

New & Improved 2012 CREC Forms

COLORADO REAL ESTATE COMMISSION FORMS

(Adopted 8-2-11, 10-4-11, 12-6-11)

By

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I. INTRODUCTION

Unlike prior legislative sessions, laws enacted this last legislative session (2011) did not mandate any changes to the Contract to Buy and Sell Real Estate and other Commission forms. However, due to substantial changes made in the CREC contract forms the last two years, this year's changes were primarily clean up and fix up. While many of the proposed changes are significant, they now provide, more clearly, what was previously intended in the forms. Consistency in language used throughout the contract forms was largely accomplished. Changes occurred in all 5 of the contract forms, as well as the ancillary forms.

The only legislative change addressed was the Private Transfer Fee, S.B. 11-234. The contract now contains a place to address the "good" private transfer fees, i.e. Stapleton, etc.

The following 14 revised and 3 new forms were considered and adopted by the Commission at its August 2, 2011 Emergency Rule Making and Public Hearing. A Permanent Rule Making Hearing is scheduled for October 4, 2011 where the forms were adopted. One additional revised form, Inspection Resolution NTC43R) was adopted on December 6, 2011 that was not previously noticed. The revised and new forms are to become Mandatory on January 1, 2012.

Listing Contracts (no changes)

Sales Contracts

1. Contract to Buy and Sell Real Estate (Residential) (Revised)

2. **Contract to Buy and Sell Real Estate (Income-Residential) (Revised)**
3. **Contract to Buy and Sell Real Estate (Commercial) (Revised)**
4. **Contract to Buy and Sell Real Estate (Land) (Revised)**
5. **Contract to Buy and Sell Real Estate (Colorado Foreclosure Protection Act) (Revised)**
6. **Licensee Buy-Out Addendum to Contract to Buy and Sell Real Estate (Revised)**
7. **Residential Addendum (Revised)**
8. **Short Sale Addendum for CBS (Revised)**
9. **Short Sale Addendum for Listing Contract (New)**
10. **Post Closing Occupancy Agreement (New)**
11. **Inspection Objection Notice (Revised)**
12. **Notice to Terminate (Revised)**
13. **Estoppel Statement**
14. **Counterproposal (Revised)**
15. **Agreement to Amend / Extend Contract (Revised)**
16. **Seller's Property Disclosure (All Types) (SPD19-8-11) (Revised)**
17. **Seller's Property Disclosure (Residential) (SPD29-8-11) (Revised)**
18. **Inspection Resolution (NTC43R-12-11) (Revised)**

II. NEW and REVISED FORMS

NOTE: The forms included in this material are current through December 19, 2011. The forms and rules when adopted and effective are to be available electronically at the Colorado Real Estate Commission's web site:

<http://www.dora.state.co.us/real-estate/>

A. Contract to Buy and Sell Real Estate

1. CBS1 - Contract to Buy and Sell Real Estate (Residential)
2. CBS2 - Contract to Buy and Sell Real Estate (Income-Residential)
3. CBS3 - Contract to Buy and Sell Real Estate (Commercial)
4. CBS4 - Contract to Buy and Sell Real Estate (Land)
5. CBSF1- Contract to Buy and Sell Real Estate (Colorado Foreclosure Protection Act)

As noted above, the impetus to revising the Contract to Buy and Sell forms was to implement certain fixes, clarity and consistency.

The following Sections of the Contract to Buy and Sell Real Estate contain changes or clarification:

1. **Section 2.5.4, Water Rights.** Captions were created for "Deeded Water Rights" and "Well Rights"; there is another category for "Other Rights" to address related matters, e.g. Ditch Rights, etc.

2. **Section 3, Dates and Deadlines.** This Section reflects revised labels for some of the deadlines. For example, "Record Title" deadline (for those matters that are of record with the County Clerk and Recorder's office and Title Commitment. The "Off-Record" deadline is now "Off-Record Title Deadline." The "CIC" deadlines have been renamed "Association" Documents and Objection deadlines. The "Survey" deadline is now called "Current Survey Deadline" to avoid confusion with an old or "existing" survey. The "Closing Documents Delivery Deadline" has now been removed. **Note:** As a result, counsel may still want to set forth in Additional Provisions that the Closing Documents be delivered XX number of days prior to Closing. **Note:** Most all the check boxes that previously appeared in each substantive Section have been removed. If a Section does not apply, or is not conditional upon an appraisal, financing, etc., the abbreviation "N/A" should be inserted in the corresponding column in Section 3, Dates and Deadlines. This was done to avoid a potential inconsistency when the CBS, §3 is completed with a "date" inserted but the check box in the respective Section is marked as "Not Applicable." The completion may still be incorrect, but at least it will not be inconsistent, ambiguous or confusing.

3. The Note following Section 3, "Applicability of Terms" was reworked to avoid confusion when dealing with a Counter Proposal or Agreement to Amend/Extend Contract. A corresponding fix was made to the Counter Proposal and Amend/Extend forms as well.

4. The 2nd Note following Section 3, dealing with FHA and VA loans (previously located in Section 6, Appraisals) was moved to clarify that the "Appraisal Deadline" does not apply to FHA and VA loans.

5. **Section 4.4, Seller Concession.** Section 4.4 was clarified that any Seller Concession will be reduced to the amount allowed by the lender. The limitations on the amount the Seller may contribute to the Buyer for Closing Costs, points, etc., can vary by loan program, underwriter and lender.

6. **Section 4.6, Assumption.** This section, and throughout the Contract contains a new provision entitled "Right to Terminate". The language previously used, while intended to reach the same conclusion, previously varied from Section to Section. The form now uses, as much as possible, identical language. It refers to a newly created Section 25.1, Right to Terminate, that applies throughout the Contract.

7. **Section 6, Appraisal Provisions.** The most significant change in § 6 is to eliminate the "check boxes" specifying the type of appraisal (Conventional/other, FHA, VA). As § 4.5.2 allows the Buyer to change the type of financing (after contracting and prior to Closing) and § 4.5.3 specifies the various types of loans a Buyer could elect to obtain, it was necessary to conform the Appraisal Provisions in § 6 to "float", dependent upon the type of loan the Buyer obtains (which may be different from the initial type of loan specified in the Contract). If the Appraisal Provision does not apply, "N/A" should be inserted in Section 3, the Dates and Deadlines table.

6.2. Appraisal Condition. The applicable Appraisal provision set forth below shall apply to the respective loan type set forth in § 4.5.3, or if a cash transaction, i.e. no financing, § 6.2.1 shall apply.

8. **Section 7.4.** The caption "Common Interest Community Documents" has been renamed to "**Association Documents**".

9. **Section 8, Record Title and Off-Record Title Matters.** This Section of the Contract had the most significant changes. §8.1, Record Title

Matters, and § 8.2, Off-Record Title Matters grant the Buyer the choice of making a Title Objection or submitting a Notice to Terminate (now set forth in § 8.3, Right to Object, Resolution). It eliminates a right and obligation of a Seller to "cure" a title objection. The parties may agree whether and what needs to occur to solve a title problem. As the Buyer continues to have "subjective discretion" in determining whether title is satisfactory, the explicit basis of "unmerchantability" of title was removed as potentially inconsistent with "subjective discretion" (but it is intended that it is encompassed within the standard of "satisfactory").

10. **Section 9, Current Survey Review.** The Survey provisions are now consolidated in a separate section. To avoid confusion between the Seller supplying "existing" surveys (under § 8.2), Section 9 deals with a new or "current" Survey. A "Current" Survey could be brand new or an updated survey, now made current.

11. **Section 10.2, Inspection Objection Deadline,** consolidates most of the Physical Inspections in this section. The items enumerated in former § 10.6 have now been built into § 10.2. In § 10.2.1, the label of the form for a Buyer to give an objection on the physical condition of the Property or Inclusions has changed from "Notice to Correct" to the new title of "Inspection Objection."

12. Section 10.6, Due Diligence Documents, Section 10.7 Due Diligence Documents Conditions, and subsequent sub-sections of Section 10 continue to contain significant differences between the Residential Contract, CBS 1 or CBSF 1 and the other CBS forms (CBS 2, 3 and 4).

13. **Section 10.6.1, Due Diligence Documents (CBS1, CBSF1).** While this is not a change from the prior contract form (2010), it continues to allow the Buyer space to enumerate those documents the Seller is to supply.

13A. **Section 10.6.1-14, Due Diligence Documents (CBS2, 3, 4).** The Income, Commercial and Land contracts set forth (as in the prior contract forms) a list of various documents commonly called for to be supplied by the Seller to the Buyer.

14. **Section 10.7.1, Due Diligence Documents Conditions.** This provision is intended to be more clear and consistent throughout the Contract that the Buyer may "object" if the Buyer does not find the Due Diligence Documents satisfactory. The result of an "objection" by the Buyer is that the Contract will terminate. This Section ties into the Right to Terminate under § 25.1.

15. Section 10.8 in CBS1 and CBSF1 is entitled "**Buyer Disclosure**" addresses whether the Buyer must sell and close on another property to have sufficient monies to close on the purchase of the subject property.

15A. The provision of Buyer Disclosure appears as Section 8 in CBS2, Income-Residential. In CBS3, Commercial and CBS4, Land, there is no corresponding provision

16. While there is no change from the prior year, the following are the Section titles of the remaining "residential provisions" of Section 10, 11 and 12 in CBS1 and CBSF1:

- a. **10.9. Source of Potable Water
(Residential Land and Residential Improvements Only).**
- b. **10.10. Carbon Monoxide Alarms.**
- c. **10.11. Lead-Based Paint.**
- d. **10.12. Methamphetamine Disclosure**
- e. **11.0 Colorado Foreclosure Protection Act
(CBS 1, CBS 2, CBSF1).**

16. A **10.8. Due Diligence – Environmental, ADA.** The provision Of Due Diligence - Environmental and ADA is in CBS2, 3 and 4. This provision, while reformatted, does not involve any substantive change from the prior contract form. It addresses The Environmental aspects of due diligence and ADA Evaluation.

16. B. **10.15. Existing Leases; Modification of Existing Leases; New Leases.** No change from the prior contract form. There is no corresponding provision in CBS1, Residential and CBSF1. In CBS2, Income-Residential it is in Section 10.15. In CBS3, Commercial and in CBS4, Land it is Section 10.9.

17. **Section 11. Tenant Estoppel Statements.** There is no corresponding provision in CBS1, Residential and CBSF1. In CBS2, Income-Residential, CBS3, Commercial and in CBS4, Land it is Section 11. This Section 11 now addresses failure of the Seller to supply all of the Estoppel Statements by the Tenant Estoppel Statements Deadline. Section 11 reads as follows:

11.1. Tenant Estoppel Statements Conditions. Buyer shall have the right to review and object to any Estoppel Statements. Seller shall obtain and deliver to Buyer on or before **Tenant Estoppel Statements Deadline** (§ 3), statements in a form and substance reasonably acceptable to Buyer, from each occupant or tenant at the Property (Estoppel Statement) attached to a copy of such occupant's or tenant's lease and any amendments (Lease) stating:

- 11.1.1. The commencement date of the Lease and scheduled termination date of the Lease;
- 11.1.2. That said Lease is in full force and effect and that there have been no subsequent modifications or amendments;
- 11.1.3. The amount of any advance rentals paid, rent concessions given, and deposits paid to Seller;
- 11.1.4. The amount of monthly (or other applicable period) rental paid to Seller;
- 11.1.5. That there is no default under the terms of said Lease by landlord or occupant; and
- 11.1.6. That the Lease to which the Estoppel is attached is a true, correct and complete copy of the Lease demising the premises it describes.

11.2. Tenant Estoppel Statements Objection. Buyer shall have the Right to Terminate under § 25.1, on or before **Tenant Estoppel Statements Objection Deadline** (§ 3), based on any unsatisfactory Estoppel Statement, in Buyer's sole subjective discretion or if Seller fails to deliver the Estoppel Statements on or before **Tenant Estoppel Statements Deadline** (§ 3). Buyer shall also have the unilateral right to waive any unsatisfactory Estoppel Statement.

18. **Section 12, Closing Documents, Instructions and Closing.** All versions of the CBS have removed the "Closing Documents Delivery Deadline as discussed earlier. Closing Company (Title Co.), Buyer, Seller and Lender did not heed this provision.

19. **Section 15, Closing Costs, Closing Fee, Association Fees and Taxes.** This Section has two changes. The title of the Section was updated to reflect the change from "CIC to "Association." The other changes in this Section:

Section 15.3, Status Letter and Transfer Fee. This provision in the CBS includes the latest new label Associations and HOA Management companies are now charging a "record change fee" (plus, anticipating there will be further label changes, the form continues with "regardless of name or title of such fee").

Section 15.4, Private Transfer Fee. As S.B. 11-234 carves out from the prohibition of future "Private Transfer Fees", the Act does allow "good" transfer fees, i.e. fees that will help the community, infrastructure, etc. Accordingly, as there are some communities and developments assessing such fees and it would not properly fit into an existing category or subsection, a new subsection was included to address valid Private Transfer Fees.

20. **Section 25, Termination.** This Section added the "Right to Terminate" to address when the termination will be effective, i.e. upon receipt by the party entitle to notice of termination. By having all the various provisions within the Contract that contain a "Right to Terminate" in § 25.1, use generally the same language. This allows consistency, avoids unintended interpretations and

avoids increasing the length of the contract form. "Effect of Termination" is now set forth in § 25.2.

B. Agreement to Amend/Extend Contract (AE41-8-11)

1. Due to the rearrangement of the various Sections of the Contract to Buy and Sell Real Estate, the Dates and Deadlines Section was revised which required the Agreement to Amend/Extend be changed to coincide with the changed Section numbers.

2. Further, the omitting of the "Date or Deadline" table was clarified that "no change" from the Contract to Buy and Sell was the intended outcome.

C. Counter Proposal (CP40-8-11)

The same changes to the Agreement to Amend/Extend are reflected in the Counter Proposal form including the changes to the Dates and Deadline table.

D. Residential Addendum (RA33-8-11)

Conforming changes due to changes in the "Appraisal" condition that allow it to "float" with the type of loan the Buyer obtains were made.

E. Licensee Buyout Addendum (LB36-8-11).

Minor changes to have Section numbers coincide with the CBS numbering and removal of a repealed form.

F. Short Sale Addendum (SSA38-8-11), (SSA39-8-11)

Revisions to this form consisted of only creating separate SSA Addendums, one for the Contract to Buy and Sell and a second one (SSA39-8-11) as an Addendum to the Listing contract.

The SSA for the Listing Contract was prompted by the FTC's adoption of the MARS Rule. The Mortgage Assistance Relief Services is found at 16 CFR 322, (February 28, 2011). The Rule became effective on December 29, 2010 and the prohibition of "advance fee" became effective on January 31, 2011. The definition of "Mortgage Assistance Relief Service" includes "assisting" obtaining a

"Short Sale" in a Residential transaction involving a "Dwelling", meaning 1-4 units, primarily for personal, family, or household purposes. As a result, the "Disclosure" requirements of the Rule are now set forth in the Short Sale Addendum to the Listing Contract. The Rule requires both (1) "General Commercial Communication" and (2) "Consumer-Specific Commercial Communication" "Disclosures." While the FTC has had discussions with NAR, National Association of Realtors® who proposed excluding a broker working on listing a residential "Short Sale", nothing has been issued by the FTC modifying the Rule or its Compliance Guide. Shortly before the "transfer" of rulemaking authority and personnel occurred in July, 2011, the FTC issued an "announcement" (not a repeal of the rule, not an amendment to the rule) that it would not enforce the MARS Rule, unless they believed the real estate broker has committed a fraud or misrepresentation, in which case the rule would be enforced. Accordingly, at this time, it was the conclusion to modify the SSA to include the disclosures required by the FTC MARS Rule. The Colorado Attorney General Office has not revealed whether it would or would not exercise its authority to enforce the MARS Rule.

MARS - 16 CFR 322.2
§ 322.2 Definitions.

- (i) "**Mortgage Assistance Relief Service**" means any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following:
- (1) Stopping, preventing, or postponing any mortgage or deed of trust foreclosure sale for the consumer's dwelling, any repossession of the consumer's dwelling, or otherwise saving the consumer's dwelling from foreclosure or repossession;
 - (2) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;
 - (3) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;
 - (3) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;
 - (4) Negotiating, obtaining, or arranging any extension of the period of time within which the consumer may:
 - (i) Cure his or her default on a dwelling loan,
 - (ii) Reinstate his or her dwelling loan,

- (iii) Redeem a dwelling, or
- (iv) Exercise any right to reinstate a dwelling loan or redeem a dwelling;

(5) Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or

(6) Negotiating, obtaining or arranging:

(i) A short sale of a dwelling,

(ii) A deed-in-lieu of foreclosure, or

(iii) Any other disposition of a dwelling other than a sale to a third party who is not the dwelling loan holder.

**G. Seller's Property Disclosure (All Types) (SPD19-8-11)
Seller's Property Disclosure (Residential) (SPD29-8-11)**

Only two changes were made to the SPD19 form (All Types) the first change was made to the "Pets" (now referencing "Animals" kept in the residence) found in Part "K", item # 5. The same change was made to SPD29 (Residential). The second change to SPD19 was to modify the Noxious Weeds portion, Part "O" and supplying a web address for a Buyer to obtain contact information to determine what the County Weed Supervisor has mandated for the Property.

H. Inspection Objection (NTC43-8-11)

The Inspection Notice was renamed "Inspection Objection" and revised to provide for the Buyer's Objection. If the Buyer merely wants to terminate, the NTT44, Notice to Terminate form should be used as the "termination" provision was removed from the NTC 43.

I. Notice to Terminate (NTT44-8-11)

The Notice to Terminate form was updated to reflect the respective Section Number from the Contract.

J. Estoppel Statement (ES95-8-11)

The Income-Residential (CBS2), Commercial (CBS3) and Land (CBS4) contract forms contain Section 11 that requires Estoppel Statements be furnished to the Buyer. Section 11 of the CBS formed the dictated the content of the Estoppel Statement and became an approved form.

K. Post Closing Occupancy Agreement (PCO70-8-11).

It is quite common for a Seller to stay in possession of the Property for a limited amount of time following Closing of the sale and transfer of title from the Seller to the Buyer; i.e., 3 days following Closing. Many, if not most transactions have no documents signed addressing the respective duties of both Buyer and Seller, other than the minimal provision in the Contract.

The Post Closing Occupancy Agreement is not comprehensive. It is intended to address the major risks and responsibilities of a delayed possession following Closing. The form is not intended to address a long-term occupancy for which a properly drafted and prepared lease is recommended. Anticipating that there would be substantial public and market resistance to pay for the preparation of a residential lease for a 3-7 day period (following Closing), as it would not be well received, and likely would not be used at all, we prepared a short-form version of a lease, knowing full well that there are areas not addressed. However, the form addresses the more common problem areas and areas of concern. With further input and experience the form will likely be further enhanced to address other areas that have been sacrificed for brevity.

L. Inspection Resolution (NTCR43-12-11)

The Inspection Resolution form was recently noticed for revision. It will contain a similar provision as the Inspection Objection form, to clarify that the Seller will pay the costs of repairs, replacements and other work the parties address in the Inspection Resolution form. This addition was necessary due to the revised language in § 10.4 of the Contract to assure the cost is borne by the Seller, not the Buyer, and therefore avoid any inconsistency with the Liquidated Damage provision of the Contract in §21.1.2.

M. Rule Changes

The Commission converted the August 2, 2011 Rule Making hearing to an “Emergency” Rule Making Hearing, due to the short time allowed to proof, correct and distribute the forms following adoption. The Commission adopted the same forms at its October 4, 2011 Permanent Rule Making Hearing. Rule F-1 and other rule changes are to be considered and likely adopted on December 6, 2011.

III. CONCLUSION

This paper highlighted the more significant changes to the Colorado Real Estate Commission's new and revised forms for 2011 that will become mandatory for Real Estate Brokers as of January 1, 2012. All of the forms, as well as the Rules of the Colorado Real Estate Commission are available on the Commission's website. Currently they are under the rulemaking tab, but will be moved over to the "Forms" tab on or about January 2, 2012.

<http://www.dora.state.co.us/real-estate/>

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