

Questions and Answers on the APA: ADDENDUM TO THE PURCHASE AGREEMENT

Q Why use the Addendum to the Purchase Agreement (APA)?

A The Risk Management Committee (comprised of brokers and lawyers in the larger San Diego area) have learned from experience that some additional provisions that supplement and/or amend the C.A.R. forms have proven extremely useful in safeguarding the interests of buyers, sellers and real estate agents, as well as useful in assisting a smoother completion of a purchase-sale transaction. Each of the provisions is designed to protect the interests of the parties and promote the integrity of the transaction. For example, with the Addendum, the buyer will often gain important additional information about the property by reading the Seller's Additional Disclosures—information that is not required in the C.A.R. forms (see paragraph 1). Similarly, the seller will be able to quickly catch any problem with the buyer's loan (see paragraph 5).

Q Why require Seller's Additional Disclosures (Paragraph 1)?

A Experience and court case opinions have decided that the disclosures that the seller must make pursuant to the Transfer Disclosure Statement form often fall short of disclosing all that a buyer is entitled to know and/or that a seller must disclose. The Seller's Additional Disclosures form (SAD) forces the seller to think about and disclose matters that might otherwise have been overlooked or forgotten. Each of the items in the SAD covers matters that have been sources of litigation against sellers. The form serves to alert sellers to these matters, and assist the seller in avoiding later allegations of non-disclosure.

This paragraph now makes it mandatory to have the Seller's Additional Disclosures as part of the purchase agreement. The paragraph follows the time lines of the Residential Purchase Agreement (RPA-CA) for other disclosures or documents that the seller is to provide, and follows the RPA provisions regarding a Notice To Perform if the SAD is not provided.

Q Why the "Continuation Of Escrow," and how does it work (Paragraph 2)?

A This paragraph is included to address two common occurrences or problems:

- Unfortunately not all escrows close on the designated and scheduled closing date, and often without fault of either party; and
- Courts are reluctant to enforce a "time is of the essence" clause unless it was separately and clearly negotiated.

The RPA-CA does not require a Notice to Perform regarding closing dates. However, judges who decide disputes between sellers and buyers often do not enforce the "time is of the essence" provision clause in the RPA-CA. More typically, the court will allow a party, usually the buyer, a reasonable time (whatever that is) to overcome a problem so that the party may close escrow. These results have left an uncertainty as to what courts will do in such situations. The "Notice To Close Escrow" serves to do what courts do, but add certainty as to how much additional time is to be allowed, thus avoiding unnecessary and costly litigation. This paragraph has been widely accepted by courts over the years.

The Addendum follows the essence of the other provisions of the RPA by providing that before either party may cancel the agreement, that party must first deliver the non-performing party a "Notice to Perform" (in this case the notice to perform would require the non-closing party to close escrow).

The paragraph also makes it clear that if a party is in breach of contract by closing late, neither party is waiving any rights to damages for the "late" closing.

Q What is the purpose of the third paragraph, "Financial Interests"?

A This paragraph was included to serve as a reminder that the real estate broker must disclose a financial interest in any RESPA service providers. Under RESPA guidelines, the mere disclosure of an interest may be insufficient. It may require an explanation of the service and applicable rates for such service providers. The Addendum specifically included the box to be checked if the broker has a more extensive affiliated business disclosure.

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Q What does the fourth paragraph, “Licensing and Relationship Disclosures,” do?

A Buyers and sellers are entitled by law to be told if the other party is a licensed agent, or if an agent is related to a party by blood or marriage. This paragraph serves as a reminder and provides the real estate agents a place to make these disclosures.

Q What is the meaning of the fifth paragraph, “Loan Progress”?

A This paragraph only applies if the contract contains a financing contingency. The purpose of the paragraph is to allow the seller to be informed about the status of the buyer’s financing. This language can be a powerful tool for the seller’s agent when there are questions about the buyer’s ability to qualify for financing. Also, buyers and their agents are required to provide prompt information if the buyer changes lenders or loan programs.

Q What is the purpose of paragraph six, “Seller’s Right to Terminate in a Short Pay” or “Short Sale”?

A This paragraph addresses the problem that a seller (and therefore the selling agent) can get into on a “short pay” or “short sell” transaction. The Purchase Agreement Addendum (PAA) to the RPA addresses the

matter, but it does not provide adequate protection to a seller. A short pay often carries with it serious income tax consequences to a seller. Although the PAA advises the seller to seek advice prior to entering into the agreement, it fails to recognize that sellers often have not received such counseling until after the agreement has been entered into. This paragraph provides the seller a right to cancel the agreement upon advice of appropriate professional advice within seven (7) days after acceptance.

Q What does Paragraph 7, “Seller Financing Disclosure,” do?

A Sellers take various risks whenever they carry back financing on the property being sold. This paragraph is an attempt to notify sellers of some of the risks and urge them to investigate those risks through an attorney.

Q What about Paragraph 8, “Signatures and Power of Attorney”?

A Without a properly executed power of attorney, agents do not have authority to sign documents for their clients. This paragraph makes it a contract provision that agents can’t sign for their principals unless specifically authorized to do so in writing.



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