

2011

Bank Of America Short Sale Addendum & Realtor/Broker Listing Agreement Certification

Annotated Versions

This is an annotated version of the new BOA Short Sale Addendum by the Nash Law Firm, PLLC. This is not intended as legal advice. You should consult with a real estate attorney to determine how this Addendum impacts you and as to how you should modify your procedures if deemed necessary.



New Bank of America Short Sale Documents

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Short Sale Purchase Contract Addendum

Dated: _____ Bank of America 1# Loan# _____ Bank of America 2nd
Loan# _____

Seller: _____ Buyer: _____

Seller: _____ Buyer: _____

Seller: _____ Buyer: _____

Seller: _____ Buyer: _____

This Addendum to Purchase Contract is entered into and is effective as of ___/___/___ by and between, Seller(s), Buyer(s) Seller (s) Broker/Agent and Buyer(s) Broker/Agent (hereinafter referred to as “the Parties” and shall be deemed to amend, modify and supplement that certain Contract Dated ___/___/___ by and between Seller(s) and Buyer (s) (the “Purchase Contract”).

This Addendum makes Brokers parties to the Purchase Agreement

This Addendum amends the terms of the purchase agreement.

NOW, THEREFORE, in consideration of the mutual benefits to be delivered from this Short Sale Contract Addendum and of the representations, warranties, conditions and promises hereinafter acknowledged, Sellers, Buyers and Broker hereby agree as follows:

1. The Parties acknowledge and agree that the Subject property is being sold “**as is**” condition.
2. The Parties acknowledge and agree that the Seller may cancel this agreement prior to the ending date of the contract period without advanced notice to the broker, and may cancel this agreement prior to the ending date of the contract period without advanced notice to the broker, and without payment of a commission of any other consideration, if the property is conveyed via foreclosure to the mortgage insurer or the mortgage holder.

Are buyers going to accept additional uncertainty in a short sale transaction?

This clause is vague – what do they mean by “contract period” and “conveyed via foreclosure”? Is the contract period referring to the listing and buyers’ broker agreement or the purchase agreement? Does “conveyed via foreclosure” refer to a deed-in-lieu or the completion of the foreclosure?

3. The Parties acknowledge and agree that the Subject Property must be sold through an “Arms Length” Transaction. Arm’s Length means (1) two unrelated parties characterized by (2) selling price and other terms and conditions that would prevail in a typical real estate sales transaction. No party to this contract is a (3) family member, (4) related by blood or marriage, (5) business associate, or (6) shares a business interest with the mortgagor (Sellers).

Do brokers always know if buyers and sellers have some type of relationship? Should brokers require representations regarding this issue from the seller(s) and Buyer(s)?

What is considered a “typical real estate transaction”? Short sale transactions? Non-short sale transactions? REO’s?

4. The Parties acknowledge and agree that the Buyers, or Sellers, nor their respective Brokers/Agents have any agreements written or oral that will permit the Seller or the Seller's family member to remain on the property as renters or regain ownership of said property at any time after the execution of the Short Sale transaction. This includes if the seller is retaining a direct or indirect ownership or possessory interest in the property, and/or have a formal or informal option to obtain such as interest in the future.

Similar to clause 3 – are the brokers always aware of such agreements? Do brokers need written representations from seller(s) and Buyer(s) with respect to this issue?

5. Seller agrees to vacate the subject property within _____ days PRIOR TO closing of the transaction OR Seller agrees to vacate the subject property within _____ days PRIOR TO closing subject to terms as shown on the purchase contract.
6. The Parties acknowledge and agree that none of the parties shall receive any proceeds from this transaction except approved sales commissions.

This clause would prohibit an owner/agent from receiving an undisclosed commission or referral fee. Arguably would prohibit an agent who has an ownership interest in a company from receiving money for services provided by that company in the short sale transaction.

7. The Parties acknowledge and agree that the purchase contract cannot have any provisions for Assignment/Assignee and/or Option to purchase. Bank of America will NOT approve any transactions with these sales contract provisions and any such provisions are expressly deemed unapproved.
8. Buyer agrees that property cannot be sold or otherwise transferred within 30 days of closing; Or 90 days if transaction is approved under the Home Affordable Foreclosure Alternatives program (HAFA).
9. The Parties acknowledge and agree that the upon Bank of America's request the Parties shall provide all material documents involved in the short payoff transaction, including but not limited to, the Buyer(s') and Seller(s') HUD-1 Settlement Statements.
10. The Parties acknowledge and agree that this Short Sale transaction will not constitute appraisal fraud, flipping, identify theft and/or straw buying.

What duty does this create for Brokers/Agents to discover fraud, flipping, etc.? Since there generally not an appraisal ordered in connection with a short sale, what would constitute "appraisal fraud"? Should brokers require written representations from seller(s) and Buyer (s) with respect to this issue?

11. The Parties acknowledge and agree that any (1) misrepresentation or deliberate omission of fact that would (2) induce the (3) Bank of America, Investor or a Mortgage Insurer (4) to agree to the terms of a short payoff which would not have been approved had all facts been known, constitutes Short Sale Fraud and may subject the responsible Party to civil and/or criminal liability.

This clause creates a duty for the sellers' and buyers' brokers to disclose all facts to Bank of America that BOA, the investor or mortgage insurer need to approve a short sale.

- The first concern is how do the brokers know what BOA, the investors or mortgage insurer deem material to their decision?
- The second concern is that in almost all short sales the buyers' broker does not deal with BOA, the investors or mortgage insurer and in many cases neither does the sellers' broker. The third concern is that in many transactions it is not known if there is a mortgage insurer or investors or who they are or how they could be contacted.
- Finally, and most importantly, this duty directly conflicts with the each brokers fiduciary duty to their clients. Quite simply, the interests of the seller and buyer are not the same as BOA's, the investors or mortgage insurers!

If the buyer is willing to pay more for the property does the buyers' broker disclose this fact to BOA? Under this clause, disclosure would be required.

If the seller is will to contribute cash to get the short sale approval, does the sellers' broker disclose this fact to BOA? Under this clause, disclosure would be required.

12. The Parties acknowledge and agree that this Addendum together with the Sales Contract shall constitute the entire and sole agreement between the Parties with respect to the Sale of the Subject property and supersede any prior agreements, negotiations, understandings, optional contracts, or other matter=s whether oral or written, with respect to the subject matter hereof. To the extent that any term or condition contained within the Short Sale Contract is contradictory or inconsistent with this Addendum, the Parties agree that this Addendum shall supersede. No alterations, modifications, or waiver of any provision hereof shall be valid unless in writing and signed by Parties, FHA, VA, government agencies, any investor, and/or mortgage holder, hereto.

This Addendum and the purchase agreement supersede any prior agreements or negotiation whether written or oral.

If any terms of Addendum conflict with Purchase Agreement, The Addendum terms control.

This Addendum and Purchase Agreement cannot be modified, or amended unless in writing and signed by Parties and the FHA, VA government agencies, investor and/or mortgage holder. This basically means that it will be impossible to amend the agreement even if for something as simple as extending the closing date.

IN WITNESS WHEREOF, the parties hereby have acknowledged the terms and contained in the Addendum as evidenced by the signatures appearing below.

Seller: _____

Buyer: _____

Seller: _____

Buyer: _____

Seller: _____

Buyer: _____

Seller: _____

Buyer: _____

Realtor / Broker Listing Agent Certification

Subject to and including the terms and condition contained in the attached Short Sale Purchase Contract Addendum seller(s') Broker/Real Estate agent _____ and Buyer ('s') Broker/Real Estate Agent _____ (hereinafter referred to as "Brokers") further acknowledge and agree as follows:

1. Brokers' hereby acknowledged and agree that Bank of America is not the property seller, but only the mortgage lien holder (s) or alternatively Servicer acting on behalf of the lien holder, accepting less that the balance owed to facilitate the Short Sale purchase transaction of above said property as an alternative to foreclosure. Bank of America is in no way responsible for Listing or Buyer Realtor / Broker sales commissions, since that is the sole responsibility of the property seller under the terms of the listing agreement.

This clause is vague. BOA would not pay the commission but does this mean that they will not approve the payment of the commission in a short sale transaction? If so, this clause would kill the short sale market.

2. Brokers hereby acknowledge and agree that Brokers are actively licensed and in good standing by the appropriate authority within the State that the property is listed for sale, or licensed Attorney in good standing in the State where the property is listed for sale.
3. Seller's Broker acknowledge and agree that the subject property has been listed on the Multiple Listing Service at fair market value to provide open market competitive bids to present to seller as per the terms of seller / agent listing agreement and that the marketing is in fact and "in spirit" seeking to maximize the selling price of the property.

Does this create a duty to BOA that the Selling Broker will get the highest price? What if seller wants to accept offer but the Selling Broker believes that they might get a higher offer? What if the period of redemption is close to expiring and the seller can't wait for another possible offer?

4. Seller's Broker acknowledge that Seller has been presented with all offers to purchase home from this open market listing, and seller has selected the buyer of said transaction at the sales price terms disclosed and agreed to within the purchase contract.

Can the Seller chose a lower offer because the other terms are better?

5. Brokers' acknowledge and agree that there are no agreements, understandings of contracts relating to the current sale or subsequent sale that have not been disclosed to property seller and Bank of America as the mortgage lien holder or Servicer on behalf of the Lien holder.

Violates Brokers fiduciary duty to their clients. Brokers/Agents cannot disclose the agreements and understandings they have with their clients.

6. Brokers' acknowledge and agree that Seller, Buyer or Brokers have not received, nor will receive directly or indirectly any form of compensation outside the official terms of closing as presented in the purchase contract and what will be presented in the preliminary and certified HUD-1 closing settlement statement.

Any compensation received by the brokers/agents, even to related entities, would be required to be disclosed and approved. In other words, BOA would have to know that the Broker is indirectly receiving compensation.

7. Brokers' acknowledge and agree that they have disclosed to Bank of America any relationship to the buyer or ownership interest in the buyer's company, or represents that Listing Realtor/Broker has no existing business relationship with buyer.

If a broker/agent had represented a buyer previously does this has to be disclosed? It would appear so. What constitutes "relationship"? What if you go to the same church? Golf each week with the buyer or a relative of the buyer? What if you both are in the Chamber of Commerce or another similar group? Quite often, clients come from existing relationships where do you draw the line?

8. Brokers' acknowledge and agree that there are no Dual Representation. Dual Representation is defined as a single agent representing both the Buyer and the Seller in the transaction giving rise to the underlying Purchase Contract.

This clause prohibits dual agency in a BOA short sale. This would prohibit the selling broker from selling the property to any buyer also represented by that Broker. This could cause a significant problem for larger brokerages.

Do the Brokers need to revise their listing and buyer broker agreements to disclose the limitations on their representations when a short sale property is subject to a BOA mortgage?

9. Brokers acknowledge and agree that any misrepresentation or omission may subject the responsible Party to civil and/or criminal liability.

Misrepresentation or omission to whom? BOA? If so, this will violate the Brokers fiduciary duty to their clients?

Listing Broker/Realtor Agent:_____

Buyer('s')Broker/Realtor Agent_____

State License Number:_____

State License Number:_____

Date:_____

Date:_____