



# **Disposal of Real Estate Assets by NAMA Debtors and Insolvency Office Holders**

**Version: 7.0**

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## 1 Introduction

This document supersedes Version 6.0 previously published on the NAMA Website.

This document outlines NAMA's requirements in respect of sales by a Debtor or Insolvency Office Holder, of controlled Real Estate Assets that are subject to NAMA security or are included in an agreed disposal to repay outstanding debt to NAMA.

The timing of Real Estate Asset disposals will be agreed by Debtors or Insolvency Office Holders with NAMA. The objective is to obtain the best price reasonably obtainable for the Real Estate Asset in the marketplace at the time of sale, in the context of a phased and orderly disposal (subject always to an Insolvency Office Holder's statutory obligations in that regard).

A key principle is that disposals should be conducted on a competitive basis and in accordance with prevailing market norms.

## 2 Policy Basis

NAMA has statutory powers, including those set out in S12 of the NAMA Act to manage loans and assets in a way that best serves its purposes as defined in S10 of the NAMA Act. NAMA will act at all times to obtain the best achievable financial return for the State commensurate with its policies, codes and guidance notes.

NAMA may be subject to guidelines and directions from the Minister as set out in S13 and S14 of the NAMA Act.

A copy of the S172 Confirmation (2019 Version - see Appendix 1) or Contracting Purchaser's Warranty (2019 version - see Appendix 2) should be furnished to NAMA by the relevant external party (i.e. Sales Agent or Vendor's solicitor).

A summary of the key policy considerations are outlined below.

Capitalised terms are defined in section 6 below.

### 2.1 Open Marketing

All Real Estate Assets must be openly marketed for sale and there are to be no exceptions to this rule in normal circumstances. Possible exceptions, which are subject to approval by both the CEO of NAMA and any one of the Chief Commercial Officer ("CCO" as Head of the Asset Management and Recovery division and Residential Delivery division) or Deputy Heads of those divisions, can be made in certain limited and specific circumstances – see Section 4.1.1 below for details.

## 2.2 Section 172 Policy

NAMA has adopted a policy of obtaining (written) assurance that the Contracting Purchaser (or the Purchaser, if different) of a Real Estate Asset is not connected with the relevant Debtor. For these purposes 'connected' refers to those parties in respect of which the provisions of S172 (3) of the NAMA Act would apply.

## 2.3 Excluded Persons

NAMA has also adopted a policy of obtaining (written) assurance that neither the Contracting Purchaser (nor the ultimate Purchaser, if different), nor any person with a beneficial interest in the transaction, is an Excluded Person (as defined in Section 4.3 below).

# 3 Overall Objective / Purpose

The disposal of Real Estate Assets by Debtors and, in some cases, appointed Insolvency Office Holders, is likely to be the main source of repayment of a Debtor's outstanding indebtedness to NAMA. The conduct of these disposals should be done on a competitive basis and in accordance with prevailing market norms for the asset class and jurisdiction having regard to NAMA's objectives set out in S10 of the NAMA Act.

# 4 Disposal Process

The following procedure is applicable to all **Real Estate Asset** disposals:

## 4.1 Open Marketing

As a general rule, all Real Estate Assets must be openly marketed for sale to ensure current market value is obtained<sup>1</sup>.

### 4.1.1 Exceptions to Open Marketing

Subject to Section 4.2 below, the sale of a Real Estate Asset may be concluded without open marketing in the following circumstances:

- (a) Where specific written advice (either legal or professional) has been obtained by NAMA in relation to the disposal of the Real Estate Asset recommending that open marketing should not be pursued for commercial or legal reasons giving rise to material risks. Such Real Estate Assets will be offered at the appraised market value, confirmed by way of independent valuation report received by NAMA;

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<sup>1</sup> NAMA Board have approved certain scenarios are deemed out of scope for the purpose of this policy requirement. Reference should be made to NAMA where there is any doubt as to whether open marketing is required.

- (b) Where a government entity or State/Semi-State body has approached NAMA, or any of its subsidiaries, to purchase a Real Estate Asset for legitimate reasons in the public interest<sup>2</sup>;
- (c) Where the Real Estate Asset is the subject of a compulsory purchase order (CPO) by a State Body or Local Authority. The Debtor should be professionally advised with the adviser entering into a duty of care arrangement with NAMA; and
- (d) In instances where the Real Estate Asset is acquired for Social Housing purposes (including an acquisition by NARPS, approved housing bodies, local Authorities etc.) from NAMA Debtors or Insolvency Office Holders<sup>3</sup>, noting that an independent market valuation report must exist.

Where any exceptions are proposed for legal or commercial reasons, prior approval of both the CEO of NAMA and any one of the CCO (as Head of the Asset Management and Recovery division and Residential Delivery division) or Deputy Heads of those divisions must be obtained and the market value must be confirmed by way of independent valuation.

#### 4.2 Section 172

All Real Estate Asset sales by NAMA must comply with S172 (3) of the NAMA Act which provides as follows:

*“A person who is the debtor in relation to an acquired bank asset, who is a person referred to in any of subparagraphs (i), (ii), (iii), (v) or (vi) of section 70(1)(b) or who is a person on whose behalf the debtor or the person referred to in one of those subparagraphs acts as a nominee or trustee in relation to an acquired bank asset shall not, if any of those persons is in default in relation to any acquired bank asset, acquire from NAMA or a NAMA group entity, any legal or beneficial interest in property comprised in the security forming part of any acquired bank asset in relation to which the default has occurred.”*

In essence, where there is a default by any of the above persons in respect of any acquired bank asset, none of the persons can acquire an interest from NAMA in any property securing a bank asset in respect of which the default has occurred.

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<sup>2</sup> Per existing NAMA Board policy, NAMA will engage proactively with Government Departments, local authorities, State Agencies and other appropriate bodies and entities in relation to their possible need for land/properties in the public interest (e.g. social housing, schools, water and other infrastructure, health centres, hospitals, community and amenity facilities, cemeteries, warehouse space). Such assets will be offered at the appraised market value, confirmed by way of independent valuation, to such bodies for up to 6 months prior to an open market offering. Any agreed sales to such entities will be subject to contract where such contract must be negotiated and agreed within a 6 month period from the date the entity expressed an interest in purchasing the asset.

<sup>3</sup> NAMA will not direct any insolvency professional. The discretion to sell any asset to NAMA or not is a decision for them.

NAMA has adopted a policy of obtaining (written) assurance from all Purchasers of Real Estate Assets (where the vendor is either a Debtor or IP) that the Purchaser is not “connected” with the relevant Debtor in the manner set out in S172 (3) of the NAMA Act. In addition, where the Purchaser is different from the Contracting Purchaser, NAMA’s Board has also adopted a policy of obtaining the same written assurance from that Purchaser.

### 4.3 Excluded Persons

NAMA Board Policy also requires the written confirmation that neither the Contracting Purchaser nor (if different) the ultimate Purchaser nor any person with a beneficial interest in the transaction, is an Excluded Person.

An **Excluded Person** is defined as:

1. Any person employed by NTMA who is assigned to NAMA (i.e. under S42 of the Act).
2. Any person working in a Participating Institution, Master, Primary or Service Provider to NAMA who:
  - A. either works, or has worked in the past 12 months, in the designated “NAMA Unit” of the Participating Institution Master or Primary or Service Provider; or
  - B. has access to/knowledge of NAMA sensitive information (as outlined below) or had such access/knowledge in the last 12 months.

**Sensitive information** is defined as any of the following:

- Information which would provide an unfair advantage over other potential purchasers where such information was obtained as a result of working in a Participating Institution, Master or Primary Provider (See 2. above), or
- Information which could result in a conflict of interest, whereby professional judgement or actions regarding the transaction is unduly influenced by a personal/secondary interest in the transaction, or
- Privileged or proprietary information which, if disclosed, may affect the price of an asset, or a reasonable purchaser/investor would want to know before investing in an asset.

#### 4.4 Sale by Debtor / Insolvency Office Holder (IP):

All sales of Real Estate Assets must be supported by a signed s172 and Excluded Person Confirmation (“**Confirmation**” - see **Appendix 1**) or a “**Contracting Purchaser’s Warranty**” (see **Appendix 2**)<sup>4</sup>.

Where the Purchaser is different from the Contracting Purchaser (who contracted to acquire the relevant Real Estate Asset), that final Purchaser must also provide a Confirmation.

The Sales Agent or Vendor’s solicitor appointed by the Debtor/IP to perform services related to the sale of the Real Estate Asset should obtain the Confirmation from a Contracting Purchaser prior to entering into a binding contract for sale or satisfy itself that the Contracting Purchaser’s Warranty will be provided instead (as part of the binding contact).

Where the Purchaser who completes the acquisition of that relevant Real Estate Asset is different from the Contracting Purchaser who contracted to acquire it, one of either the Sales Agent or the Vendor’s solicitor should also obtain a Confirmation from that Purchaser.

Where the Contracting Purchaser or the Purchaser is not in a position to provide this Confirmation/Contracting Purchaser’s Warranty, the Debtor’s agent/IP should bring this to the immediate attention of NAMA and the sale should not proceed until NAMA has provided its agreement as to how the matter should be dealt with.

#### 4.5 Sales Agents – Appointment, Role and Reporting

##### 4.5.1 Appointment of Sales Agent

Generally, it is expected that Agents will be appointed following an informed arm’s length selection process, the Agent will be expected to enter into a **duty of care agreement** with an obligation to NAMA, including acknowledging NAMA’s statutory requirements in general and NAMA’s S172 (3) policy in particular. Sale instruction and contracts with Agents require NAMA prior approval.

- At the outset the Agent should disclose to NAMA any commercial relationship with the Debtor in the last five years.

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<sup>4</sup> Alternatively, it is also acceptable that a Contracting Purchaser and/or Purchaser provide a Statutory Declaration on the same terms as the Confirmation instead. In that case, the Statutory Declaration should be provided (inter alia) for the benefit of NAMA (or the relevant NAMA group entity involved in the sale).

- An appointed Agent should have no interest in the Real Estate Asset under sale.
- The appointed Agent should have a suitable level of professional indemnity insurance having regard to the size and nature of the Real Estate Asset. Any queries on professional indemnity cover should be directed to NAMA.
- The Agent should not be entitled to delegate his instruction to a sub-Agent.
- Contracts with Agents handling Asset disposals should not exceed an initial 12 months and must be capable of being terminated at any time by notice in writing stating the reasons for such termination.
- In limited circumstances where it is approved that the Debtor retains an “in house” sales team the Debtor shall be deemed to be the Agent for the purposes of Section 4.5 (and all sub-sections) and shall report accordingly.

#### 4.5.2 Role of Sales Agent

- All disposals are to be conducted in a demonstrably impartial and professional manner.
- During the sales process, the appointed Agent will be expected to report to NAMA and the Debtor/Insolvency Practitioner at a frequency agreed with the NAMA case manager.

#### 4.5.3 Sales Agent Reporting

For details on Sales Agent Reporting Requirements, please contact your NAMA Case Manager directly.

## 5 Personal Data and GDPR

NAMA is subject to the requirements of the General Data Protection Regulation (“GDPR”) and the related Data Protection Act 2018 (together “Data Protection Law”). All NAMA Staff are responsible for processing and managing Personal Data in accordance with Data Protection Law and in accordance with NAMA’s Data Protection Policy. Queries in this regard should be addressed to the NAMA Data Protection Officer.

## 6 Definitions

Term	Definition
<b>Agent or Broker</b>	Third party real estate service firm experienced in the disposal of real estate in the relevant market place



Term	Definition
	appointed by a Debtor or Insolvency Office Holder.
<b>Auction</b>	A sale (usually held in public) in which property is sold to the highest bidder, provided the amount offered exceeds any reserve, i.e. the lowest acceptable price, fixed by the vendor. Occasionally, but not often, properties may be offered without a reserve price, in which event the highest bid will be accepted however low it may be.
<b>Chief Commercial Officer (CCO)</b>	Head of Asset Management & Recovery (AMR)/ Residential Delivery (RD)
<b>Connected Party</b>	The manner by which a person may be connected to a Debtor for the purposes of this Policy is set out within the Confirmation/Contracting Purchaser's Warranty in Appendices 1 and 2. Broadly, it includes either (a) a subsidiary company or related company of the Debtor, (b) a nominee of the Debtor, or another associated Debtor, (c) a trustee for a Debtor, the Debtor's nominee or a company controlled by the Debtor, (d) a company of which the Debtor is the sole shareholder or is otherwise controlled by the Debtor or (e) a person on whose behalf the Debtor acts as nominee or trustee. As such, it does not include an association through partnership or family connections unless that family member falls into the foregoing categories.
<b>Data Protection Procedures</b>	All procedure and process documents relating to the implementation of NAMA's Data Protection Policy, including the NAMA Data Subject Rights Requests Procedure, NAMA Personal Data Breach Procedure, NAMA Records Management Policy and any other documents that may be introduced in this regard.
<b>Debtor/Debtor Connection</b>	<p>A person who is or was indebted or obligated to a Participating Institution under or in connection with a credit facility acquired by NAMA.</p> <p>A Debtor Connection is a bundle of loans that have been grouped together as they are connected or linked to a Debtor.</p>
<b>Contracting Purchaser</b>	The party who is to enter or has entered into a contract to acquire the relevant Real Estate Asset. If they ultimately complete (or close) that acquisition, they will become the Purchaser.

Term	Definition
<b>Contracting Purchaser's Warranty</b>	A contractual representation made by the Contracting Purchaser within the contract to acquire the relevant Real Estate Asset. The form of warranty is provided in Appendix 2.
<b>Insolvency Practitioner(IP)</b>	Contractual, statutory or court appointed official appointed to an insolvent entity or pursuant to a charge, according to custom and practice of the relevant jurisdiction, e.g. Receiver.
<b>NAMA Act (the Act)</b>	National Asset Management Agency Act 2009
<b>NAMA Officer</b>	Any employee of the NTMA who is assigned to NAMA in accordance with section 42 of the NAMA Act 2009
<b>NAMA Staff</b>	All NAMA Officers, NAMA Directors, members of NAMA's Board and its Committees and temporary NAMA Staff (i.e. independent contractors, temporary agency staff and/or staff seconded to NAMA).
<b>NARPS</b>	National Asset Residential Property Services
<b>Personal Data</b>	Any information relating to an identified or identifiable living individual ("Data Subject") which allows the identification, directly or conjunction with other information, of that individual.
<b>Other assets</b>	Any asset owned by a Debtor that does not meet the definition of "Real Estate" above and which is either subject to security in favour of NAMA or the Debtor has agreed to use the proceeds of disposal of that asset to reduce NAMA debt. These are commonly referred to as non-real estate assets or NRE.
<b>Private Treaty</b>	The most common method of disposal of real property, in which negotiations are carried out between the vendor and prospective purchasers (or their respective Agents) privately and in comparative confidentiality, normally without any limit on the time within which the negotiations must be completed before contracts are exchanged.
<b>Public Tender</b>	A Tender open to any member of the public who is able to fulfil the requirements specified in the tender document, the tender being advertised for this purpose.

Term	Definition
<b>Sealed Bid</b>	An offer, usually in the form of a tender, submitted in a sealed package on the understanding that it will be opened simultaneously with other competitive offers at a stated time and place. In some circumstances tenderers are permitted to be present when the bids are opened.
<b>Security</b>	Includes a charge, guarantee, indemnity or surety, right of set off, debenture, bill of exchange, promissory note, collateral and any other means of securing the payment of a debt or the discharge or performance of an obligation or liability and any other agreement having a similar effect.
<b>Tender</b>	In the property market, the process method whereby competitive bids are sought from a number of prospective or potential buyers/lessees/contractors normally submitted on or before a specified time and date (as distinct from an auction).

## Appendix 1 - Substantive Content of Purchaser's Confirmation (2019 version)<sup>5</sup>

[On letterhead of Purchaser]<sup>6</sup>

Re: Proposed purchase of [detail property] (the "Subject Property") from [name of owner]

[Addressed to the Debtor's/IP's Agent]

*"[The Purchaser is/ the Purchaser confirms that it/he/she is]:*

(a) *not a person connected to [name of owner ] where "person connected to [name of owner ]" means any of the following:*

- (i) *a subsidiary company or related company (as defined under the relevant Companies Acts in the jurisdiction governing this Contract and each or both being referred to as "a Relevant Company" )of [name of owner ];*
- (ii) *a company of which [name of owner ]is the sole shareholder ("an Owned Company");*
- (iii) *a company controlled by [name of owner ], that is to say [name of owner ] has an interest (either alone or together with (a) a Relevant Company, (b) a nominee (as defined in (iv) below) of [name of owner ], (c ) a trustee of [name of owner], (d) a person in partnership with [name of owner ]in connection with any credit facility or security or (e) an Owned Company) in 25% or more of the equity share capital or entitled to exercise or control the exercise of 25% or more of the voting powers at any general meeting;*
- (iv) *a nominee , or person who may or does in fact act at the direction, of either [name of owner ] or any of the parties referred to at (i) to (iii) above;*
- (v) *a trustee (whether or not declared) where the beneficiaries include, directly or indirectly, [name of owner] or any of the parties referred to at (i) to (iv) above.*

[The Purchaser] further warrants and confirms that:

*(b) the Purchase Price payable under the Contract for Sale comprises the entire consideration being paid or passing in any form and at any time from the Purchaser in respect of the Subject Property and there are no other arrangements or agreements in any form between the Vendor and Purchaser that are connected with the Subject Property and through which the Vendor may benefit*

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<sup>5</sup> To be provided pre Contract

<sup>6</sup> Where the Purchaser who completes the acquisition of the relevant property is different from the party who contracted to acquire the property, both parties must provide this form of Confirmation.

(c) *neither the Purchaser nor any person with a beneficial interest in the sale is an Excluded Person, where “Excluded Person” means any of the following:*

(i) *Any person employed by NTMA who is assigned to NAMA (under section 42 of the National Asset Management Agency Act, 2009)*

(ii) *Any person working in a Participating Institution, Master or Primary Service Provider to NAMA who:*

*(a) either works, or has worked in the past 12 months, in the designated “NAMA Unit” of the Participating Institution, Master or Primary Service Provider; or*

*(b) has access to/knowledge of “NAMA sensitive information\*” or had such access/knowledge in the last 12 months.*

*\*For this purposes of this confirmation, “NAMA sensitive information” means any of the following:*

- information which would provide an unfair advantage over other potential purchasers where such information was obtained as a result of working in a Participating Institution, Master or Primary Service Provider; or*
- information which could result in a conflict of interest, whereby professional judgement or actions regarding the sale are unduly influenced by a personal/related beneficial interest in the sale; or*
- privileged or proprietary information which, if disclosed, may affect the price of the subject property, or which a reasonable purchaser/investor would want to know before investing in the property.”*

(d) *the Purchaser will be [completing the purchase of the Subject Property in their own name / nominating another party to complete the purchase of the Subject Property and will notify you of the identity of that third party and procure that that third party will also provide a separate Confirmation or Statutory Declaration on the terms of this Confirmation<sup>7</sup>].*

(e) *This Confirmation is given for the benefit of NAMA.*

Signed: \_\_\_\_\_

[Purchaser]/ authorised signatory of [Purchaser]

Dated: [Insert Date]

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<sup>7</sup> Delete as appropriate

## Appendix 2 - Contracting Purchaser's Warranty (2019 version)<sup>8 9</sup>

[Insert as Special Condition in Contract for Sale of Subject Property]

Re: Proposed purchase of [detail property] from [name of owner]

*"The Purchaser warrants and confirms that [it/he/she/they] is:*

(a) *not a person connected to [name of owner<sup>10</sup>, by whom the receiver is acting] where "person connected to [name of owner, by whom the receiver is acting]" means any of the following:*

- (i) *a subsidiary company or related company (as defined under the relevant Companies Acts in the jurisdiction governing this Contract and each or both being referred to as "a Relevant Company" )of [name of owner, by whom the receiver is acting ];*
- (ii) *a company of which [name of owner, by whom the receiver is acting ]is the sole shareholder ("an Owned Company" );*
- (iii) *a company controlled by [name of owner, by whom the receiver is acting ], that is to say [name of owner, by whom the receiver is acting ] has an interest (either alone or together with (a) a Relevant Company, (b) a nominee (as defined in (iv) below) of [name of owner, by whom the receiver is acting ], (c) a trustee of [name of owner, by whom the receiver is acting ], (d) a person in partnership with [name of owner, by whom the receiver is acting ]in connection with any credit facility or security or (e) an Owned Company) in 25% or more of the equity share capital or entitled to exercise or control the exercise of 25% or more of the voting powers at any general meeting;*
- (iv) *a nominee , or person who may or does in fact act at the direction, of either [name of owner, by whom receiver is acting ] or any of the parties referred to at (i) to (iii) above;*
- (v) *A trustee (whether or not declared) where the beneficiaries include, directly or indirectly, [name of owner, by whom receiver is acting] or any of the parties referred to at (i) to (iv) above.*

(b) *[The Purchaser] further warrants and confirms that the Purchase Price payable under the Contract for Sale comprises the entire consideration being paid or passing in any form and at any*

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<sup>8</sup> This Warranty can be included in any contract for sale to obviate the need to obtain a separate Purchaser's Confirmation

<sup>9</sup> Where the Purchaser of the property is different from the Contracting Party who contracted to acquire the relevant property (and who provided this warranty), the Purchaser must also provide a Confirmation per Appendix 1.

<sup>10</sup> Owner/Vendor of Subject Property (where relevant, acting by a Receiver)

*time from the Purchaser in respect of the Subject Property and there are no other arrangements or agreements in any form between the Vendor and Purchaser that are connected with the Subject Property and through which the Vendor may benefit*

*(c) [The Purchaser] further warrants and confirms that neither the Purchaser nor any person with a beneficial interest in the sale is an Excluded Person, where "Excluded Person" means any of the following:*

- (i) Any person employed by NTMA who is assigned to NAMA (under section 42 of the National Asset Management Agency Act, 2009)*
- (ii) Any person working in a Participating Institution, Master or Primary Service Provider to NAMA who:
  - (a) either works, or has worked in the past 12 months, in the designated "NAMA Unit" of the Participating Institution, Master or Primary Service Provider; or*
  - (b) has access to/knowledge of "NAMA sensitive information\*" or had such access/knowledge in the last 12 months.**

*\*For this purposes of this confirmation, "NAMA sensitive information" means any of the following:*

- information which would provide an unfair advantage over other potential purchasers where such information was obtained as a result of working in a Participating Institution, Master, or Special Service Provider; or*
- information which could result in a conflict of interest, whereby professional judgement or actions regarding the sale are unduly influenced by a personal/related beneficial interest in the sale; or*
- privileged or proprietary information which, if disclosed, may affect the price of the subject property, or which a reasonable purchaser/investor would want to know before investing in the property."*

*(d) [The Purchaser] further confirms that, subject always to the terms of this contract, they will procure that any other party they nominate to take delivery of the Assurance of the Subject Property will provide a separate Confirmation or Statutory Declaration on the terms of this Special Condition.*

*(e) [The Purchaser] further agrees that this warranty and confirmation is also provided for the benefit of NAMA.*