Making Improvements

Midyear Changes to the 2020 GAR Forms

The GAR Forms Committee continues its work in revising and improving its forms. Let's take a closer look at the mid-year changes that were made.

1. THE EXCLUSIVE SELLER LISTING AGREEMENT (GAR FORM F101).

The GAR Forms Committee modified its Exclusive Seller Listing Agreement to comply with NAR's MLS Clear Cooperation Policy 8.0, which tries to ensure that all members of a multiple listing service (MLS) have equal access to all listings in the MLS.

The new language requires all listing agreements to be filed in the applicable multiple listing service within one business day of the listing broker commencing marketing of the property to the public. Marketing is defined very broadly to include flyers displayed in windows, yard signs (including "Coming Soon" signs), digital marketing on public-facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage sharing networks and applications available to the general public. It does not require that the property be listed if all the broker or agent is doing is verbally making other agents in the office aware of the property. However, it would be required to be listed if the broker or an agent sends email blasts out about the property.

2. SPECIAL STIPULATIONS EXHIBIT (GAR FORM F246).

The Special Stipulations Exhibit was revised to make it applicable to all types of agreements between the parties. Previously, the exhibit was only applicable to the GAR Purchase and Sale Agreement (GAR Form F201). This change should give REALTORS® greater flexibility to modify all the agreements they use in real estate transactions.

3. LEAD-BASED PAINT EXHIBIT (GAR FORM F316).

The Lead-Based Paint Exhibit was revised to first clarify that the exhibit should be filled out by the buyer and seller prior to the binding agreement date and by the landlord and tenant prior to the commencement of the lease. The new boldface disclosure is as follows:

> **UNDER FEDERAL LAW, THIS EXHIBIT MUST BE SIGNED BY THE SELLER/LANDLORD AND BUYER/TENANT, AND THE BUYER/TENANT PROVIDED WITH A COPY OF THE LEAD-BASED PAINT BROCHURE PRIOR TO THE BUYER/TENANT AND SELLER/LANDLORD ENTERING INTO A BINDING AGREEMENT. THIS AGREEMENT MUST BE FILLED OUT FOR ALL HOUSING BUILT PRIOR TO 1978.**

Having the Lead-Based Paint Exhibit signed during the Due Diligence Period has been treated as a violation of our lead-based paint laws by investigators from the EPA. Their position is that it must be filed out and signed by both parties prior to the agreement going binding.

There has also been confusion in how best to fill out other parts of the Lead-Based Paint Exhibit. Under Section 3.A, there is a place for the Buyer/Tenant to initial if "Buyer/Tenant has received copies of all information, if any, listed above." The question is confusing because it is asking the person filling out the form to acknowledge receiving all information even if none exists. My recommendation is that if the Buyer/Tenant has actually received information about lead-based paint in the home, this block should always be initialed. If no information has been received, it can either be initialed or not initialed since in using the phrase "if any," it is an acknowledgment that the Buyer has received whatever information about lead-based paint the seller may have.

There is also confusion about which box Buyers/Tenants should initial in Section 3.C where the two choices are that the Buyer/Tenant has either:

> ____ Received a ten (10) day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards; or
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> _____ Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

What many REALTORS® do not understand is that the reference to whether the Buyer has received a 10-day opportunity to conduct a risk assessment or inspection for lead-based paint or lead-based paint hazards is referring to the time period prior to the Buyer being obligated under a contract. On this point, the language on the EPA website provides that Buyers must receive a ten day period to conduct a lead-based paint inspection or risk assessment for lead-based paint or lead-based paint hazards "before being obligated under a contract to buy housing built prior to 1978". However, buyers can agree in writing to shorten or waive the 10-day inspection opportunity. While it can be argued that buyers are not obligated under the GAR Purchase and Sale Agreement until after the end of the Due Diligence Period, the safer approach is to check the box that the buyer has waived the 10-day inspection right. The buyer can then still inspect for lead-based paint during any Due Diligence Period or Right to Request Repairs Period.

GAR is currently reviewing its Lead-Based Paint Exhibit and is considering revising it to create one form for sellers to disclose lead-based paint and lead-based paint hazards and another form for landlords to make these disclosures. Doing so will bring the lead-based paint disclosures in closer alignment with the model form used by the EPA. GAR is also considering whether to revise some of the questions to make them less confusing.

4. CLOSING ATTORNEY ACTING AS HOLDER OF EARNEST MONEY (GAR FORM F510).

This form was modified to give the closing attorney greater flexibility to specify how earnest money the closing attorney is holding shall be paid by the buyer. The previous language required the closing attorney to hold earnest money sent by wire transfer or ACH. The new language simply provides that the earnest money will be sent by wire transfer or "such other method deemed acceptable and/or required by the Closing Attorney..."

Some closing attorneys only want the funds to be wired since that ensures that the funds are good funds. This avoids the closing attorney having to occasionally deal with earnest money payments that are returned for insufficient funds. Other closing attorneys are willing to accept earnest money sent by wire, ACH, or check. This latter approach gives the buyer greater flexibility

(and is usually less expensive since there is normally a cost to send a wire) but it also means that the closing attorney will need to deal with the headache of checks and ACHs occasionally being returned for insufficient funds.

~~6.~~5. SALE OR LEASE OF BUYER'S PROPERTY CONTINGENCY (GAR FORM F601).

This form was modified in several significant ways. First, an explanation of what is a "kick-out clause" was added. This was done because while most REALTORS® know what a kick-out clause is, many consumers do not have a clear understanding of the meaning of that term.

The form was also reorganized to try to make it easier to fill out. Additionally, the form was clarified by adding language that the elimination of contingencies to which the agreement is subject shall not eliminate any contingencies benefitting the seller. The form now includes an example that the seller can still request proof of funds from the buyer even though the Conventional Loan Contingency (GAR Form 404) in which the requirement for proof of funds is included has been removed from the agreement.

The Forms Committee is continuing to work on this form. Specifically, it's exploring adding language where the buyer warrants whether the buyer's property that must be sold is or is not under contract since many sellers will not agree to include the sale of other property contingency unless they know that the buyer's other property is already under contract.

~~7.~~6. COMMUNITY ASSOCIATION DISCLOSURE (GAR FORM F322).

The Community Association Disclosure was revised to clarify what happens if the seller forgets to fill in the blank specifying the maximum amount to be paid by the buyer for transfer, initiation and administrative fees. Language was added that in the event the seller fills in the blank with "N/A" or the blank is left empty, it shall be the same as the seller filling in the blank with $0.00. The effect of this language is that if the seller forgets to fill in the blank or fills it in with "N/A", the seller is going to pay 100 percent of the costs for transfer, initiation, and administrative fees.

Sellers who want to ensure that the buyer pays 100 percent of the costs for transfer, initiation and administrative fees may want to estimate these costs on the high end. In this way, if any of these costs increase after the binding agreement date, the seller has built in a bit of a cushion to protect himself or herself from such an increase. Of course, if the seller builds in too large of a cushion, it could create an obstacle to selling the property.

The other change that was made to this form relates to who pays for disclosed special assessments. Specifically, the existing language was clarified to provide that if the special assessment can be paid in installments, then the installments coming due while the seller owns the property are paid by the seller and the installments coming due when the buyer owns the property are paid by the buyer. Most special assessments are technically due when they are passed but may often be paid in installments without penalty. Part of the clarification here was that in this situation the buyer and the seller each pay their respective portion of the special assessments based on the due dates for the installments of the special assessments.

The GAR Forms Committee is constantly revising its forms to try to make them clearer and easier to use. Hopefully, these changes will be well-accepted by the GAR membership.

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