ABOUT THE AUTHOR

Nicole LaSlavic joined the Arizona Association of REALTORS® as Government Affairs Director in November 2010, joining CEO Tom Farley in representing the association at the Arizona capitol. In the past, LaSlavic worked as a lobbyist for a law firm as well as a local government relations lobbying firm. In both capacities, she worked to develop, advocate and implement policy and programs on a broad range of issues including health care, retirement, public safety and economic development. Throughout her career, she has developed and maintained relationships with legislators, staff and members of the various state agencies. In addition, Ms. LaSlavic has solid expertise in fundraising and event planning for both political candidates and organizations. You can reach her at nicole@aaronline.com or 602-248-7787.

OVERVIEW OF 2011 FORM CHANGES

New & Revised Forms Launched February 28, 2011

BY AAR GENERAL COUNSEL K. MICHELLE LIND

Form revision and development is within the purview of the AAR Risk Management Committee (“RMC”). If a form revision request is approved by the RMC, a chair is selected and a work group is formed to draft the language to implement the requested change. Once the workgroup finalizes the draft form, it is submitted for approval by the RMC. Once approved by the RMC, the forms are submitted for final approval by the AAR Executive Committee. AAR’s form revision and development process may sound unduly burdensome. However, the process is intended to ensure that the forms are fully vetted, practical for use by the members and legally sound.

AAR member volunteers have collectively invested hundreds of hours of their time in the creation of these forms. AAR owes a debt of gratitude to all of the members involved and a special thanks to 2010 RMC Chair John Foltz, Residential Forms Workgroup Chair Jim Sexton and Miscellaneous Forms Workgroup Chair Martha Appel.

AAR continually strives to provide its members with the best real estate forms available so that they can achieve the association’s vision:

REALTORS® . . . the best prepared real estate professionals with the highest standards.

REVISIONS TO THE 2011 AAR RESIDENTIAL RESALE REAL ESTATE PURCHASE CONTRACT

OVERVIEW

The Residential Resale Real Estate Purchase Contract (“Contract”), Pre-Qualification Form and Loan Status Update (“LSU”) were revised/developed due primarily to changes in the Real Estate Settlement Procedures Act (“RESPA”) rules regulating the issuance of a Good Faith Estimate (“GFE”) to a buyer. The RESPA reforms require a property address before a GFE may be provided by a lender and encourages the buyer to “shop” for lenders. (For more information, visit www.hud.gov/offices/hsg/rmra/res/respa_hm.cfm.)

There have been numerous other changes in the lending industry as a whole. As a result, the primary substantive changes are concentrated in the financing section of the Contract.

The Pre-Qualification Form, which is designed to be completed by the lender, was developed to provide information on the buyer’s ability to qualify for a loan without a GFE. Therefore, the new form is not property specific but does provide more information than provided on the current Loan Status Report. The form sets forth the loan amount for which the buyer can pre-qualify, assuming a stated maximum monthly housing payment. The Contract does not require the buyer to submit a Pre-Qualification Form with the offer because

there are circumstances in which the buyer may wish to submit an offer prior to consulting with a lender.

The Contract provides that the buyer’s obligation to complete the sale is contingent upon the buyer obtaining loan approval without Prior to Document (“PTD”) conditions no later than three days prior to the close of escrow (“COE”) date. If the loan contingency is not fulfilled by that date, the buyer has no obligation to close escrow, and the Contract is cancelled. Thus, the Contract requires the buyer to sign loan documents or deliver a notice of the inability to obtain loan approval no later than three days prior to the COE date. The loan contingency was changed to expire three days prior to COE rather than on the actual COE date to increase the probability that the seller will be informed prior to the COE date whether or not the buyer will be able to qualify for the loan and close escrow.

To obtain loan approval without PTD conditions, the buyer must submit all necessary documentation, the appraisal must be completed, any appraisal conditions met and the loan underwritten all as set forth in the revised LSU. The remaining prior-to-funding loan condition requirements, such as approving the pre-audit and receiving the signed loan documents, are unrelated to the buyer’s ability to qualify for the loan.

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ABOUT THE AUTHOR

AAR General Counsel Michelle Lind

is a State Bar of Arizona board certified real estate specialist and the author of Arizona Real Estate: A Professional's Guide to Law and Practice.

The AAR Residential Contract Revision Workgroup was led by Jim Sexton, chair, with the valuable assistance of workgroup members Amy Swaney (lender representative), John Lotardo (title/escrow representative), Kelly Hand, Martha Appel, Holly Mabery, John Foltz, Kerry Melcher, Jerome King, Paula Monthofer and AAR staff Christina Smalls and Jan Steward.

These articles are of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, these articles reflect only the opinion of the author, and are not intended as definitive legal advice and you should not act upon them without seeking independent legal counsel.

ONLINE RESOURCES

2011

Find links to all AAR forms and form resources at <http://www.aaronline.com/ForRealtors/Forms/>

2011 REVISIONS

RESIDENTIAL RESALE REAL ESTATE PURCHASE CONTRACT

Article

[Revisions to the Residential Resale Real Estate Purchase Contract](http://www.aaronline.com/legal/forms/revisions-to-the-aar-rpc.aspx)
www.aaronline.com/legal/forms/revisions-to-the-aar-rpc.aspx

Webinar (42 min 14 sec)

www.aaronline.com/legal/forms/2011-residential-purchase-contract.wmv

FAQ

[Financing Section of the Residential Purchase Contract](http://www.aaronline.com/legal/forms/faq-financing-section-rpc.aspx)
www.aaronline.com/legal/forms/faq-financing-section-rpc.aspx

Sample Form(s)

[Residential Resale Real Estate Purchase Contract](http://www.aaronline.com/legal/forms/sample-pdfs/sample-residential-purchase-contract.pdf)
www.aaronline.com/legal/forms/sample-pdfs/sample-residential-purchase-contract.pdf

Additions Highlighted in Yellow

www.aaronline.com/legal/forms/sample-pdfs/sample-rpc-additions-in-yellow.pdf

Deletions Noted in Red

www.aaronline.com/legal/forms/sample-pdfs/sample-rpc-deletions-in-red.pdf

PRE-QUALIFICATION FORM

FAQ

www.aaronline.com/legal/forms/faq-pre-qualification-form.aspx

Sample Form

www.aaronline.com/legal/forms/sample-pdfs/sample-pre-qualification-form.pdf

LOAN STATUS UPDATE

FAQ

www.aaronline.com/legal/forms/faq-loan-status-update.aspx

Sample Form

www.aaronline.com/legal/forms/sample-pdfs/sample-loan-status-update.pdf

The buyer is obligated to deliver the revised LSU to the seller five days after Contract acceptance. The LSU is required at this point in the transaction to establish that the buyer intends to proceed with the lender indicated in the LSU on the terms described. The LSU also allows the seller and listing broker the opportunity to begin “tracking” the progress of the buyer’s loan.

The following is an outline summary of the revisions from the 2005 Contract:

PROPERTY – SECTION 1

Sub-section 1e: Added “existing” keys to clarify that the seller is not obligated to have keys made for locks, etc.

Sub-section 1f: Added “AS IS” and “Short Sale” addenda.

Sub-section 1g: Added “central vacuum, hose, and attachments” to the list of fixtures and personal property that are included in the sale. Omitted “TV” from “attached media antennas/satellite dishes” to clarify that attached TVs, such as flat screens, are not included in the sale.

FINANCING – SECTION 2

See FAQ about the financing section of the Contract (page 7), FAQ on the Pre-Qualification Form (page 10) and FAQ about the LSU (page 11) for a detailed discussion of the changes to the financing section.

TITLE AND ESCROW – SECTION 3

Sub-section 3a: Added lines for the Escrow/Title Company's address and email information.

Sub-section 3c: Omitted "general warranty deed" and replaced the term with "warranty deed, subject to existing taxes, assessments, covenants, conditions, restrictions, rights of way, easements and all other matters of record." This change was made due to an Arizona court case that ruled that the standard form of deed utilized in Arizona is not a general warranty deed. The revision was intended to respond to the recent court case and, more importantly, represent the type of warranty deed being used in the common residential transaction. Also added to this section: "If applicable, Buyer shall pay the cost of obtaining the A.L.T.A. Lender Title Insurance Policy." to clarify that the expense of a lender's policy is the buyer's obligation.

DISCLOSURE – SECTION 4

Sub-section 4c: Added "Buyer is further advised to use certified contractors to perform renovation, repair or painting projects that disturb lead-based paint in residential properties built before 1978 and to follow specific work practices to prevent lead contamination." This addition is intended to advise buyers of the EPA rule, effective April 22, 2010, that requires the certification of contractors who renovate properties constructed prior to 1978. [Read more information on this EPA rule.](#)

www.aaronline.com/Documents/rule-on-lead-paint-renovation-certification.aspx

WARRANTIES – SECTION 5

No changes

DUE DILIGENCE – SECTION 6

No changes

REMEDIES – SECTION 7

Sub-section 7b: Changed sub-section references due to changes in the financing section's sub-sections. Added: "The parties expressly agree that the failure of any party to comply with the terms and conditions of Section 1d to allow COE to occur on the COE Date, if not cured after a cure notice is delivered pursuant to Section 7a, will constitute a material breach of this Contract, rendering the Contract subject to cancellation." This language was included in the pre-2005 AAR residential/vacant land contracts and was relied upon by an Arizona court in affirming a seller's right to cancel for a buyer's breach of contract by failure to close escrow (*Mining Invest. Group v. Roberts*, 217 Ariz. 635, 177 P.3d

1207 (App. 2008)). This addition does not change current practice or the rights and obligations of the parties in the event of a failure to close escrow as agreed.

There have been numerous other changes in the lending industry as a whole. As a result, the primary substantive changes are concentrated in the financing section of the Contract.

ADDITIONAL TERMS AND CONDITIONS – SECTION 8

Sub-section 8n: Added: "Buyer acknowledges that failure to pay the required closing funds by the scheduled Close of Escrow, if not cured after a cure notice is delivered pursuant to Section 7a, shall be construed as a material breach of this contract and all earnest money shall be subject to forfeiture." As with the change to Section 7b, this language was included in the pre-2005 AAR residential/vacant land contracts and was relied upon by an Arizona court in affirming a seller's right to cancel for a buyer's breach of contract by failure to close escrow (*Mining Invest. Group v. Roberts*, 217 Ariz. 635, 177 P.3d 1207 (App. 2008)). Again, this addition does not change current practice or the rights and obligations of the parties in the event of a failure to close escrow as agreed.

Sub-section 8o: Added: "price and terms of sale, return on investment" and "The parties understand and agree that the Broker(s) do not provide advice on property as an investment and are not qualified to provide financial, legal, or tax advice regarding this real estate transaction." The seller's initials are now required along with the buyer's because price, terms and investment decisions affect both buyer and seller.

Sub-section 8r: Added "preferred" to telephone number.

SELLER ACCEPTANCE – SECTION 9

Sub-section 9a: Added "preferred" to telephone number.

*For additional information, please [view the webinar discussing these revisions.](#) **

Webinar (42 min 14 sec)
www.aaronline.com/legal/forms/2011-residential-purchase-contract.wmv

OVERVIEW OF 2011 FORM CHANGES

FAQ ABOUT THE FINANCING SECTION OF THE 2011 AAR RESIDENTIAL RESALE REAL ESTATE PURCHASE CONTRACT

QUESTION C-1

Why doesn't the Residential Resale Real Estate Purchase Contract ("Contract") require the buyer to submit a Pre-Qualification Form with the offer?

Answer: The Contract does not require the buyer to submit a Pre-Qualification Form with the offer because there are circumstances in which the buyer may wish to submit an offer prior to consulting with a lender. A listing broker should consider discussing the advisability of accepting an offer that does not include a completed Pre-Qualification Form with the seller.

QUESTION C-2

When must the loan contingency be fulfilled?

Answer: The Contract provides that the buyer's obligation to complete the sale is contingent upon the buyer obtaining loan approval for the loan described in the AAR Loan Status Update ("LSU") form without Prior to Document ("PTD") conditions no later than three days prior to the close of escrow ("COE") date. (See "Contract", Section 2b.) If the loan contingency is not fulfilled, the buyer has no obligation to close escrow. Therefore, the Contract can be considered cancelled or terminated because it is unenforceable against the buyer. Even though the Contract is no longer enforceable, the parties should execute written mutual cancellation instructions to avoid any confusion. Further, if the seller agrees to allow the buyer additional time to obtain the loan, the parties should execute an amendment to the Contract extending the close of escrow date.

QUESTION C-3

Why does the loan contingency expire three days prior to COE rather than at COE?

Answer: The loan contingency was moved to expire three days prior to COE rather than on the actual COE Date to increase the probability that the seller will be informed prior to the COE Date whether or not the buyer will be able to qualify for the loan and close escrow. Thus, the Contract requires the buyer to sign loan documents or deliver a notice of the inability to obtain loan approval no later than three days prior to the COE Date. (An [Unfulfilled Loan Contingency Notice](#) is available for this purpose.)

www.aaronline.com/documents/LinedLCN.doc

QUESTION C-4

Why was the loan contingency changed from "loan approval without conditions" to "loan approval without Prior to Document ("PTD") conditions"?

Answer: To obtain loan approval without PTD conditions, the buyer must submit all necessary documentation, the appraisal must be completed, any appraisal conditions met and the loan underwritten. (See "LSU," lines 41-55.) The remaining prior-to-funding loan condition requirements, such as approving the pre-audit and receiving the signed loan documents, are primarily ministerial acts that are unrelated to the buyer's ability to qualify for the loan. (See "LSU," lines 52-65.)

QUESTION C-5

What does the term "Prior to Document ("PTD") conditions" mean?

Answer: PTD conditions are what lenders call all the actions/approvals necessary before the lender actually orders the closing loan documents and instructions. (See "LSU," lines 41-55.) PTD conditions include items that must be provided and reviewed by the underwriter before the loan documents can be requested.

QUESTION C-6

What if the buyer is unable to obtain loan approval without PTD conditions?

Answer: If the buyer is unable to obtain loan approval without PTD conditions, the buyer must deliver a notice of the inability to obtain loan approval without PTD conditions to the seller or escrow company no later than three days prior to the COE Date. In such an event, the contract is cancelled, and the buyer is entitled to a return of the earnest money.

QUESTION C-7

Must the buyer sign the loan documents three days prior to COE?

Answer: Yes. The buyer is obligated to sign the loan documents three days prior to COE. (See "Contract," Section 2g.)

QUESTION C-8

What is the seller's remedy if the buyer fails to sign all loan documents three days prior to the COE Date?

Answer: The seller should deliver a cure notice to the buyer. If the buyer fails to sign the loan documents within three days after the cure notice, the buyer is in breach and the seller may pursue the remedies set forth in Section 7b.

QUESTION C-9

What if the buyer does not deliver a notice of the inability to obtain loan approval without PTD conditions or sign loan documents three days prior to the COE Date?

Answer: The seller should deliver a cure period notice to the buyer specifying that the buyer has not complied with the contract by signing the loan documents or delivering a notice of the inability to obtain loan approval to the seller or the escrow company.

Thereafter: If the buyer signs the loan documents within three days and is prepared to close escrow on the COE Date, the seller must close.

If the buyer delivers notice of the inability to obtain loan approval without PTD conditions within three days, the contract is unenforceable against the buyer and the buyer is entitled to a return of the earnest money, assuming that the buyer made a diligent and good faith effort to obtain the loan.

If the buyer does neither, the buyer is in breach of contract, and the remedy for the breach depends on the specific noncompliance, as set forth in Section 7b:

If the buyer failed to obtain loan approval without PTD conditions and failed to deliver the notice, the buyer is in breach for the failure to deliver the notice, and the seller is entitled to the earnest money.

If the buyer obtained loan approval without PTD conditions or failed to make a diligent and good faith effort to obtain loan approval, the buyer is in breach, and the seller may accept the earnest money as the seller's sole right to damages or pursue the buyer for the actual damages or specific performance.

QUESTION C-10

If the buyer fails to close escrow on the COE date, what should the seller do?

Answer: The seller should deliver a cure notice to the buyer specifying that the buyer has not complied with the Contract by failing to close escrow. If the buyer closes escrow within three days, there is no breach.

Note: To avoid any issue regarding the buyer's ability to obtain loan approval, the cure notice should be delivered as set forth above.

QUESTION C-11

If the buyer provided the seller with a notice of the inability to obtain loan approval without PTD conditions, but the seller believes that the buyer failed to make a diligent and good faith effort to obtain loan approval, what are the seller's options?

Answer: If the seller believes that the buyer failed to make a diligent and good faith effort to obtain loan approval, the seller should contest the notice in writing. If the buyer does not produce evidence of the inability to obtain loan approval after a good faith effort that is satisfactory to the seller, the seller can initiate mediation to resolve the dispute.

QUESTION C-12

Is the buyer obligated to lock the interest rate during the Inspection Period?

Answer: No, the Contract does not require the buyer to lock the interest rate during the Inspection Period. However, if the buyer does not lock the interest rate during the Inspection Period, for example, at 5 percent, but at COE can get the other loan terms described in the LSU at, for example, 6 percent, the buyer will be obligated to close escrow or will be in breach of contract (after the expiration of the cure period). However, if the buyer does not lock but cannot obtain loan approval for some other reason, the loan contingency is unfulfilled, and the buyer is entitled to a return of the earnest money.



FINANCING



QUESTION C-13

What if the buyer fails to deliver the LSU with, at a minimum, lines 1-40 completed within five days after Contract acceptance?

Answer: The seller should deliver a cure notice to the buyer. If the buyer fails to deliver the LSU within three days after the cure notice, the buyer is in breach, and the seller may pursue the remedies for breach of contract as set forth in Section 7b.

QUESTION C-14

What is the seller's remedy if the buyer fails to complete the loan application and provide the lender all Initial Requested Documentation listed in the LSU at lines 32-35 during the Inspection Period?

Answer: The seller should deliver a cure notice to the buyer. If the buyer fails to complete the loan application and provide the lender all Initial Requested Documentation within three days after the cure notice, the buyer is in breach, and the seller may pursue the remedies for breach of contract as set forth in Section 7b.

QUESTION C-15

Why were Seller Concessions included in the Contract?

Answer: In today's marketplace, Seller Concessions are a prevalent loan condition. Instead of requiring buyers to write concessions in the Contract with various verbiage, the concession, if any, is specifically defined as the maximum amount that the seller agrees to pay for buyer's loan costs, including pre-pays, impounds and buyer's title/escrow closing costs. Of note, Private Mortgage Insurance (PMI) is a loan cost which would be included in the seller concession amount. PMI is extra insurance that lenders require from most buyers with less than a 20 percent down payment.

QUESTION C-16

What fees are not included in Seller Concessions?

Answer: Fees that are not attributable to the buyer's loan costs or the buyer's title/escrow closing costs are not included in the Seller Concessions. For example, inspection fees, home warranty plan fees, HOA transfer fees and any other fees unrelated to the buyer's loan or the buyer's title/escrow closing costs are not included in Seller Concessions. Appraisal fees may or may not be included in the Seller Concessions, as indicated on the Contract at line 90.

QUESTION C-17

What VA loan costs are not permitted to be paid by the Buyer?

Answer: The VA loan costs that are not permitted to be paid by the buyer include the escrow fee, any processing fee, tax service and notary. (See [VA Pamphlet 26-7](#), revised November 8, 2010, for complete list.) Notably, the VA does not obligate the seller to pay these loan costs and the seller is not required to pay these costs unless the seller agrees to do so in the Contract. If the buyer does not indicate in

the Pre-Qualification form that the type of loan is a VA loan, zero or N/A should be indicated on line 79. Of note, the VA periodically changes the costs that VA buyers are not permitted to pay, and at present, these costs could be as much as \$1500.

<http://www.aaronline.com/legal/forms/va-pamphlet-26-7.pdf>

QUESTION C-18

Is the buyer entitled to make changes in the lender, loan program or financing terms without the seller's prior written consent?

Answer: Yes, pursuant to the Contract at Section 2l, a buyer may make changes in the loan program, financing terms or lender without the seller's prior written consent as long as the changes do not: (1) adversely affect the buyer's ability to obtain loan approval without conditions, (2) increase the seller's closing costs, or (3) delay close of escrow. However, the buyer is obligated to notify the seller immediately of any such changes.

QUESTION C-19

Does the appraisal contingency apply to any appraisal required by the lender?

Answer: Yes. If the Premises fail to appraise for the purchase price in any appraisal required by the lender, the buyer has five days after notice of the appraised value to cancel the Contract and receive a refund of the earnest money, or the appraisal contingency will be waived.

QUESTION C-20

What are the buyer's rights if the Premises do not appraise for the purchase price in any appraisal required by the lender?

Answer: The buyer has five days after notice of the appraised value to cancel the Contract, or the appraisal contingency is waived. If the buyer waives the appraisal contingency and is thereafter unable to close escrow due to the appraisal, the buyer will forfeit the earnest money. (See "Contract," Section 7b.) ※

OVERVIEW OF 2011 FORM CHANGES

FAQ ABOUT THE 2011 AAR PRE-QUALIFICATION FORM

QUESTION P-1

What is the purpose of the Pre-Qualification Form?

Answer: The Pre-Qualification Form was developed to provide information on the buyer's ability to qualify for a loan without a Good Faith Estimate ("GFE"). The new form provides more information than provided on the current Loan Status Report. The form sets forth the loan amount for which the buyer can prequalify, assuming a maximum monthly housing payment.

QUESTION P-2

Why isn't the Pre-Qualification Form property specific?

Answer: The Real Estate Settlement Procedures Act ("RESPA") requires a property address before a GFE may be provided by a lender. Thus, the Pre-Qualification Form is designed to provide information on the buyer's ability to qualify without a GFE.

QUESTION P-3

Who should complete the Pre-Qualification Form?

Answer: The lender.

QUESTION P-4

Why is marital status requested?

Answer: The lender will require the buyer to disclose marital status to obtain a loan. Arizona is also a community property state. If a married borrower is purchasing a property in Arizona without their spouse, there will be specific title requirements that may impact the ability to close a transaction. HUD also requires lenders to consider the debts of a non-purchasing spouse when the property being purchased is located in a community property state.

QUESTION P-5

What is a USDA loan?

Answer: A USDA-guaranteed loan is a government-insured purchase loan. USDA loans are only offered in rural areas and serviced by direct lenders that meet federal guidelines.

QUESTION P-6

Why are Planned Unit Development, Manufactured Home and Mobile Home included on the form as property types?

Answer: These types of property are eligible for different loan programs. Therefore, these properties are

evaluated based on different loan criteria and documentation than other properties.

QUESTION P-7

What is the difference between a manufactured home and a mobile home?

Answer: A "manufactured home" means a structure built in accordance with the National Manufactured Home Construction and Safety Standards Act of 1974 and Title VI of the Housing and Community Development Act of 1974 after June 15, 1976. A "mobile home" means a structure built prior to June 15, 1976, on a permanent chassis, capable of being transported in one or more sections and designed to be used with or without a permanent foundation as a dwelling when connected to on-site utilities, except recreational vehicles and factory-built buildings. (See A.R.S. § 41-2141 et. seq.)

QUESTION P-8

What "other" property types are there beyond those listed?

Answer: Co-op or condo-tel (condo hotel) properties would be examples of other property types.

QUESTION P-9

Why is the maximum total monthly housing payment indicated on the form?

Answer: The loan amount that a buyer can qualify for is based not only on a monthly principal-and-interest loan payment but on a total monthly housing payment, which includes property taxes, homeowner's insurance, HOA fees and flood insurance costs.

QUESTION P-10

Why is the lender company's Arizona license number requested?

Answer: As of July 1, 2010, in order to transact business as a mortgage originator, the originator must work for a licensed mortgage banker, licensed mortgage broker or an exempted entity. An exempted entity would be a federally chartered institution and thus would not have an Arizona License number. All non-exempted entities will be licensed as either a BK (Banker) or MB (Broker). (See A.R.S. § 6-991.02(14)¹) For more information, visit the [Department of Financial Institutions website](#)².

¹ www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/6/00991-02.htm&Title=6&DocType=ARS

² www.azdfi.gov/Licensing/NMLSLO/nmlslo.html

FAQ ABOUT THE PRE-QUALIFICATION FORM – CONTINUED

QUESTION P-11

What is the difference between a mortgage broker and mortgage banker?

Answer: As set forth above, the lender’s license number will indicate whether the entity is a banker or a broker. A mortgage banker is a lending institution that offers a variety of loans, funded with the bank’s assets or by use of a credit line issued in the bank’s name. A mortgage broker generally is an intermediary who brings borrowers and lenders together but does not use its own money to fund the loan.

QUESTION P-12

Why is the lender’s loan officer’s NMLS number requested?

Answer: “NMLS” means the National Mortgage Licensing System, and all residential loan originators must be licensed or registered through this system. (See *A.R.S. § 6-991.02(14)*¹) For more information, visit the [Department of Financial Institutions website](http://www.azdfi.gov/Licensing/NMLSLO/nmlslo.html)².

¹ www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/6/00991-02.htm&Title=6&DocType=ARS

² www.azdfi.gov/Licensing/NMLSLO/nmlslo.html

QUESTION P-13

Why is there an expiration date on the Pre-Qualification Form?

Answer: A pre-qualification generally expires when the credit report expires – typically within 60 days.

QUESTION P-14

What happens if the buyer makes an offer without submitting the Pre-Qualification Form?

Answer: Section 2e of the Contract requires the buyer to deliver an LSU to the seller describing the current status of the buyer’s proposed loan within five days after Contract acceptance. The LSU will contain most of the information contained in the Pre-Qualification Form. ✱

OVERVIEW OF 2011 FORM CHANGES**FAQ ABOUT THE 2011 AAR LOAN STATUS UPDATE****QUESTION L-1**

Why is the Loan Status Update (“LSU”) with lines 1-40 completed required five days after Contract acceptance?

Answer: The LSU is required five days after Contract acceptance to establish that the buyer intends to proceed with the lender indicated in the LSU on the terms described. The LSU also allows the seller and listing broker the opportunity to begin “tracking” the progress of the buyer’s loan process.

QUESTION L-2

Why is the information from the Pre-Qualification Form repeated in the LSU?

Answer: The information from the Pre-Qualification Form is repeated in the LSU because a Pre-Qualification Form may not have been submitted with the offer or the information contained in the Pre-Qualification Form submitted with the offer may have been incomplete or may have changed.

QUESTION L-3

Why is the “Closing Loan Documents Delivery Date” included in the LSU?

Answer: The buyer’s obligation to complete the sale is contingent upon the buyer obtaining loan approval for the loan described in the LSU without Prior to Document (“PTD”) conditions, and the buyer is obligated to sign all loan documents no later than three days prior to the close of escrow (“COE”) date. The “Closing Loan Documents Delivery Date” was included so that the lender and all parties will be alerted as to the date the loan documents must be at the escrow company so that the documents can be signed as required.

QUESTION L-4

If the Contract provides that COE is Friday, when must loan documents be signed?

Answer: Pursuant to Section 8i (Calculating Time Periods) of the Contract, if COE is Friday, March 11, the loan documents must be signed by 11:59 p.m. on Monday, March 7.

Note: Pursuant to Contract Section 8h, all references to “days” are calendar days.

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QUESTION L-5

What if the buyer fails to provide an LSU five days after Contract acceptance?

Answer: If the buyer fails to deliver the LSU as required, the seller may deliver a three-day cure notice to the buyer pursuant to Contract Section 7a. If the buyer does not deliver the LSU within three days after delivery of the cure notice, the failure becomes a breach of Contract, and the seller may proceed as set forth in Contract Section 7b.

QUESTION L-6

What if the buyer provides an LSU five days after Contract acceptance, but lines 1-40 are not completed?

Answer: As set forth above, the seller may deliver a three-day cure notice to the buyer.

QUESTION L-7

What happens if the Buyer's Lender refuses to complete an LSU?

Answer: The buyer should complete and sign the LSU. The failure of the buyer's lender to complete the LSU is not a potential breach and, therefore, is not subject to a cure period notice because the lender is not a party to the Contract.

QUESTION L-8

What is the Seller's recourse if the Seller "disapproves" of the buyer's LSU?

Answer: The Contract does not provide the seller an opportunity to "disapprove" the LSU. If the LSU indicates changes in the loan program, financing terms or lender described in the Pre-Qualification Form submitted with the Contract and those changes adversely affect the buyer's ability to obtain loan approval, increase seller's closing costs or delay close of escrow, the seller may deliver a cure notice pursuant to Contract Section 7a for

the failure to obtain the Seller's written consent. If the buyer's offer was accepted without a Pre-Qualification Form, the seller may only issue a cure notice if the seller can establish that the buyer is not diligently working to obtain the loan as required by Contract Section 2g or is not acting in good faith.

The LSU...allows the seller and listing broker the opportunity to begin "tracking" the progress of the buyer's loan process.

QUESTION L-9

In a short sale, when is the LSU required?

Answer: Pursuant to the AAR Short Sale Addendum to the Contract, the date of the seller's delivery of the Short Sale Agreement Notice to the Buyer is deemed to be the date of Contract acceptance for purposes of all applicable Contract time periods. Therefore, the buyer is required to deliver an LSU to the seller five days after delivery of the Short Sale Agreement Notice.

QUESTION L-10

If the buyer changes lenders after submitting the LSU, is the buyer required to submit an updated LSU?

Answer: No. However, pursuant to Contract Section 2l, the buyer is obligated to immediately notify the seller of any changes in the loan program, financing terms or lender described in the LSU. The buyer is entitled to make any such changes without the prior written consent of the seller if the changes do not adversely affect the buyer's ability to obtain loan approval without conditions, increase the seller's closing costs or delay close of escrow. ✱



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OVERVIEW OF 2011 FORM CHANGES

2011 AAR MISCELLANEOUS NEW & REVISED FORMS

The Miscellaneous Forms Workgroup was chaired by Martha Appel and included Larry Hibler, Jim Amdahl, Kathy Sanford, Paula Serven, Liz Echeverria and AAR staff Christina Smalls and Jan Steward. This group worked on five miscellaneous forms: Multiple Counter Offer, Multiple Offer/Counter Offer, Counter Offer, Residential Buyer's Inspection Notice and Seller's Response (BINSR) and Short Sale Addendum to the Residential Resale Real Estate Purchase Contract.

The **Multiple Counter Offer** form was revised to clarify when the seller was agreeing to the terms of the Multiple Counter Offer or submitting an additional counter offer. The **Multiple Offer/Counter Offer** form is a new form that essentially mirrors the Multiple Counter Offer form. This form is intended for use by buyers making offers on multiple properties. The **Counter Offer** form, which has remained unchanged since 1996, was revised for consistency with the Multiple Offer/Counter Offer and Multiple Counter Offer forms. The acceptance language in all three forms now references the Notice section of the Contract (Section 8m) for acceptance delivery purposes.

The **Residential Buyer's Inspection Notice and Seller's Response (BINSR)** form was expanded to three pages by adding additional lines. The additional lines were added to respond to members comments that more space was needed for a seller to respond to a buyer's notice of items disapproved.

A small but significant revision was made to the **Short Sale Addendum to the Residential Resale Real Estate Purchase Contract**. The line in the Short Sale Addendum requiring the buyer to pay all loan costs was removed because it is becoming more common that the seller will pay some loan costs in a short sale transaction. As a result, the parties responsible for paying loan costs in a short sale transaction will be as set forth in the Contract.

ONLINE RESOURCES 2011

Find links to all AAR forms and form resources at <http://www.aaronline.com/ForRealtors/Forms/>

2011 MISCELLANEOUS NEW & REVISED FORMS

Article

Miscellaneous New and Revised Forms

www.aaronline.com/legal/forms/miscellaneous-new-and-revised-forms.aspx

MULTIPLE COUNTER OFFER

Sample Form

www.aaronline.com/legal/forms/sample-pdfs/sample-multiple-offer.pdf

MULTIPLE OFFER/COUNTER OFFER

Sample Form

www.aaronline.com/legal/forms/sample-pdfs/sample-multiple-offer-counter-offer.pdf

COUNTER OFFER

Sample Form

www.aaronline.com/legal/forms/sample-pdfs/sample-counter-offer.pdf

RESIDENTIAL BUYER'S INSPECTION NOTICE AND SELLER'S RESPONSE (BINSR)

Sample Form

www.aaronline.com/legal/forms/sample-pdfs/sample-residential-binsr.pdf

SHORT SALE ADDENDUM TO THE RESIDENTIAL RESALE REAL ESTATE PURCHASE CONTRACT

Sample Form

www.aaronline.com/legal/forms/sample-pdfs/sample-short-sale-addendum.pdf

As an aside, a short sale workgroup will be formed in the near future to again discuss AAR's short sale forms, as well as other issues arising from this type of transaction, and recommend any actions that AAR might take to make a positive impact on the industry in this regard. ✱

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LEGAL HOTLINE

BY CHRISTOPHER A. COMBS

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The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white,"

so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

AGENCY

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:

http://www.aaronline.com/documents/HL_Agency.aspx

Listing Broker Can Show Offers to Competing Buyers

Buyer #1 offers \$100,000 for the home. Buyer #2 offers \$105,000. The listing broker contacts the broker for buyer #1 to see if buyer #1 wants to make a higher offer than the \$105,000 offer from buyer #2. The broker for buyer #1 wants a copy of the \$105,000 offer from buyer #2. Can the listing broker furnish a copy of the \$105,000 offer to the broker for buyer #1?

Answer: Yes. Under the fiduciary duty owed to the seller, unless the seller denies permission, the listing broker is required to "shop offers" to get the highest price for the seller. Neither the offer nor the terms of the offer are confidential, unless otherwise agreed. Therefore, the listing broker can furnish to the broker for buyer #1 a copy of the \$105,000 offer received from buyer #2.

Arizona REALTOR® Magazine — February 2011

Real Estate Broker Can Be Statutory Agent for an LLC

The real estate broker is leaving a major real estate brokerage firm to form his own real estate brokerage firm. This real estate brokerage firm will be a limited liability company ("LLC"). Under Arizona law an LLC must appoint a statutory agent to be the agent of the LLC for service of process and other notices required under Arizona law. Can the real estate broker be the statutory agent for this LLC?

Answer: Yes. Any individual can be the statutory agent for a real estate brokerage firm operating as an LLC.

Note: A.R.S.' 29-604, ' 29-605 should be reviewed before the individual agrees to act as the statutory agent for the LLC.

Arizona REALTOR® Magazine — March 2011

BROKERAGE: ADRE

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:

http://www.aaronline.com/documents/HL_Broker.aspx

Real Estate Broker Can Act as the Trustee Under a Seller Carryback Deed of Trust

The seller owns a parcel of land free and clear. The buyer is purchasing the parcel of land with a small down payment and seller carryback financing, i.e., promissory note and deed of trust. Can the real estate broker act as trustee under the seller carryback deed of trust?

Answer: Yes. A.R.S. ' 33-803(A)(3) authorizes a real estate broker to act as the trustee of a deed of trust.

Note: Any real estate broker acting as a trustee under a deed of trust should confirm with their errors and omissions insurance company that there will be insurance coverage for any negligence of the real estate broker acting as a trustee.

Arizona REALTOR® Magazine — March 2011

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HAVE YOU SIGNED UP FOR THE LEGAL HOTLINE?

The Legal Hotline provides all AAR broker members (designated REALTORS® — DRs) free access to a qualified attorney who can provide information on real estate law and related matters.

Find out how brokers can access the Legal Hotline.
www.aaronline.com/documents/hotline_access.pdf

Browse more Legal Hotline topics.
www.aaronline.com/documents/LH.aspx

BROKERAGE: ADRE — CONTINUED

Real Estate Broker Cannot Draft Promissory Note and Deed of Trust For Seller Carryback Financing Unless Representing Seller or Buyer in Transaction

The seller and buyer have entered into a contract for the sale of a parcel of land with seller carryback financing. Neither the seller nor the buyer are represented by real estate brokers in the transaction. After the contract is signed, the seller asks a real estate broker to draft the seller carryback financing documents, namely, the promissory note and deed of trust, for a payment of \$500. Can the real estate broker draft the seller carryback financing documents for a payment of \$500?

Answer: No. Under Article 26 of the Arizona Constitution a real estate licensee can draft legal documents,

including seller carryback financing documents, if these documents are incidental to the sale of real estate for their clients. A separate charge, however, for the drafting of these real estate documents is prohibited. Therefore, if the real estate broker was not representing the seller or the buyer in the transaction, the real estate broker is prohibited from drafting the seller carryback documents for a \$500 payment.

*Note: If a real estate licensee drafts legal documents incident to a real estate sale of their clients as allowed under Article 26 of the Arizona Constitution, the real estate licensee is held to the standard of care of an attorney. See *Morley v. J. Pagel Realty & Ins.*, 27 Ariz. App 62 (1976) (broker liable for not informing client that seller carryback financing should be secured by a recorded deed of trust).*

Arizona REALTOR® Magazine — March 2011

DISCLOSURE

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_Disclose.aspx

Death of Seller's Husband Does Not Need to Be Disclosed to Buyer

Two months after the seller's husband died in the home, the seller accepted a contract to sell the home. Does the seller have to disclose to the buyer that her husband died in the home?

Answer: No. Neither the seller nor the brokers in the transaction have to disclose the death of the seller's husband to the buyer. See A.R.S. § 32-2156. Similar to Fair Housing guidelines, if directly asked by the buyer if there have been any deaths in the home, however, the seller and the brokers must respond truthfully. They cannot deny that there has been a death in the home. The seller and the brokers should say that state law (or office policy) does not allow such discussion.

Arizona REALTOR® Magazine — January 2011

Seller Not Obligated to Buyer if Home Not Connected to Sewer

In the two years that the seller owned the home the seller paid monthly sewer bills to the local municipality. Therefore, in the SPDS and in the Contract the seller represented that the home was connected to the sewer. After close of escrow the buyer discovered that the local municipality was erroneously sending monthly sewer bills because the home had a septic tank, and was not connected to the sewer. Is the seller liable to the buyer for damages because the home was not connected to the sewer?

Answer: Probably not. In the Contract the seller warranted that any information regarding sewer connection was correct to the best of seller's knowledge. See Contract, lines 173-175. Inasmuch as the seller had been paying monthly sewer bills to the local municipality, the seller probably believed that the home was connected to the sewer. Furthermore, the Contract states in bold and capitalized print that, if sewer connection is material to the buyer, the buyer must make an investigation during the inspection period. See Contract, lines 213-216 (initialing required by buyer). Therefore, the buyer probably has no claim against the seller for damages because the home is not connected to sewer.

Arizona REALTOR® Magazine — March 2011



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FINANCING

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http://www.aaronline.com/documents/HL_Financ.aspx

Seller Not Required to Make FHA Repairs

The contract stated on Line 70 that the buyer would be getting FHA financing. The FHA appraisal now requires extensive roof repairs. The buyer is demanding that the seller make these extensive roof repairs because the seller agreed in the contract to FHA financing. If the FHA requires any repairs, does the seller have to make those repairs if the contract provided for FHA financing?

Answer: No. Although the seller in the contract acknowledged that the buyer was getting FHA financing, this acknowledgement is not an open-ended agreement by the seller to pay for any repairs required by the FHA.

Note: If the buyer wants the seller to pay for any repairs required for FHA financing, the seller and buyer should specifically add this language to the contract and limit the liability of the seller, e.g., "Seller agrees to make all repairs required for FHA financing up to \$1,500."

Arizona REALTOR® Magazine — January 2011

Any Specific Term in Advertising for a Mortgage Requires Compliance with Regulation Z

In the mortgage broker advertisement the only statement regarding terms of the mortgage loan was that "payments will be under \$700.00." Does this advertisement with only one specific term, namely the amount of the mortgage payment, comply with Regulation Z of federal law?

Answer: No. Regulation Z of federal law requires that whenever a specific term, such as the amount of a periodic mortgage payment, is disclosed in an advertisement for financing then other material terms must be disclosed. These material terms include the total of payments, the repayment period, finance charges, and interest rates. See 12 CFR Part 226.

Note: The representation that "the payments will be under \$700.00" probably also violates Arizona law because a borrower could be misled as to the terms of the financing being advertised. A.R.S. ' 6-909 (C) and (L).

Arizona REALTOR® Magazine — March 2011

LANDLORD / TENANT

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_L_T.aspx

Month-to-Month Tenant Entitled to Thirty Days Notice after Short Sale Closes

The parents were the owners of the home. The parents agreed to a short sale contract with a buyer. The parents moved out while waiting for lender approval of the short sale contract and let their son move into the home at no charge. The short sale contract has now closed. The parents have demanded that the son leave the home, but the son refuses to leave. How can the buyer evict the son from the home? Do the parents have any liability to the buyer?

Answer: Although the son had no written lease, had no specific lease term and was not paying rent to his parents, the son did initially have possession of the home with the consent of his parents. Therefore, under Arizona law, the son became a month-to-month tenant. The buyer now as the new owner of the home must furnish thirty days notice to the son before beginning the eviction proceedings. In regard to the parents' liability, under line 21 of the contract, the parents were required to deliver "possession" at close of escrow. Therefore, the buyer should furnish a three-day cure period notice to the parents, and if the son does not vacate the home

within that three days, the parents should be liable for any damages, including attorneys fees and court costs, incurred by the buyer in evicting the son.

Note: If there was a foreclosure of the home, however, the son would only be entitled to five days notice as the lease rights of the son were extinguished by the foreclosure. Although the 2009 federal law generally requires 90 days notice to evict a month-to-month tenant after a foreclosure, this law only applies to "bona fide" leases. A lease to a relative for no rent is not a "bona fide" lease.

Arizona REALTOR® Magazine — January 2011

Landlord Required to Furnish Notice to Tenant of Any Foreclosure before Lease Executed

The home was in foreclosure. The tenant and landlord then executed a lease for the home. The landlord did not disclose to the tenant the foreclosure. Was the landlord required to notify the tenant of the foreclosure at the time that the lease was executed? If so, what rights does the tenant have?

Answer: Under a new Arizona law, the landlord must notify the tenant of any pending foreclosure proceedings

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LANDLORD / TENANT — CONTINUED

at the time that the lease agreement is executed. See A.R.S. § 33-1331 (effective July 29, 2010). If not, the tenant can furnish ten days notice to the landlord to reinstate the mortgage loan or to otherwise cancel the foreclosure proceedings. If the landlord does not do so within ten days, the tenant can terminate the lease and move out. In addition, the tenant has a claim against the landlord for any damages, such as additional moving expenses.

Arizona REALTOR® Magazine — January 2011

Tenant Entitled to Terminate Lease after Tenant Learns of Foreclosure

The tenant executed a one-year, non-AAR lease for a rental home. Four months later, a notice of foreclosure is posted in the front yard of the rental home. Although the foreclosure sale is not scheduled for another two months, the tenant wants to terminate the lease as soon as possible and does not want to pay any more rent. Can the tenant terminate the lease because of the pending foreclosure?

Answer: Probably. Under a 2009 federal law, the new landlord after foreclosure is generally required to honor the terms and conditions of an existing lease, including the expiration date. The identity of a new landlord, however, would probably be a material breach of an existing lease. Therefore, the tenant would probably be entitled to terminate the lease because of the pending foreclosure if the current landlord, after ten days written notice, did not “cure” the foreclosure proceedings, e.g., reinstate the mortgage loan by making back payments. See A.R.S. § 33-1368. If the tenant does not terminate the lease, the tenant will be required to pay rent to the current landlord until the date of the foreclosure sale. Under the 2009 federal law, although the new landlord is required to honor the terms of the lease after a foreclosure, the tenant is not. In other words, under the 2009 federal law, the tenant after foreclosure has the option to move out or stay in the home and honor the lease for the remaining term.

Note: *Under lines 206-208 of the AAR Residential Lease Agreement, however, the landlord specifically agrees that no foreclosure proceeding will be allowed. Therefore, if there is a foreclosure proceeding, the tenant is entitled to furnish ten days notice to the landlord to “cure” the foreclosure proceeding, e.g., reinstate the loan by making back payments. If the landlord does not cure the foreclosure proceeding after ten days written notice, the tenant is entitled to terminate the lease. See A.R.S. § 33-1368.*

Arizona REALTOR® Magazine — February 2011

Short Sale Buyer Has to Honor Existing Lease

A tenant signed a one-year lease for a home. The owner of the home thereafter entered into a short sale contract, which closed five months later. The short sale buyer is now threatening to evict the tenant. Can the tenant stay in the home for the rest of the lease term?

Answer: Yes. The general rule is that a lease for a home entered into before any sale of a home, including a short sale of a home, is superior to the new buyer’s ownership interest in the home. Therefore, the tenant is entitled to stay in the home until the expiration of the lease.

Note: *Before a 2009 federal law, the general rule was that the foreclosure of the mortgage loan eliminated any lease rights of a tenant. The 2009 federal law now generally requires a new owner after a foreclosure to honor the lease of any existing tenant.*

Arizona REALTOR® Magazine — February 2011

Tenant Entitled to Keep Furniture after Foreclosure until End of Lease

The landlord and the tenant executed a two-year lease for a furnished home. The furnished home included a refrigerator, washer/dryer and other personal property. Eight months later, there is a foreclosure of the home. Although the landlord knows that the 2009 federal law requires the new owner of the home to allow the tenant to stay in the home until the end of the two-year lease term, the landlord is demanding the return now of all of the landlord’s personal property in the home. Does the tenant with a lease of a furnished home have to return the landlord’s personal property after the foreclosure?

Answer: No. The landlord has no right to the return of the landlord’s personal property until the lease is terminated. When the lease is terminated, the landlord is entitled to the return of the landlord’s personal property, and if there has only been reasonable wear and tear of the home and of the personal property, the tenant is entitled to the return of the security deposit.

Arizona REALTOR® Magazine — February 2011

After Filing Bankruptcy the Tenant Does Not Need Consent of Bankruptcy Court to Sign a New Lease

The tenant owes his landlord \$1,200 in back rent for an apartment at the time of filing bankruptcy. After filing bankruptcy the tenant moves out and wants to sign a lease for a new apartment. Does the tenant need the

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permission of the bankruptcy court to sign a lease for a new apartment?

Answer: No. The bankruptcy court generally does not have any control over the liabilities of a tenant, including signing a lease for a new apartment, that are incurred after the date of the bankruptcy filing.

Note: The \$1,200 in back rent owed prior to filing bankruptcy should be discharged in the bankruptcy proceeding.

Arizona REALTOR® Magazine — March 2011

LISTINGS

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_List.aspx

No Change in Listing Agreement Without Addendum Executed by Both Seller and Listing Broker

The seller and the listing broker signed a six-month listing agreement with a list price of \$160,000. In the first week after the listing agreement was signed, there were numerous offers on the home. The seller now wants to increase the list price of the home to \$240,000. The listing broker does not want to increase the list price to \$240,000. Does the listing broker have to agree to an increase in the list price from \$160,000 to \$240,000?

Answer: No. Any material change in the listing agreement, e.g., modification of the list price to \$240,000 or modification of the term of the listing from six months to one year, requires the consent of both the seller and the listing broker. Under the Statute of Frauds (A.R.S. § 44-101), any listing agreement, and any amendment to the listing agreement, must be signed by both the seller and the listing broker.

Arizona REALTOR® Magazine — February 2011

Reduction in Listing Price Requires Consent of Both Husband and Wife

The listing agreement was signed by both the ex-husband and the ex-wife for the sale of the home. After several months there have been several offers on the home, and the listing broker has recommended a reduction in the listing price. The ex-husband has agreed to this reduction in the listing price, but the ex-wife is living in the home and refuses to agree to the reduction in the listing price. Can the listing broker reduce the listing price in the MLS based on the agreement of only one of the owners?

Answer: No. The listing broker has a fiduciary duty to both the ex-wife and the ex-husband for the sale of the home at the agreed listing price. The marketing of the home at a lower listing price without agreement by both broker's clients would be a violation of this fiduciary duty.

Note: Divorce decrees may subject spouses to liability for refusing to reduce the listing price or otherwise reasonably cooperate in the sale of the home.

Arizona REALTOR® Magazine — March 2011

REMEDIES

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_Remedies.aspx

Despite Massive Stroke, Seller Is Obligated to Close Sale of Home

The seller is an elderly lady. One week prior to close of escrow, the seller suffers a massive stroke and is severely disabled. Although the seller is competent, she no longer wants to sell the home and is refusing to sign the deed. Is the seller still required to sell the home?

Answer: Yes. The buyer should issue a three-day cure period notice, and if the seller still refuses to sign the closing documents, the buyer is entitled to file a lawsuit for specific performance of the contract and record a lis pendens to furnish legal notice that a lawsuit has been filed to get the title to the home. In the lawsuit, the

judge can order the seller to sign the deed (with contempt of court as a remedy if the seller fails to sign the deed), or the judge can order the clerk of the Superior Court to sign a deed conveying the home to the buyer. The judge can also award attorneys' fees and court costs to the buyer.

Arizona REALTOR® Magazine — January 2011

New Owner after Foreclosure Has No Two-Day Right of Inspection

After the foreclosure, the new owner of the home wants to conduct an inspection. The former owner of the home refuses access to the home for the

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LANDLORD / TENANT — CONTINUED

inspection. The new owner then delivers a two-day notice to the former owner of the home to inspect the home under A.R.S. § 33-1343 of the Arizona Residential Landlord-Tenant Act. Is the new owner entitled to furnish this two-day notice to inspect?

Answer: Probably not. The Arizona Residential Landlord-Tenant Act only applies if there is a rental agreement. For example, see A.R.S. § 33-1310(16). After a foreclosure, there is no “rental agreement” between the former owner and the new owner of the home. Therefore, the new

owner of the home probably has no right to inspect the home until after a five-day notice and completion of eviction proceedings under A.R.S. § 12-1173.01.

Note: Even if the new owner would be entitled to furnish a two-day notice to inspect but the former owner refused access, the new owner would have to get a court injunction for access, which could take two to three weeks.

Arizona REALTOR® Magazine — February 2011

TITLE & INTEREST IN PROPERTY

FIND MORE HOTLINE Q&A FOR THIS TOPIC ON AARONLINE.COM:
http://www.aaronline.com/documents/HL_T_I_L.aspx

Former Owner of Home Entitled to Washer/Dryer after Foreclosure

The lender foreclosed on the home. The home was unoccupied at the time of the foreclosure sale, but the former owner left a washer/dryer in the home. Two months after the foreclosure sale, the former owner of the home is demanding the return of the washer/dryer. Does the lender have to return the washer/dryer to the former owner?

Answer: Yes. The lender is required to return the washer/dryer to the owner, provided that the owner pays any reasonable storage and maintenance expenses incurred by the lender.

Note: There are no statutory guidelines for the buyer's obligations regarding personal property left in the home after a foreclosure sale or any other sale of a home. Therefore, the Hotline recommends that after a foreclosure sale, or any other sale of a home, the new owner take photographs and an inventory (witnessed by two disinterested witnesses) of any personal property remaining in the home. After written notice to the owner of the personal property, the personal property of the former owner should be stored for a reasonable amount of time, e.g., 90 days. At that time, the personal property can be sold or destroyed, unless the owner of the personal property requests the return of the personal property and pays reasonable storage and maintenance expenses. Alternatively, the Hotline recommends compliance in good faith by the new owner with the procedures in A.R.S. § 33-1370 relating to abandoned personal property of a tenant.

Arizona REALTOR® Magazine — January 2011

Utility Lien Extinguished by Foreclosure

The city has recorded a utility lien against a home for an unpaid water bill. The first mortgage is foreclosing

on the home. Will the city's utility lien be extinguished by the foreclosure?

Answer: Yes. A city or town is entitled to record a lien for unpaid utilities. See A.R.S. § 9-511.02. This utility lien, however, is inferior to mortgages recorded prior to the recording of the utility lien. See A.R.S. § 9-511.02(C). Therefore, after the foreclosure, the utility lien generally will be extinguished.

Note: After foreclosure, the former owner of the home will still have personal liability for the unpaid utilities.

Arizona REALTOR® Magazine — January 2011

Gate May Be Constructed Over an Easement if Reasonable and Necessary

The owner of parcel A has an easement for access to the main highway over the land of the owner of parcel B. The owner of parcel B is a cattle rancher, and wants to erect a gate over the easement to prevent the cattle from escaping to the highway. The owner of parcel A is objecting to any gate over the easement. Can the owner of parcel B construct a gate over the easement to prevent the cattle from escaping to the highway?

Answer: Probably. The owner of a parcel of land subject to an easement can construct a gate across an easement if reasonable and necessary. *Hunt v. Richardson*, 216 Ariz. 114 (2007) “Reasonable” could be a hand-latch or activation by an electronic handset given to the owner of parcel B. “Necessary” is defined as not absolutely necessary, but convenient in light of the surrounding community. If the community is a ranching community with cattle and other livestock, the gate is probably “necessary.” Therefore, the owner of parcel B should be able to construct the gate across the easement.

Arizona REALTOR® Magazine — March 2011

Deed Restrictions Recorded After Mortgage Are Eliminated by Foreclosure

Four family members each purchased five-acre contiguous lots. Three family members paid cash, but one family member used seller carryback financing. The four family members then recorded deed restrictions on all four lots allowing only one single-family residence to be constructed on each of the lots. The family member with seller carryback financing failed to make the payments on the seller carryback financing, and there was a foreclosure of that family member's five-acre lot. The purchaser at the foreclosure sale now wants to build two homes on this five-acre lot. Can the purchaser at the foreclosure sale build two homes on the five-acre lot despite the deed restrictions?

Answer: Yes. The deed restrictions were recorded after the seller carryback financing on the five-acre lot. Therefore, after the foreclosure of the seller carryback financing, the deed restrictions were eliminated on that five-acre lot, and the new owner can build two homes on that five-acre lot. See A.R.S. '33-811 (E). ❖

Arizona REALTOR® Magazine — March 2011



ABOUT THE AUTHOR

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www.combslawgroup.com



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MORTGAGE ASSISTANCE RELIEF SERVICES ("MARS") RULE

REQUIREMENTS FOR SHORT SALE BROKERS

BY AAR GENERAL COUNSEL
K. MICHELLE LIND

The Federal Trade Commission ("FTC") Mortgage Assistance Relief Services ("MARS") Rule applies to any person that provides, offers to provide, or arranges for others to provide, any "mortgage assistance relief service." A "mortgage assistance relief service" includes any service, plan, or program, offered or provided in exchange for consideration to assist or attempt to assist the consumer with negotiating, obtaining or arranging a short sale. Thus, despite initial uncertainty about this issue, it is now clear that a broker negotiating a short sale with a lender on behalf of the seller must comply with the MARS Rule.

Not surprisingly, AAR continues to receive inquiries regarding this new Rule. AAR has been diligently working to provide answers. AAR's Risk Management Committee is meeting to determine if any of the MARS disclosures should be incorporated into AAR's existing Short Sale forms and to develop any necessary separate MARS disclosure forms. Since this is a federal rule, NAR has been working with the FTC and has published a summary of the Rule at: www.realtor.org/letterlw.nsf/pages/0211mars?OpenDocument&Login

The FTC has published *The Mortgage Assistance Relief Services Rule: A Compliance Guide for Business (February 2010)* ("FTC Guide"), which is available at: <http://business.ftc.gov/documents/bus76-mortgage-assistance-relief-services-rule>. Every broker involved with short sales should carefully read this FTC Guide.

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MARS RULE REQUIREMENTS FOR SHORT SALE BROKERS – CONTINUED

The FTC Guide states:

- **Real Estate Agents.** The Rule covers real estate agents who promote their services as a way to help consumers to avoid foreclosure, for example, by getting a lender’s approval for a short sale. However, the Rule doesn’t cover real estate agents who don’t promote their services this way, and who only provide services to help people in buying or selling homes — like listing homes for sale, showing homes, or finding homes that meet buyers’ needs.

THE FOLLOWING IS A SUMMARY OF THE MARS REQUIREMENTS

(1) NO ADVANCE FEES

The Rule contains a prohibition against requesting or receiving any advance payment of any fee or other consideration until the seller has executed a written agreement between the seller and the lender or servicer incorporating the terms of the short sale offer.

The FTC Guide states:

You can’t collect any fees for intermediate steps you take as part of the process. For example, it would be illegal to charge separately for:

- conducting an initial consultation with a customer;
- reviewing or auditing a customer’s mortgage or foreclosure documents to detect errors, including “robo signing” or title problems;
- gathering financial or other information from a customer;
- sending an application for mortgage relief or any other request to a customer’s lender or servicer;
- communicating with a lender or servicer on a customer’s behalf; or
- responding to requests for information from a customer’s lender or servicer.

Notably, in Arizona a real estate licensee may not receive additional compensation for negotiating a short sale, unless also licensed as a loan originator by the Arizona Department of Financial Institutions and the requirements of A.R.S. § 32-2155(C) are met. See, *ADRE Informational Alert (February 15, 2011)* at: www.azre.gov/PublicInfo/Documents/Short_Sale_Negotiator_Regulations.pdf.

The ADRE Informational Alert also states: “[a]ny fee, refundable or non-refundable, that a broker/salesperson requests or receives from a consumer to negotiate, obtain or arrange a short sale, in advance of an executed agreement between the consumer and his or her lender or servicer that incorporates the final terms that the lender or servicer will agree to, violates the advance fee ban described in section 322.5 of the Federal Trade Commission’s MARS Rule.”

(2) DISCLOSURES IN ADVERTISING

The FTC guide states:

The Rule requires certain disclosures in what it calls “general commercial communications” — that is, advertising meant for a general audience, like ads on TV, radio, or the Internet.

The **clear and prominent*** advertising disclosure must state:

IMPORTANT NOTICE (*in two-point type larger than the font size of the disclosure*): (Name of company) is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan. [If the broker represents that the seller should stop making payments add: “If you stop paying your mortgage, you could lose your home and damage your credit rating”]

Communications disseminated orally or through audible means must be preceded by the statement “Before using this service, consider the following information.”

(3) DISCLOSURES IN COMMUNICATIONS WITH PROSPECTIVE CUSTOMERS

The FTC Guide states:

The Rule requires additional disclosures in any “consumer-specific commercial communication” — that is, a letter, phone call, email, text, or the like, directed at a specific person you’re soliciting for your service.

The **clear and prominent*** disclosure required in every communication with a prospective customer must state:

IMPORTANT NOTICE (*in two-point type larger than the font size of the disclosure*): You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (*insert amount or method for calculating the amount*) for our services. (Name of company) is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan. [If the broker represents that the seller should stop making payments add: “If you stop paying your mortgage, you could lose your home and damage your credit rating”]

Communications disseminated orally or through audible means must be preceded by the statement “Before using this service, consider the following information” and, in telephone communications, must be made at the beginning of the call.

>>

* **Clear and Prominent**
www.aaronline.com/AZR/2011/March/mars-rule-clear-and-prominent.aspx

(4) TWO SEPARATE DISCLOSURES WHEN PRESENTING A SHORT SALE OFFER FROM THE LENDER OR SERVICER

The FTC Guide states:

Under the Rule, when you give a customer an offer of mortgage relief from their lender or servicer, you have additional disclosure requirements...

The first **clear and prominent*** disclosure must be on a separate written page and state:

IMPORTANT NOTICE: Before buying this service, consider the following information (*in two-point type larger than the font size of the disclosure*): This is an offer of mortgage assistance we obtained from your lender [or servicer]. You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [same amount as disclosed previously] for our services. [If the broker represents that the seller should stop making payments add: "If you stop paying your mortgage, you could lose your home and damage your credit rating"]

The second disclosure the broker must provide is a separate notice from the lender or servicer.

The FTC Guide states:

You have to give your customer a separate one-page written notice *from the customer's lender or servicer* that explains all material differences between the offer of mortgage relief you got from the lender or servicer and the customer's current loan.

(5) TRUTH IN ADVERTISING SERVICES

The Rule contains prohibitions against making certain representations and misrepresentations.

The FTC Guide states:

Under the Rule, it's illegal to misrepresent, either expressly or by implication, any "material aspect" of your services. That includes any information that's likely to affect a consumer's decision to use your service or choose one service over another. [Examples Omitted]...

In addition, if you make claims about the benefits, performance, or efficacy of your services, your statements must be truthful and you must have competent and reliable evidence to back them up. [Examples Omitted]...

Beyond requiring that your claims are truthful, the Rule makes it illegal to tell a customer or potential customer to stop communicating with their lender or servicer.

(6) RECORD-KEEPING AND MONITORING REQUIREMENTS

The Rule requires certain records be retained for at least two years and reasonable steps to ensure employees and independent contractors comply with the Rule. The records that must be retained include: (i) advertising and promotional materials; (ii) sales records; (iii) communications with customers; and (iv) agreements with customers.

In addition to the foregoing, it is a violation of the Rule for a person to provide substantial assistance or support to any mortgage assistance relief service provider when that person knows or consciously avoids knowing that the provider is engaged in any act or practice that violates this Rule.

The Attorney General is authorized to bring an action to enforce the Rule. To review the MARS Rule in its entirety, go to <http://www.ftc.gov/os/fedreg/2010/december/R911003mars.pdf>

In conclusion, the FTC Guide states:

Questions about the MARS Rule?

Contact:

Division of Financial Practices
Bureau of Consumer Protection
Federal Trade Commission
Washington, DC 20580
202-326-3224 ✱

* Clear and Prominent
www.aaronline.com/AZR/2011/March/mars-rule-clear-and-prominent.aspx

STAY TUNED

New information on MARS is expected after the NAR Mid-Year Meeting in May.

Look for updates on AAROnline.com or Facebook.com/REALTORSuccess.

A "ROADMAP" TO THE MORTGAGE ASSISTANCE RELIEF SERVICES ("MARS") DISCLOSURES

BY AAR GENERAL COUNSEL K. MICHELLE LIND

Posted February 23, 2011

There are three types of disclosures that a real estate broker involved in short sales may need to make.

The first is a clear and prominent disclosure on a separate written page that states:

DISCLOSURE #1: ADVERTISING

The Rule requires disclosures in "general commercial communications," such as advertising short sale services. The clear and prominent advertising disclosure must state:

IMPORTANT NOTICE (in two-point type larger than the font size of the disclosure): (Name of company) is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan. [If the broker represents that the seller should stop making payments add: "If you stop paying your mortgage, you could lose your home and damage your credit rating"]

IMPORTANT NOTICE: Before buying this service, consider the following information (in two-point type larger than the font size of the disclosure): This is an offer of mortgage assistance we obtained from your lender [or servicer]. You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [same amount as disclosed previously] for our services. [If the broker represents that the seller should stop making payments add: "If you stop paying your mortgage, you could lose your home and damage your credit rating"]

Communications disseminated orally or through audible means must be preceded by the statement "Before using this service, consider the following information."

The second disclosure the broker must provide is a separate notice from the lender or servicer that explains all material differences between the offer of mortgage relief you got from the lender or servicer and the customer's current loan.

DISCLOSURE #2: COMMUNICATIONS WITH PROSPECTIVE CUSTOMERS

The Rule requires additional disclosures in any "consumer-specific commercial communication," such as communication with a specific prospective client regarding a short sale transaction. The clear and prominent disclosure required in every communication with a prospective client must state:

IMPORTANT NOTICE (in two-point type larger than the font size of the disclosure): You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount) for our services. (Name of company) is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan. [If the broker represents that the seller should stop making payments add: "If you stop paying your mortgage, you could lose your home and damage your credit rating"]

SAMPLE DISCLOSURE FORMS

AAR has developed sample MARS disclosure forms (Microsoft Word), which can be downloaded from the links below:

[Federal Trade Commission \("FTC"\) Mortgage Assistance Relief Services \("MARS"\) Advertising Disclosure](http://www.aaronline.com/azr/2011/march/1-mars-ads.doc)

www.aaronline.com/azr/2011/march/1-mars-ads.doc

[FTC MARS Consumer-Specific Commercial Communication Disclosure](http://www.aaronline.com/azr/2011/march/2-mars-client-communication-disclosure.doc)

www.aaronline.com/azr/2011/march/2-mars-client-communication-disclosure.doc

[FTC MARS Agreement Offer Disclosure](http://www.aaronline.com/azr/2011/march/3a-mars-agreement-offer-disclosure.doc)

www.aaronline.com/azr/2011/march/3a-mars-agreement-offer-disclosure.doc

[FTC MARS Lender/Servicer Notice](http://www.aaronline.com/azr/2011/march/3b-mars-lender-notice.doc)

www.aaronline.com/azr/2011/march/3b-mars-lender-notice.doc

Please consult your designated broker or independent legal counsel about the use of the sample forms.

ADDITIONAL INFORMATION

[The Mortgage Assistance Relief Services Rule: A Compliance Guide for Business](http://business.ftc.gov/documents/bus76-mortgage-assistance-relief-services-rule)

<http://business.ftc.gov/documents/bus76-mortgage-assistance-relief-services-rule>

[AAR's MARS summary](http://www.aaronline.com/azr/2011/march/mars-rule-requirements-for-short-sale-brokers.aspx)

www.aaronline.com/azr/2011/march/mars-rule-requirements-for-short-sale-brokers.aspx

[NAR's MARS summary](http://www.realtor.org/letterlw.nsf/pages/0211mars?OpenDocument&Login)

www.realtor.org/letterlw.nsf/pages/0211mars?OpenDocument&Login

[ADRE Informational Alert \(PDF\)](http://www.azre.gov/PublicInfo/Documents/Short_Sale_Negotiator_Regulations.pdf)

www.azre.gov/PublicInfo/Documents/Short_Sale_Negotiator_Regulations.pdf

[The MARS Rule in its entirety \(PDF\)](http://www.ftc.gov/os/fedreg/2010/december/R911003mars.pdf)

www.ftc.gov/os/fedreg/2010/december/R911003mars.pdf ❖

Communications disseminated orally or through audible means must be preceded by the statement "Before using this service, consider the following information" and, in telephone communications, must be made at the beginning of the call.

DISCLOSURE #3: WHEN PRESENTING A SHORT SALE OFFER FROM THE LENDER OR SERVICER

When presenting the seller with the lender's short sale approval letter, the Rule requires two disclosures.



ABOUT THE AUTHOR

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Note: This information is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this information is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel.



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