

2010-2011 UPDATE COURSE

SECTION ONE

REVISED OFFER TO PURCHASE AND CONTRACT

Outline
<u>Introduction</u>
<u>New Offer to Purchase and Contract Form 2-T</u>
<u>Paragraph 1: Terms and Definitions</u>
<u>Paragraph 2: Fixtures</u>
<u>Paragraph 3: Personal Property</u>
<u>Paragraph 4: Buyer's Due Diligence Process</u>
<u>Paragraph 5: Buyer Representations</u>
<u>Paragraph 6: Buyer Obligations</u>
<u>Paragraph 7: Seller Representations</u>
<u>Paragraph 8: Seller Obligations</u>
<u>Paragraphs 9-23 of the New Offer to Purchase</u>
<u>Miscellaneous Comments</u>

Learning Objective: Upon completing this Section, licensees should have a better understanding of the provisions of the new revised Offer to Purchase and Contract form typically utilized by most licensees in residential sales that will become effective January 1, 2011.

INTRODUCTION

As most licensees have heard by now, and as hinted in last year's Update in the section on "Due Diligence in Residential Transactions," the standard Offer to Purchase and Contract form designed for use in residential sales transactions has been revised. The anticipated *effective date is January 1, 2011*. The Joint Forms Task Force, comprised of members of the North Carolina Association of REALTORS® and lawyers from the Real Property Section of the North Carolina Bar Association, has been hard at work for more than eighteen months attempting to craft a form that eliminates many of the problem areas which fostered disputes. To that end, they sought to apply the "due diligence period" concept that has been in commercial sales contracts for several years to residential sales transactions.

Gone are Alternatives One and Two, the multiple dates for giving notice of and responding to repair requests, the limitations on the type of repairs a buyer may request, as well as several other provisions brokers are accustomed to seeing. While the new Standard Form 2-T looks quite different from the form to which brokers currently are accustomed, approximately sixty percent of the current language is still found in the new form, just in different places, i.e.,

reorganized. This Section will discuss the 2011 contract form paragraph by paragraph, breaking lengthier paragraphs into their component subsections. Section Two of these materials will present a hypothetical contract along with various fact situations to illustrate the application of the 2011 contract's provisions in various scenarios. The 2011 Standard Form 2-T is reprinted at the end of this Section One. The revised Guidelines for the new form had not been finalized as of September 2010 and thus are not included, but once approved, they may be found at www.ncrealtor.org under Consumer Information.

THE NEW OFFER TO PURCHASE & CONTRACT FORM 2-T

Recall that the Offer to Purchase form and related addenda are jointly authored by the North Carolina Association of REALTORS® and the North Carolina Bar Association, both of which are trade organizations, rather than state regulatory agencies. The applicable regulatory agencies are the North Carolina Real Estate Commission for real estate brokers and the North Carolina State Bar for lawyers. Licensing by the latter two is mandatory if one wishes to practice brokerage or law in North Carolina, whereas membership in a trade organization is voluntary. In other words, for brokerage purposes, all Realtors® are licensees, but not all licensees are Realtors®. Standard Form 2-T, and any other forms ending in “T” denote “transactional forms” all of which are jointly authored. *Only Realtor® members or non-members affiliated with a member-principal may use forms bearing the Realtor® logo.* Brokers who are not Realtor® members nor affiliated with a member-principal may only use the forms bearing the Bar Association logo, but not those with the Realtor® logo.

Paragraph 1: Terms and Definitions

Paragraph One contains fourteen subparagraphs and consumes the first two pages of the nine page form. It defines most, if not all, of the major terms used in the contract. Remember too that *whenever a term appears in the body of the contract and begins with capital letters that normally would not be capitalized, it indicates that the word or phrase is a “defined term” that usually will be found somewhere in Paragraph 1.* Occasionally, the term may be defined elsewhere in the form.

Names

Subparagraph (a) identifies the sellers and subparagraph (b) identifies the buyers. All parties should be identified by their current individual *legal* names, including full first and last names and at least the initial of their middle name, as well as any suffix, e.g., Jr, Sr, III, etc. Spouses may be identified as such, although it is not mandatory, i.e., Sally B. Wright and husband, Robert M. Wright. Entities should be identified by the complete legal name of the entity, e.g., Built4U, LLC, Smith Brothers, LLP, etc.

Property

The real property that is the subject of the transaction is first identified in subparagraph (c) by street address, city, county and zip code. Then all applicable legal descriptions available should be set out because street addresses are not always adequate as an enforceable description

for contract purposes. Additional references may include the plat book and page number, the deed book and page number, a PIN or PID number, or some other description sufficient to identify the parcel or tract in question. This subsection continues to contain the cautionary note that “Governmental authority over taxes, zoning, school districts, utilities and mail delivery may differ from address shown.”

Purchase Price

The total amount of the purchase price is stated on the first line in subparagraph (d), followed by lines on which to detail how much of that purchase price will be paid by each of the following: a due diligence fee, an initial earnest money deposit, an (additional) earnest money deposit, an assumption of seller’s existing loan, seller financing, a building deposit (for new construction), and the balance to be paid in cash at Settlement. Note that (additional) is in parentheses to address both the situation where there is an initial earnest money deposit *and* a subsequent deposit, as well as where there is no initial deposit, but a later deposit is expected. While time remains “of the essence” as to this subsequent deposit that is to be paid directly to the escrow agent as in the current contract, the new contract now specifies the *mode of payment*, namely: “...by cash or immediately available funds such as official bank check or wire transfer.” The initial earnest money deposit still may be paid in cash, by personal check, official bank check or other means at the time the offer is accepted.

The subparagraph expressly references the applicable addenda that should be completed and attached to the offer in the event loan assumption, seller financing or new construction is involved. It also states that in the event the buyer fails to deliver either the due diligence fee or *initial* earnest money deposit by the “Effective Date,” or if any other checks or funds paid by buyer are dishonored, then buyer shall have *one banking day* after written notice from seller to deliver good funds to the seller or seller has the right to unilaterally terminate the contract upon written notice to buyer.

Earnest Money Deposit

Subparagraph (e) provides that the term “earnest money deposit” includes any amounts listed in Paragraph 1(d) under either initial or additional deposits. It continues current practice to the extent that the monies are to be held by the named escrow agent and credited to buyer at closing unless the contract is otherwise terminated. If the offer is not accepted or a condition of the resulting contract is not satisfied, then the monies are to be *refunded* to the buyer. If the *seller breaches* the contract, not only is the total earnest money deposit to be refunded to the buyer, but the buyer also is entitled to reimbursement from the seller of his/her reasonable costs expended during the due diligence period and may pursue any other remedies s/he may have against the seller. If the *buyer breaches* the contract, then the earnest money deposit is to be paid to the seller upon the seller’s request as *liquidated damages* and is the *sole and exclusive remedy available to the seller* for buyer’s breach *except* for seller’s right to retain any due diligence fee and to seek compensation for any actual damage to the property caused by buyer or his/her agents.

What does this mean? It means if the seller *breaches*, i.e., cannot or will not convey marketable and insurable title or fails to fulfill other obligations imposed upon the seller, then the buyer may sue the seller, if necessary, for his actual out-of-pocket expenses for surveys or home

or pest inspections or other fees incurred in preparing to purchase the property or may sue the seller for specific performance of the contract, if appropriate, but the seller may not sue the buyer for specific performance or other damages if the buyer breaches. This is unequivocally stated in the concluding sentences of Par. 1(e), namely:

It is acknowledged by the parties that payment of the Earnest Money Deposit to Seller in the event of a breach of this Contract by Buyer is compensatory and not punitive, such amount being a reasonable estimation of the actual loss that Seller would incur as a result of such breach. The payment of the Earnest Money Deposit to Seller shall not constitute a penalty or forfeiture but actual compensation for Seller's anticipated loss, both parties acknowledging the difficulty determining Seller's actual damages for such breach.

Why this apparent disparity? The reasons are at least twofold:

1) Buyers typically must expend funds for inspections, fees, loan applications, appraisals, etc. in anticipation of purchasing the property and should be entitled to recover sums expended in good faith to move forward with the deal, whereas sellers are not as likely to incur such preliminary expenses. In most cases, a seller's damages are non-existent or inconsequential. Even if a seller makes repairs requested by a buyer who then fails to purchase, the seller still has the benefit of the improvements to the property s/he still owns.

2) Courts *rarely* grant sellers specific performance against buyers, but are more likely to grant buyers specific performance against sellers. Why? In part, because the buyer has lost something unique (the property) that may not be readily replaceable, but the seller has simply lost money. Moreover, to prevail in an action for specific performance the plaintiff must show that the defendant has the *present ability to do (perform) that which s/he agreed to do in the contract*. When attempting to compel a buyer to perform, there are too many variables that influence a buyer's ability that may not be within the buyer's control, e.g., ability to obtain a loan on the terms represented, or inability to qualify because the property is in a flood zone, or the appraisal comes back too low, etc.. As to the sellers' performance however, typically all that is required is the owners' signature(s) on the General Warranty Deed, which normally is within their ability and relatively easy.

Thus, because sellers typically have limited prospects for sustaining damages during the pendency of a contract if the buyer breaches and are unlikely to get specific performance, the 2011 form attempts to give sellers a more realistic understanding of the consequences of a breach by the buyer. Brokers representing sellers should be mindful that if the deal fails to close because the buyer fails to perform, the ***only monies the seller will receive are any sums paid as the due diligence fee and as earnest money deposits.*** Not only should *seller agents* be aware of this fact, but they *should attempt to ensure that the seller fully understands that whatever the seller agrees to accept as the due diligence fee and earnest money deposit will be the only compensation the seller receives if the buyer fails to consummate the transaction after the due diligence period has expired.* Thus, brokers should encourage their seller clients to carefully consider the amount of the due diligence fee and earnest money deposit(s) before accepting an offer and evaluate whether it would be enough to adequately compensate the seller in the event the buyer breaches the contract. Sellers should also keep in mind that if the buyer timely

exercises his/her right to terminate the contract, the only compensation the seller will retain is the due diligence fee.

Attorney Fees

Lastly, a new sentence was added expressly recognizing that if either party is compelled to sue the other for a determination of who is entitled to the earnest money deposit under the contract, then the prevailing party (i.e., the one who wins the lawsuit) “... *shall be entitled to recover from the non-prevailing party reasonable attorney fees and court costs incurred in connection with the proceeding.*” In most civil actions, each side must pay their own attorney fees absent special circumstances or statutory allowance and breach of contract typically is not one of those circumstances. In this instance, however, the right to recover attorney fees and costs is now expressly conferred by the parties’ contract. Hopefully, the threat of additional costs will help dissuade persons who clearly are not entitled to the earnest money deposit from refusing to consent to its release to the other party.

Escrow Agent

The escrow agent is to be identified by name in Paragraph 1(f). Typically this will be the name of a real estate company or a title company or an attorney. While an affiliated broker may sign on page 9 acknowledging receipt of the earnest money deposit on behalf of the company (if permitted by office policy), the trust account is not in the individual broker’s name, but rather the company’s name; thus, *the company* is the escrow agent. This subparagraph contains language currently found in Paragraph 4 of the 2008 form concerning the escrow agent’s duty to hold disputed funds pending agreement or court order and authorizing the escrow agent to deposit the funds in an interest-bearing trust account. Persons or entities serving as *escrow agents should not sign page 9 acknowledging receipt of the earnest money deposit if in fact they have not yet received it!* While this may seem obvious, it occasionally happens. When asked to produce the earnest money deposit, the agent cannot and claims it was never received, yet there is a document stating it was received.

Effective Date

The definition of “Effective Date” found in Paragraph 1(g) is not new — it’s just changed location. It also is consistent with basic contract law concepts in North Carolina. It remains: “The date that: (1) the last one of Buyer and Seller has signed or initialed this offer or the final counteroffer, if any, and (2) such signing or initialing is communicated to the party making the offer or counteroffer, as the case may be.” This concept will be more fully explored in Section Two, but brokers must understand that *until the last party’s signing has been communicated to the last offeror, there still is no contract.* The first question an agent should ask when told that “the parties now have a deal” should be “Has everyone *signed* the offer?” If the answer is “no, but they’re on their way in” or “they’re going to sign tomorrow when they are back in town,” *then there still is no contract.*

Oral assurances that everyone is in agreement are meaningless when it comes to the conveyance of real property as the Statute of Frauds requires contracts to convey real property to be *in writing* to be enforceable. *Any notions that oral negotiations of real estate sales contracts are binding or that a seller must complete negotiations with a buyer who has made a written offer before entertaining another offer are simply wrong.*

A listing agent was heard to comment that she and a buyer agent had been orally negotiating terms proposed in a written offer back and forth (with the consent of their respective principals) and had finally reached an “agreement” that still had to be reduced to writing and signed by the parties. In the interim, the seller had received an offer from a different buyer offering more money and more favorable terms that the seller was inclined to accept. The listing agent allegedly told the owner that the owner was not at liberty to accept the new offer as the listing agent had just concluded *orally negotiating* an agreement with the first buyer agent and that they now “had a deal.” The listing agent would have been grievously mistaken and may have been liable to her principal for misrepresentation and failing to act in a competent manner to protect the interests of her principal.

Due Diligence, Due Diligence Fee and Due Diligence Period

The next three subparagraphs, (h), (i) and (j), are all related and discuss the new due diligence standard which should not be foreign to brokers. It is very similar to the option fee and option period concept embodied in Alternative Two of the 2008 form. For the sake of clarity, these subparagraphs follow, reprinted in their entirety.

(h) “**Due Diligence**”: Buyer’s opportunity during the Due Diligence Period to investigate the Property and the transaction contemplated by this Contract, including but not necessarily limited to the matters described in Paragraph 4 below, to decide whether Buyer, in Buyer’s sole discretion, will proceed with or terminate the transaction.

(i) “**Due Diligence Fee**”: A negotiated amount, if any, paid by Buyer to Seller with this Contract for Buyer’s right to conduct Due Diligence during the Due Diligence Period. It shall be the property of Seller upon the Effective Date and shall be a credit to Buyer at Closing. The Due Diligence Fee shall be non-refundable except in the event of a material breach of this Contract by Seller, or if this Contract is terminated under Paragraph 8(l) or Paragraph 12, or as otherwise provided in any addendum hereto. Buyer and Seller each expressly waive any right that they may have to deny the right to conduct Due Diligence or to assert any defense as to the enforceability of this Contract based on the absence or alleged insufficiency of any Due Diligence Fee, it being the intent of the parties to create a legally binding contract for the purchase and sale of the Property without regard to the existence or amount of any Due Diligence Fee.

(j) “**Due Diligence Period**”: The period beginning on the Effective Date and extending through 5:00 p.m. on _____ **TIME BEING OF THE ESSENCE** with regard to said date.

As with Alternative Two, the due diligence fee (called an “option fee” in the 2008 form) is to be paid directly to the seller upon contract formation and generally is retained by the seller regardless of whether the transaction closes. If the transaction does close, then the amount of the due diligence fee is applied against the purchase price. However, unlike the 2008 form, the *2011 form expressly allows the buyer to receive a refund of the due diligence fee in two limited situations*, one being the seller’s breach of contract and inability or refusal to convey the property [Par. 8(l)] and the other being material damage or destruction of the improvements due to fire or other casualty [Par.12].

As with Alternative Two, *the amount of the fee and the length of the due diligence period is subject to negotiation by the parties prior to contract formation*. How much time or money is adequate is up to the parties to decide, who obviously may have different perspectives. Presumably a buyer will want to pay as little as possible for as long a period as possible, whereas a seller would prefer a larger fee for a shorter period. As indicated, it is up to the parties to negotiate.

Must a fee be paid? The express language in the first sentence of 1(i) defines a **due diligence fee** as “[a] negotiated amount, *if any...*” and the last sentence states that it is “... the intent of the parties to create *a legally binding contract* for the purchase and sale of the Property *without regard to the existence or amount of any Due Diligence Fee.*” [Italics added.] Thus, the contract form allows for the possibility that no fee will be paid. The latter provision was added to combat the concern of certain legal minds that the contract might be held by a court to be illusory where the buyer has the unilateral ability to terminate and walk away for any or no reason (“in the *buyer’s sole discretion*”), yet has not given the seller any consideration for that right. In order to protect against that argument, the safest course is to include a reasonable due diligence fee until such time as the issue is decided by a North Carolina appellate court.

The consequences of a buyer’s failure to give written notice to the seller by 5pm on the date stated in 1(j) that s/he is electing to terminate is addressed in Paragraph 4.

Settlement, Settlement Date and Closing

Paragraphs 1(k), (l), and (m) detail more precisely the distinction between a settlement meeting, when everyone gathers around a table and signs lots of papers, versus the actual closing. The 2008 form lumps the settlement conference in with closing, yet defines “closing” as “...the date and time of the recording of the deed.” The 2011 form defines “Settlement” as:

(k) The proper *execution and delivery to the settlement agent of all documents* necessary to complete the transaction contemplated by this Contract, including the deed, settlement statement, deed of trust and other loan or conveyance documents, *and the settlement agent’s receipt of all funds* necessary to complete such transaction. [Emphasis added.]

Under this standard, the parties may not physically meet at a settlement as long as each has provided the settlement agent with everything s/he needs to consummate the transaction. Closing is now defined in 1(m) as “The legal process which results in the transfer of title to the Property from Seller to Buyer.” It goes on to enumerate various steps that may precede the actual transfer of title, but the transfer of title, i.e., recording of the deed, remains the linchpin and it is only *after the recording of the deed and deed of trust that the settlement agent is authorized to disburse the funds s/he is holding*.

Special Assessments

Paragraph 1(n) defines a special assessment as a charge against the property by a governmental authority other than for taxes or by an owners’ association other than for dues which may become a lien upon the property. A “*proposed*” *special assessment* is one that is under formal consideration but has not been approved prior to Settlement, whereas a “*confirmed*” *special assessment* is one that *has been approved* prior to Settlement, even if

payable in installments that extend beyond the settlement date. Who pays what is addressed in later paragraphs which basically provide that the buyer takes the property subject to all disclosed proposed assessments and the seller pays all confirmed assessments, so long as the amount can be reasonably determined or estimated.

Paragraph 2: Fixtures

The language of the new fixtures paragraph is similar, but not identical, to the language in the 2008 form. The 2011 form expressly holds that the enumerated items “...are deemed fixtures and are included in the Purchase Price free of liens.” Added to the list in the 2008 form of what will convey as a fixture are the following:

- range/stove/oven (even if not “built-in”);
- carbon monoxide alarms;
- *attached* wall and/or door mirrors;
- landscape and/or foundation lighting; and, *contrary to the 2008 form,*
- “fuel tank(s) whether attached or buried and including contents, if any, as of Settlement.”

Any items in the lengthy list that either are leased or not owned by seller or that seller does not intend to convey must be specifically identified as exceptions. Further, the new language specifically requires the seller to repair any damage caused by the removal of any excepted items. What is meant by “attached wall and/or door mirrors”? Perhaps the Guidelines will help clarify this provision, but in the interim it is believed that what is intended are those mirrors reasonably affixed to doors and walls as opposed to those which are hung more like pictures or paintings.

Paragraph 3: Personal Property

Any personal property, other than fixtures as defined in Paragraph 2, that is to convey with the real property should be identified in Paragraph 3. Note that refrigerators still are not fixtures, since most are not built-in (although the stove/oven/range will convey as a fixture even if not built-in), so if the buyer wants the refrigerator, it needs to be specified in Paragraph 3. What about microwave ovens? If it is a “built-in appliance” then it would convey under Paragraph 2; if it sits on top of the counter, it would not. The new language specifically states that any personal property identified shall transfer to the buyer at Closing “at no value.” However, inclusion of personal property that is not usually conveyed with a house in a sales contract, even if stated to be at “no value,” generally creates significant issues for mortgage lenders and should be avoided unless approved by the lender. Items such as home appliances or window air conditioners or fans, even if not built-in, may not pose any problem for lenders. On the other hand, it appears that flat screen televisions, stereo home-theater sound equipment, lawn and garden equipment and similar items that do not typically convey with houses can be very problematic. The buyer is advised to consult with his/her lender to assure that the enumerated items can be included in the contract. If not, one could prepare a separate bill of sale for such items.

Paragraph 4: Buyer's Due Diligence Process

Paragraph 4 outlines many activities a buyer should perform prior to the expiration of the due diligence period, as once that period expires, the buyer loses the right to terminate for any or no reason and is bound by the contract terms. The list does not purport to be exhaustive, as a buyer is free to engage in any inquiries or investigations s/he wishes during the due diligence period. However, the mere expiration of the due diligence period does not guarantee that the transaction will actually close; if the buyer ultimately is unwilling or unable to close, then the seller will retain not only the due diligence fee, but all earnest money deposits paid, *which will be the seller's sole and exclusive remedy*. Note too that the due diligence period now replaces a number of specific conditions or contingencies previously found in the 2008 and predecessor forms that could excuse buyer's performance virtually up to the closing, e.g., appraisal condition, flood hazard condition.

Among the many items a prudent buyer will investigate are the following, all of which are listed in various subsections of Paragraph 4.

- **Financing.** If the buyer needs a loan to purchase the property, then s/he should actively pursue obtaining loan approval prior to and during the due diligence period, because if the buyer learns after the Due Diligence Period expires that s/he is not able to obtain a loan on whatever terms are stated in Paragraph 5, s/he still forfeits all earnest money deposits paid, if s/he fails to close. Understand that **there is no loan condition in the 2011 form**. In the 2008 form, the risk of not obtaining a loan shifts to the buyer once the agreed time for termination under Paragraph 5 has elapsed. This aspect of the due diligence process works in exactly the same manner. The buyer is advised to consult his/her lender prior to entering into any contract to assess how much time may be needed for an appraisal to be performed and for the lender to decide whether and on what terms it will extend a loan to the buyer. This time estimate should be considered in deciding upon an agreeable due diligence period. Buyers might make their offers more enticing by obtaining well-documented loan pre-approvals, thereby placing them in a better position to offer a shorter due diligence period.
- **Property Investigation.** Buyer, at his expense, “...*shall* be entitled to conduct all desired tests, surveys, appraisals, investigations, examinations and inspections of the Property *as Buyer deems appropriate*” [Italics added.] Buyer's right to investigate is both absolute and unrestricted; s/he has complete discretion to explore any matter related to the property s/he desires. Such matters may include, but are not limited to:
 - inspecting the condition of any improvements, whether there is excessive moisture affecting any improvement, or whether there are any unusual drainage conditions;
 - inspecting for the presence of asbestos or other environmental contamination or wood-destroying insects or damage therefrom, and testing for radon gas levels;
 - reviewing any and all relevant documents such as restrictive covenants and the bylaws, rules, regulations, articles of incorporation or other governing documents of any owners’

association or subdivision. Restrictive covenants or zoning restrictions may limit or prohibit a use of the property that buyers may want to have available, such as business uses, pets and other common uses. If the property is subject to an owners' association, the offer recommends that the buyer obtain and review the Owner Association addendum (Form 2A12-T) from the seller *prior to making an offer*.

- investigating the availability and cost of homeowner's/hazard insurance for the property;
 - having the property appraised. **Note that there is no appraisal condition in the 2011 form.** Whether the *appraisal* is initiated by the buyer or the buyer's lender, it *should be concluded before the due diligence period expires* to enable the buyer either to negotiate with the seller or terminate the contract before the expiration of the due diligence period if there is an issue with the appraisal.
 - having the property surveyed to determine whether there are any encroachments or easements or violations of set-back lines and to confirm access to a public right of way;
 - investigating current or proposed zoning or other governmental regulations that may affect the intended use of the property, adjacent land uses, planned or proposed roads, and school zones;
 - investigating potential flood hazards and whether flood insurance will be required by the lender. Again note that there is *no independent flood hazard disclosure/condition* in the 2011 form as there is in the 2008 form.
- **Repair Negotiations/Agreement:** This provision expressly recognizes that the parties may, but are not compelled to, negotiate any repair or remediation issues they wish. The buyer is free to request any such repairs or remediation and the seller may agree or decline. If the parties agree on certain repairs to be performed by the seller, such agreement should be reduced to writing, signed by both parties and dated, and will be considered an addition to the contract. Negotiated repairs are to be performed in a good and workmanlike manner and Buyer has the right to verify the adequacy of the repairs or remediation prior to Settlement.

Pursuant to other provisions in Paragraph 4, buyer is obligated to "promptly" repair any damage caused to the property by his/her agents and inspectors/contractors, other than damage resulting from accepted practices approved by the Home Inspector Board or other licensed professionals. Buyer shall indemnify, defend and hold the seller harmless from any claims, suits, loss, damage, or injury to person or property resulting from the activities of buyer or his agents or contractors *except* for any loss, damage, claim or suit arising from pre-existing property conditions or from seller's negligence or willful acts or omissions. The buyer's duty both to repair and to indemnify expressly survive the termination of the contract. Buyer also has the right to conduct a walk-through inspection prior to closing. (These three matters are found in Par.17 of the 2008 form.)

- **Buyer's Right to Terminate:** Lastly, the buyer's right to terminate is addressed in Paragraph 4(g) which is reprinted in its entirety below without any added emphasis.

(g) **Buyer's Right to Terminate:** Buyer shall have the right to terminate this Contract for any reason or no reason, by delivering to Seller written notice of termination (the "Termination Notice") during the Due Diligence Period (or any agreed-upon written extension of the Due Diligence Period), ***TIME BEING OF THE ESSENCE***. If Buyer timely delivers the Termination Notice, this Contract shall be terminated and the Earnest Money Deposit shall be refunded to Buyer.

(**WARNING:** If Buyer is not satisfied with the results or progress of Buyer's Due Diligence, Buyer should terminate this Contract, *prior to the expiration of the Due Diligence Period*, unless Buyer can obtain a written extension from Seller. SELLER IS NOT OBLIGATED TO GRANT AN EXTENSION. Buyer's failure to deliver a Termination Notice to Seller prior to the expiration of the Due Diligence Period shall constitute a waiver by Buyer of any right to terminate this Contract based on any matter relating to Buyer's Due Diligence.)

(**NOTE:** Following the Due Diligence Period, Buyer may still exercise a right to terminate this Contract for any other reason permitted under the terms of this Contract or North Carolina law.)

Buyer's right to unilaterally terminate the contract by ***timely delivering written notice of termination to the seller prior to the expiration of the due diligence period*** is analogous to the practice under Alternative Two. Delivery to the listing agent is deemed delivery to the seller under Paragraph 21. The *mailbox rule does not apply to delivery of this notice*; thus, depositing the notice into the US Mail at 4:00pm on the final date is insufficient; the buyer would remain bound under the contract. (Licensees should understand that the "mailbox rule" generally applies only to contract acceptance.)

"Delivery"

It is imperative that brokers understand that written notice of termination must be ***delivered*** to the seller/listing agent no later than 5:00pm on the date the due diligence period expires or the buyer will have lost the ability to unilaterally terminate the contract. If the buyer subsequently fails to close, then the seller would be entitled to the earnest money deposit. Acceptable modes of delivery are indicated on page 9 of the contract. If no contact information is provided for a party, then all notices must be given through the party's agent. If the agent provides his/her telephone number and office address, but no fax number or email address, then the only permissible delivery mode would be to either personally deliver written notice to the office or mail the notice several days prior to the expiration of the due diligence period so it is timely received. (Fact situation #6 in Section 2 discusses "delivery" in greater detail.)

As with the 2008 form, ***closing constitutes acceptance of the property in its then existing condition, absent other written agreement.***

Paragraph 5: Buyer Representations

In Paragraph 5(a) buyer discloses whether the buyer must obtain a new loan to purchase the property and, if so, the type and terms of that loan, e.g., fixed or adjustable rate, conventional or FHA/VA, interest rate, duration, etc. As previously noted, **this is not a loan condition** as in the 2008 and earlier forms. It is for informational purposes only and does not create any obligation to obtain any loan or a loan on the stated terms. Instead, the buyer's due diligence period is used to provide the protections for the buyer previously provided by a specific loan condition. The 2011 form cautions the seller, *prior to accepting the offer*, to request some verification or documentation of buyer's ability to purchase in the event the buyer represents that no financing will be required.

Buyer also discloses in 5(b) whether s/he must sell other property in order to qualify for a loan (and if so, then Form 2A2-T should be attached) and in 5(c) whether there are any other circumstances or conditions that would prevent buyer from fulfilling his/her financial obligations under the contract. If such circumstances or conditions exist, they should be specified. Such facts and circumstances, including bankruptcy proceedings involving the buyer, outstanding judgments against the buyer, or the necessary receipt of a gift, inheritance or other source of purchase funds have always been material facts that a buyer agent was obligated to disclose to a seller and this provision helps agents meet that obligation. Lastly, the buyer discloses in 5(d) whether s/he received a Residential Property Disclosure Statement from the seller prior to making the offer or whether the property is exempt from this requirement and why, which is identical to language found in Paragraph 15 of the 2008 form.

Understand that the *foregoing information is merely a representation or disclosure by the buyer to the seller of the buyer's plans or needs. The seller is entitled to rely upon these representations as being true and the buyer may be liable to the seller if the representations are inaccurate. Nonetheless, they are not conditions of the contract.* Thus, if the buyer cannot obtain a loan on the stated terms, s/he may not be able to consummate the transaction, but his/her performance is not excused and s/he is not entitled to a refund of any earnest money deposits *unless* s/he terminates the contract prior to the expiration of the due diligence period. In the 2008 form, the loan terms are in Paragraph 5 which is titled "Loan Condition." The fact that the buyer may need to sell a current home may be addressed in a Contingent Sale Addendum attached to the contract, but what that revised addendum may provide remains to be seen.

Paragraph 6: Buyer Obligations

Buyer is responsible for paying the following fees or expenses:

- Any fees due an owners' association for verifying account payments for dues or assessments and any transfer or document fees charged for the ownership transfer to buyer, as is the case under the 2008 form. Buyer is not responsible for any fees seller may incur for completing Standard Form 2A12-T, Owners' Association Disclosure and Addendum.
- All *Proposed* Special Assessments *disclosed by seller* in Paragraph 7(d).

- All costs associated with any loan buyer must obtain, as well as the costs for an appraisal, title search, title insurance, recording the deed, and preparation and recording of all instruments required to secure the balance of the purchase price unpaid at Settlement.

Paragraph 7: Seller Representations

This paragraph addresses various *disclosures* the seller is required to make under either federal or state law or representations that are critical to the financing or adequate evaluation of the property *other than* the requirement to provide the Residential Property Disclosure Statement, which is referenced only in Paragraph 5(d). In this section, Seller indicates:

- whether s/he has owned the property at least one year, less than one year, or does not yet own the property;
- whether the property is or is not the seller's primary residence;
- that there are no proposed special assessments *to the best of seller's knowledge* and seller *warrants* that there are no confirmed special assessments except as to those specifically listed; and
- whether ownership of the property subjects the buyer to regulation by an owners' association that may impose restrictions on the use of the property and payment of dues or special assessments.

The disclosure as to primary residence is included because as of January 1, 2010 state law now requires the Deed to state the name and mailing address of each grantor and grantee *and to state whether the property includes the primary residence of the grantor.* (G.S.§105-317.2) The inclusion of information regarding the grantor's duration of ownership resulted from loan underwriting guidelines designed to curtail mortgage fraud related to practices of "flipping" properties and may impact the buyer's ability to obtain a loan.

Note in the third bullet that the seller "warrants" that there are no *confirmed* assessments, but as to *proposed* assessments, seller merely states that there are none to the "best of seller's knowledge." The seller generally will be liable for all confirmed assessments, even if not disclosed, but usually the buyer takes the property subject to all *proposed* assessments. If the property is subject to regulation by an owners' association, then the 2011 form *requires* the seller to provide the buyer with a completed Owners' Association Disclosure and Addendum at seller's expense *prior to the Effective Date*, rather than merely recommending that the buyer obtain this addendum from the seller. This addendum should be referenced in Paragraph 15 and attached to any resulting contract.

As with the buyer's representations, if any of the seller's representations are inaccurate, the seller may be liable to the buyer for breach of contract, as the expectation is that the representations are accurate and that others may rely on that information. If the information later

turns out to be erroneous or false, then the person making the inaccurate statement may be held accountable. However, because the standard with proposed assessments is “to the best of seller’s knowledge,” a buyer most likely would have to show that the seller had or should have had actual knowledge of the proposed assessment and failed to disclose it in order to hold the seller liable for the buyer’s damages.

Paragraph 8: Seller Obligations

The seller’s various duties and obligations under the contract are detailed in the twelve subsections of Paragraph 8(a) through (l). Virtually all of these obligations or responsibilities are found in the 2008 Standard Form 2-T, but instead of being sprinkled throughout the form, they are all gathered in one paragraph in the 2011 form. Few, however, should be new to licensees. These seller obligations include the following:

(a) to deliver to buyer copies of all title information available to seller including title insurance policies, attorney’s title opinions, surveys, easements, covenants, deeds, notes and deeds of trust, and to authorize both seller’s prior closing attorney and the title insurance company to release any title information to buyer.

(b) to provide buyer reasonable access to the property, *including working, existing utilities*, through the earlier of closing or buyer’s possession.

(c) to remove all personal property not transferring to buyer and all garbage and debris from the premises.

(d) to provide an affidavit *and indemnification agreement* signed by the seller *and* any person or entity who has performed or furnished labor, services, materials or rental equipment to the property within 120 days prior to the Settlement Date verifying that the person or entity has been paid in full and agreeing to indemnify buyer, buyer’s lender and buyer’s title insurer from any loss arising from any claim related to the services or goods provided. This provision has been slightly expanded to account for the fact that title insurance companies sometimes require contractors, sub-contractors and vendors to waive lien rights as part of this affidavit and indemnification.

(e) to pay any and all deeds of trust or other liens against the property not assumed by buyer at closing and to promptly obtain cancellation of such liens or deeds of trust.

(f) to convey marketable and insurable title to the buyer by General Warranty Deed free from all encumbrances except ad valorem taxes (prorated), utility easements, and unviolated restrictive covenants that do not materially affect the value of the property. The property must have access to a public right of way.

(g) to pay for preparation of the General Warranty Deed and any State or County excise taxes.

(h) to pay a stated sum towards any of the buyer's expenses to purchase the property, if applicable. Such expenses may include discount points, fees for loan origination, appraisal, inspections, or attorneys, and "pre-pays" (taxes, insurance, owners' association dues, etc.), but are *not* limited to "qualified closing costs" as some have mistakenly assumed about similar language in past forms. However, mortgage lenders sometimes do impose restrictions on such payments, in which event the amount paid may need to be reduced at settlement in order for the buyer to obtain the loan.

(i) to pay all *confirmed* special assessments, so long as the amount can be reasonably determined or estimated.

(j) to pay all property tax late listing penalties.

(k) when applicable, to provide the buyer with a completed Owners' Association Disclosure and Addendum (Form 2A12-T) *on or before the Effective Date*.

(l) to refund to buyer all earnest money deposits *and due diligence fee and reimburse the buyer for reasonable costs actually incurred in connection with his/her due diligence* in the event seller fails to materially comply with any of the aforementioned obligations or materially breaches the agreement **and** buyer elects to terminate as a result of such failure or breach.

Comments:

Again, most of the foregoing seller obligations are contained in the July 2008 version of the Offer to Purchase & Contract form and thus are not new. The obligation to pay all property tax late listing penalties previously implicit, is now explicit, as is the affirmative duty to provide the buyer with a completed Owners' Association Disclosure and Addendum form prior to or at contract formation. Previously it was merely recommended that buyers request and obtain that Addendum; the 2011 form imposes a duty on the seller to voluntarily provide it.

Waiver of Lien Affidavit

Settlement agents (attorneys) routinely require an affidavit from the seller to the effect that there are no unpaid bills for labor or goods furnished to the property within the preceding four to six months to avoid the possibility of a mechanic or materialmen's lien being filed post-closing that would have priority over the buyer's deed of trust to his/her lender. Such liens may not be discovered in a pre-closing title search because they may be filed up to 120 days after the final date on which services or goods were provided, yet the lien relates back to the date on which services or goods first were provided and thus takes ahead of the buyer's mortgage lender's lien. Thus, Par. 8(d) imposes on the seller the obligation to provide such lien affidavits previously required under Paragraph 14 of the 2008 contract form.

Seller's Breach

The 2008 form provides that in the event of a breach by seller all earnest money deposits should be refunded to the buyer, but the seller retains the "option fee" if Alternative Two is used. The 2011 form clearly states that *in the event of seller's breach or failure to materially perform any of his/her obligations, both the due diligence fee and earnest money deposit are to be*

refunded to the buyer in the event buyer chooses to terminate the contract because of seller's breach. Additionally, the seller is obligated under the contract to *reimburse the buyer for reasonable costs* the buyer incurred in preparing to move forward with the purchase. What costs are "reasonable" remains to be seen, but most likely would at least include expenses reasonably incurred for any of the buyer's due diligence or loan application. While these expenses probably have always been an element of compensation to which a buyer was entitled as damages in the event of seller's breach, the 2011 form for the first time contractually confirms this entitlement and requires payment by the seller. While the seller is obligated under the contract to pay these expenses, should s/he fail to do so voluntarily, the buyer still may have to sue the seller to enforce this provision.

Short Sales

The 2011 Form 2-T also includes a cautionary note under 8(f) suggesting that if the seller is in a short sale situation, s/he should seriously consider attaching the Short Sale Addendum form (**Std Form 2A14-T**) devised by the Joint Forms Task Force. Without the addendum, the seller is destined for failure as s/he will not be able to convey marketable and insurable title free from all encumbrances *without the lender's consent*, and thus will be in breach of contract, requiring not only the return of the due diligence fee and earnest money deposits to the buyer, but paying the buyer's reasonable costs incurred as well. Understand that ***the parties are under contract as soon as all parties have signed the document***; the lender is not a party to the contract, but its consent becomes a *condition* of the contract that may excuse performance *only if the short sale addendum or similar language is included in or attached to the contract*.

Paragraphs 9 through 23 of the New Offer to Purchase

The remaining paragraphs of the 2011 Offer to Purchase form on pages 7 and 8 are basically the same as in the July 2008 Offer to Purchase form with one exception, namely, *Paragraph 13 - "Delay in Settlement/Closing" has been revised* and special attention should be paid to that paragraph. However, most of the remaining paragraphs will be summarized briefly here, as licensees should already be familiar with their content.

Paragraph 9: Prorations and Adjustments. Unless otherwise agreed, ad valorem real property taxes, any rental income generated by the property and any regular owners' association dues are to be prorated between the parties *as of the date of settlement*. The seller is responsible for all ad valorem personal property taxes due for the entire year, but unpaid as of settlement, unless the personal property is conveyed to the buyer, in which event the taxes should be prorated on a calendar year basis.

Paragraph 10: Home Warranty. If a home warranty is to be provided, the parties are to indicate whether the buyer is to purchase it and the seller will pay for it at settlement or whether the seller chooses the policy and provider and pays for it at settlement.

Paragraph 11: Condition of Property at Closing. "The property must be in substantially the same or better condition at Closing as on the date of this offer, reasonable wear and tear excepted."

Paragraph 12: Risk of Loss. Seller bears the risk of any damage or destruction to the property by fire or other casualty until Closing. If the improvements are destroyed or materially damaged, buyer has the option to terminate the contract and receive a refund of both the due diligence fee and earnest money deposit or buyer may choose to continue with the purchase, in which event buyer is entitled to receive the insurance proceeds paid by seller's insurer. Seller is cautioned not to cancel any property insurance until after the General Warranty Deed has actually been recorded.

NOTE that both Paragraph 11 and 12 survive the expiration of buyer's due diligence period and remain binding through the date of Closing.

Paragraph 13: Delay in Settlement/Closing. This paragraph in the 2011 form has changed considerably from the provisions that have been in effect since July 2007. Gone is the up to 30 day delay with interest to be paid for days 11-30, apparently because people didn't understand how it worked and the interest purportedly due often was not paid or was prohibited by the lender.

Instead, as of January 1, 2011, if a party is not prepared to proceed on the Settlement Date, but intends to proceed with the transaction and is acting in good faith and with reasonable diligence to that end (Delaying Party), and the other party is ready, willing and able to complete the transaction on the stated Settlement Date (Non-Delaying Party), then the Delaying Party is to give as much advance notice as possible of his/her inability to proceed to both the Non-Delaying Party and the settlement agent and may have up to fourteen (14) days from the stated Settlement Date within which to complete the transaction.

If the parties do not agree *in writing* to an additional extension of the Settlement Date and have not completed settlement within fourteen days of the last stated Settlement Date, then the Delaying Party shall be in breach and the Non-Delaying Party may terminate the contract at his/her election and will be entitled to whatever remedy is provided under the contract. If the Non-Delaying Party is the seller, s/he is entitled to both the due diligence fee and any earnest money deposit paid. If the Non-Delaying Party is the buyer, s/he is entitled to a refund of both the due diligence fee and any earnest money deposits paid, as well as reimbursement of his/her reasonable costs incurred during the due diligence period as previously discussed in the Comments regarding seller's obligations. No other fee, charge or interest is payable on account of the period of delay.

Paragraph 14: Possession. As with current practice, possession is to be delivered upon Closing and if that cannot be accomplished, then either a Buyer Possession Before Closing or Seller Possession After Closing agreement, as may be applicable, should be completed and will become an addition to the contract.

Paragraph 15: Other Provisions and Conditions. If any addenda are used in the transaction, they are to be indicated in this paragraph so someone reviewing the contract would know that there are supplemental provisions governing the transaction beyond those provisions stated in the nine-page Offer to Purchase form. Most of the standard addenda are referenced in

the preprinted language, except for the two agreements mentioned in the preceding paragraph on “Possession.” If any other addenda are used, they should be indicated on the “Other” line. It should be carefully noted that *all addenda to the Offer to Purchase or any ancillary agreements* the parties may enter into, such as a repair agreement, *are a part of the contract and must be provided to the buyer’s lender and to the settlement agent or attorney.*

Paragraph 16: Assignments. The contract can not be assigned without the written consent of all parties, unless the assignment is in connection with a tax-deferred exchange. If the contract is assigned, its terms bind the assignee and his/her heirs.

Paragraph 17: Tax-Deferred Exchange. The parties agree to cooperate with each other and to execute whatever other documents may be required in the event either party is attempting to accomplish a tax-deferred exchange, but the non-exchanging party assumes no additional liability and any additional costs associated with the exchange are to be paid by the exchanging party.

Paragraph 18: Parties. The contract binds and inures to the benefit of the seller and buyer and their respective heirs, successors and assigns.

Paragraph 19: Survival. Any provision which by its nature is to be observed, kept or performed after Closing, shall survive the Closing and shall continue to bind the parties until fully performed. An example would be the seller’s obligation to ensure that all liens against the property are satisfied.

Paragraph 20: Entire Agreement. Provides that the parties’ agreement is as stated in the contract, along with any referenced addenda, and that there are no conditions, representations or terms other than those expressed in the agreement. Any changes, additions or deletions must be in writing and signed by all parties.

Paragraph 21: Notice. Provides that any notice or communication required to be given to either party may be given to the party or the party’s agent by sending or transmitting it to a mailing or email address or fax number provided in the “Notice Information” section on the last page of the form. If a fax number or email address is not provided, then that is not an acceptable or approved method for delivering notices, even if the brokers have exchanged emails during the pendency of the transaction. The Notice Information section is not a material part of the contract and changes made in that section do not alter any other terms of an offer or contract and do not constitute a rejection or counteroffer.

It should also be noted that the Individual Selling Agent and Individual Listing Agent Notice Information now allow for specifying whether the agent is acting as a designated dual agent. If utilized and included as part of the first offer, this should satisfy the obligation to identify the designated agents for each party no later than presentation of the first offer to purchase or sell pursuant to Commission Rule A.0104(m).

Paragraph 22: Execution. While the contract *may* be signed in multiple originals or counterparts, taken together it still constitutes one contract. Thus, both parties may sign the same piece of paper once and multiple copies are made, or both may physically sign four duplicate

originals, or other combinations may occur. Technically, now that “counterparts” are recognized, all parties no longer need to sign the same piece of paper. So long as the content of all the documents is identical, the sellers could sign one piece of paper and the buyers another, or with multiple sellers, each may sign a separate piece of paper with the buyers signing yet another, but so long as everything else in all the documents is identical, they will all be construed together as forming one contract.

Paragraph 23: Computation of Days. This paragraph continues the practice of the last several years by providing that the term “*days*” refers to ***calendar days*** with no exceptions for weekends or holidays, and that day 1 begins on the day following the day on which any act or notice was required to be performed or made. An example of this concept will be given in Section 2 of these materials.

The 2011 form concludes with lines for each party’s signature as well as the date on which s/he signs. Page 9 contains the Notice Information for both parties and their respective agents, as well as lines for the escrow agent’s signature and date.

MISCELLANEOUS COMMENTS

Undoubtedly the new Offer to Purchase form will result in some changes in the way residential sales transactions are conducted, yet the consequences of the 2011 form may not be as profound as some fear. There has never been any guarantee under any previous version of the contract form that any given transaction would actually close. In some situations where the buyer did not close, the seller was entitled to receive the earnest money deposit; in other situations where the buyer could not close, his/her performance may have been excused because of the failure to satisfy some condition, in which case the seller often received nothing, as the buyer would be entitled to a return of the earnest money deposit. Under the 2011 form, a seller may at least insist on receiving some consideration in the form of a due diligence fee that s/he will retain regardless of what happens, unless the transaction fails to close because of the seller’s breach. Further, if the Due Diligence Period expires before the Settlement Date, as will usually be the case, then the risk of situations arising that prevent the buyer from completing the transaction will have shifted to the buyer, and the buyer generally will lose the amount paid as the earnest money deposit, in addition to the due diligence fee, which is always retained by the seller *except* in the case of seller’s breach.

While the buyer initially will have the ability to unilaterally terminate the contract for any or no reason, that opportunity only exists for a specified period of time after the expiration of which the buyer is then bound by the terms of the contract. If the buyer later defaults, whether intentionally or for reasons beyond the control of the buyer, the seller will be entitled to both the due diligence fee and the earnest money deposit, *but nothing else*. Remember, ***the seller’s exclusive remedy for buyer’s breach will be whatever sums seller agreed to accept as the due diligence fee and earnest money deposit***. The seller is precluded by the terms of the contract from suing the buyer for any other relief (except for damage to the property caused by the buyer or his/her agents or indemnification for any claims arising from the buyer’s actions or those of

his/her agents) because sellers' "damages" are usually inconsequential and specific performance is not available to them.

Buyers should carefully and realistically evaluate how much time they think they will need to conduct their due diligence, *including obtaining any requisite financing and appraisals*, not to mention all other desired inspections and still allow themselves sufficient time to negotiate with the seller, if desired, any issues arising from these inspections, as once the due diligence period expires, the buyer will forfeit any due diligence fee and earnest money deposits paid if s/he fails to consummate the transaction. It would seem that a buyer who requests only a short due diligence period may be setting himself or herself up for failure, unless it is a cash sale or financing is already secured and the buyer has people ready to perform the desired inspections within a few days after contract formation.

These and many more issues will arise as the market adjusts to the 2011 form. Note that ***there will be no transition or grace period with the new form.*** Once the 2011 form becomes effective, the 2008 form no longer should be used. Some questions may not yet have answers and the revisions to the various addenda and Guidelines will be a work in progress throughout the Fall of 2010. Brokers may want to consider taking additional educational courses on the 2011 form in the November 2010 to March/April 2011 time frame and certainly will want to obtain copies of the revised Guidelines and addenda when they are available.