

HOW TO EFFECTIVELY USE THE NEW 2009 UAR SHORT SALE FORMS

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Back in 2004, the Utah Association of REALTORS® Forms Committee implemented two distinct forms that were designed to help its members steer through a short sale transaction. The two documents were called the Short Sale Addendum and the Understanding Short Sales forms. At that time, the way in which short sales were accomplished was somewhat different than how short sales are handled in today's market.

In 2009, the UAR Forms Committee recently revised these forms and created an additional short sale form to better help REALTORS® negotiate a short sale transaction. In this article, I will briefly highlight the following three new UAR forms: (1) Short Sale Disclosure, (2) Short Sale Addendum; and (3) Secondary "Back-Up" Contract for Short Sales. As many of my articles suggest, I would recommend that before you read this article, you print off these three new forms and refer to them as you study this material.

1. SHORT SALE DISCLOSURE FORM (UAR FORM 21)

As a real estate professional you have an obligation to make sure that your clients fully understand what to expect in a short sale transaction. The Short Sale Disclosure Form is designed to accomplish this task. It may be used whether you represent the Seller or the Buyer. This form first explains what a short sale is. It talks about the fact that the sale will be conditioned upon a Third Party approving the REPC. It mentions that there may be significant delays in getting a response from the Third Party and that the Seller may forward other offers to the Third Party. The form also reminds the Buyer or Seller that there may be negative legal or tax consequences as a result of participating in a short sale. It is not your job to explain what those consequences are, but rather, to advise your client to seek specific legal or tax advice from the appropriate professional. This disclosure form not only educates the client on what to expect in a short sale transaction, but it also protects you, the real estate professional.

2. SHORT SALE ADDENDUM (UAR FORM 20)

The premise of the *old* Short Sale Addendum was that once the offer was accepted by the Seller, there was no binding contract until the Third Party lender reached a written agreement with the Buyer and Seller. As you review the *new* Short Sale Addendum, you will not see this same approach taken. Instead you will see that once the Seller accepts an offer with the new Short Sale Addendum attached, the property will be placed "under contract" subject to Third Party approval. However, the listing agent and the Seller will have the option to continue to market the property on the MLS if they choose (see below).

Third Party Approval

In section 2 of the new Short Sale Addendum, this Third Party condition is clearly defined. Section 2 states that the Buyer's and Seller's obligations under the contract are conditioned upon Third Party Approval of the REPC. Third Party Approval of the REPC means that the Buyer and Seller have both received from the Third Parties, written approval of either: (a) the terms and conditions contained in the REPC as originally submitted to the Third Parties; or (b) such other terms and conditions as requested by the Third Parties ("Third Party Modifications") mutually agreed to by Buyer and Seller on a separate addendum to the REPC.

If either (a) or (b) above occur, then "Third Party Approval" will have been obtained. If neither (a) nor (b) occur, then Third Party Approval will not have been obtained. In reality, after a REPC has been submitted to a lender or other Third Party, the lender will usually come back with requested changes to the REPC ("Third Party Modifications") as a condition to approving the sale. The Third Party lender may require that the price be modified and/or the closing deadline to be a certain date. If this happens, the Buyer and Seller will be able to decide whether such modifications are acceptable. If the Buyer and Seller agree to the Third Party Modifications, an addendum to the REPC that incorporates the changes must be signed by the Buyer and Seller. The addendum that includes those changes must be approved in writing by the Third Parties. If the Buyer or Seller is not satisfied with the requested Third Party Modifications, neither party will be obligated to proceed. In that case, Third Party Approval, as defined in section 2, will not have been obtained and the Buyer may cancel the contract and be refunded any earnest money that was delivered.

Third Party Approval Deadline

In section 4 of the Short Sale Addendum, a time frame is given whereby the approval from the Third Party should be obtained. This is called the "Third Party Approval Deadline." Practically speaking, a reasonable deadline will probably be 90-120 days for a property that does not have Third Party pricing approval. That is typically how long lenders are taking to approve a short sale in today's market. It would not be wise to include an unrealistic deadline in this section because it will likely result in the Buyer and Seller having to extend the deadline.

In this same section, a provision has been included that indicates what will happen to the REPC if the Third Party Approval is not obtained by the Third Party Approval Deadline. You will notice that if Third Party Approval is not obtained by the Third Party Approval Deadline, the REPC will automatically be deemed cancelled. Do not overlook this date! As I mentioned above, it would probably make a lot of sense to include a date that is about 120 days out. If you are rapidly approaching this deadline, and the lender or other Third Party has not approved the REPC, then the Buyer and Seller should extend this deadline on an addendum. If you don't do this, then the REPC will automatically be cancelled.

Earnest Money Deposit

Section 5 of the new Short Sale Addendum will provide more clarity on when the Earnest Money Deposit will be delivered to the Buyer's brokerage in a short sale transaction. In this section, you will be given a choice as to when the earnest money should be delivered. Depending on how this section is negotiated between the Buyer and Seller will determine the timing of the earnest money delivery. It will either be: (1) in accordance with how you filled out the first paragraph on page 1 of the REPC; (2) a certain number of calendar days after Third Party Approval (** in which instance you would simply include "see Short Sale Addendum" in the first paragraph on page 1 of the REPC); or (3) something else as agreed upon between the Buyer and Seller (eg. the earnest money to be delivered to ABC Title Co. by a certain date). This approach should provide more certainty as to if or when the earnest money deposit will be delivered to the Buyer's brokerage in the short sale.

Seller's Right to Continue to Market the Property on the MLS

Section 6 of the new Short Sale Addendum explains that the Seller may continue to market the property on the MLS and how to handle subsequent offers that are submitted after the Seller accepts an offer from Buyer #1. Remember, the premise of this new addendum is that the property is placed under contract with a Third Party Approval contingency. However, in this section 6 of the Short Sale Addendum, the Seller reserves the right to continue to market the property on the MLS under any MLS status category the Seller and/or Third Party desire (as allowed by the MLS). So even though the property is placed under contract with this new Short Sale Addendum, for purposes of marketing the property after the Seller has accepted an offer from Buyer #1, the Seller may wish to continue to market the property for sale. This concept is very similar to the "Active – Time Clause" status used in the MLS. In that scenario, the property is placed under contract with Buyer #1, but the Seller reserves the right to continue to market the property on the MLS in order to receive back-up offers.

To illustrate this point, suppose the Seller accepts an offer from Buyer #1 and then submits the offer to the Third Party lender for review. While the Third Party lender is reviewing that offer, the Seller and/or Third Party lender may decide to continue to actively market the property in an effort to solicit back-up offers. In this scenario, the Seller may market the property as "Active" on the MLS, and then check the "Offer Under Third Party Review" status box (or something similar – see your individual MLS for details) in order to inform other Buyer agents that an offer is on the table. If this is done, other Buyer agents will know that back-up offers are wanted, but that one offer has already been accepted by the Seller and submitted to the lender.

On the other hand, if the Seller who accepted an offer from Buyer #1 with the new Short Sale Addendum did not want to solicit back-up offers, the Seller could instruct the listing agent to simply reflect the property as "under contract" on the MLS. The decision on how the property

will be marketed after an offer is accepted by the Seller, but not yet approved by the Third Party lender, is up to the Seller and/or the Third Party lender.

As a reminder, since the property is legally placed under contract with the new Short Sale Addendum, any subsequent offers can only be accepted in “back-up” position. Section 6 of the new Short Sale Addendum clearly describes this process. The Seller may only accept subsequent offers in back-up position. If a back-up offer is submitted, it will be imperative that the Seller use the new *Back-Up Contract for Short Sales* form that I will explain below. This section also states whether the Seller will be obligated to submit any back-up offers to the Third Party. The language simply states that depending on what the Third Party requires, the Seller may or may not submit the back-up offer to the Third Party lender for Third Party Approval. Whether or not the back-up offer(s) is submitted is usually dependent on what the requirements of that particular Third Party are. Some lenders in our market today only want to see one offer at a time. Some lenders, on the other hand, may ask to see all the offers that have been submitted. The Seller is not legally required to submit all offers to the Third Party unless the Third Party requires it.

Buyer’s Right to Cancel REPC

Section 7 of the new Short Sale Addendum contains language that allows the Buyer to terminate the contract at any time prior to the Third Party Approval Deadline or Third Party Approval, whichever occurs first. If the Buyer does cancel the contract according to this section, any earnest money will be refunded to the Buyer. The Buyer is given this right in consideration for rights the Seller has reserved under the contract which includes the right to continue to market the property on the MLS and accept back-up offers.

Contractual Deadlines

Finally, section 8 of the new Short Sale Addendum will deal with contract deadlines. Some of you have probably experienced difficulty in determining what dates to include in section 24 of the REPC on a short sale. It becomes difficult to determine these dates because it is almost impossible to know when the Third Party will approve the sale, if ever. With this in mind, this section of the addendum allows the Buyer and Seller to negotiate each deadline based upon a certain amount of time after Third Party Approval as it has been defined in section 2 of the Short Sale Addendum. For example, the Buyer and Seller will be able to negotiate the Settlement deadline to be “30 days after Third Party Approval” (i.e., Buyer’s and Seller’s receipt of written approval of the REPC by the Third Parties). However, in many circumstances, as part of the Third Party Approval process, even after the REPC deadlines have been initially negotiated, the lender will often require that the transaction close by a certain date. If this happens, the Buyer and Seller will need to amend the contract by including new deadlines in an effort to close the transaction in accordance with the lenders requests. The language in section 2 of the Short Sale

Addendum allows for the Buyer and Seller to re-negotiate these deadlines on an addendum to the REPC.

With this in mind, how should you fill out section 24 of the REPC when you make your initial offer to the Seller on a short sale? The answer is simple. In section 24 of the REPC, you should not include hard dates, but rather, include the phrase “See Attached Short Sale Addendum.” By doing this, you will have referred to the language in the Short Sale Addendum (i.e., Section 8) which spells out what the negotiated deadlines will be when the contract is signed. You will need to understand however, that these dates may need to be amended on an addendum based on the requirements of the lender as part of the Third Party Approval.

3. SECONDARY “BACK-UP” CONTRACT FOR SHORT SALE (UAR FORM 20A)

The final short sale form is called the *Back-Up Contract for Short Sale*. As you read above, once the Seller accepts an offer with the new Short Sale Addendum, the property is placed under contract subject to Third Party approval. Any subsequent offer(s) that comes in can only be accepted in back-up position. In order to accept a back-up contract in a short sale transaction, this new Back-Up Contract form must be used. It contains language that clarifies what the rights and obligations of the Seller and the back-up Buyer are. If the back-up contract is submitted to the Third Party, the back-up Buyer will be notified that this has happened. Whether or not the back-up offer is approved by the Third Party and how that approval occurs will be handled according to the language of the new Short Sale Addendum that will also be attached to the REPC along with the Back-Up Contract for Short Sale.

Short sale transactions can be complex and challenging. Although these three new forms don't have the answers to all the questions that might come up in a complicated short sale transaction, the hope of the UAR Forms Committee is that these forms will provide you with some guidance as you navigate through a short sale.

If you have any questions about these new forms, give me a call on the Legal Hotline on Monday, Wednesday or Friday at (801)676-5211 or take the 3 hour “Introduction to Forms” core class at your local board where we discuss these forms in more detail.