

2004 OREF FORM REVISIONS SUMMARY

By

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The following summary addresses the major changes to ten OREF forms. There were several stylistic and grammatical changes, as well as revisions to portions of the language for legal reasons, but they will not be discussed here as they do not affect Realtor[®] practice. This summary should not be relied upon in lieu of a thorough review of the document by each individual broker.

Real Estate Sale Agreement

1. BUYER REPRESENTATION (Section 3). The following sentence was added at the end of this section: “Buyer is encouraged to promptly verify the availability and cost of property/casualty insurance that will be secured for the Property.” *Caveat:* This new provision does not make availability and cost of such insurance a condition of the offer to purchase. To do so, the agent should expressly include specific language in the Additional Provisions section or in an addendum.
2. TITLE INSURANCE (Section 4). The following clauses were added:
 - Ø “If not fully understood, Buyer should immediately seek competent expert legal or title advice. Neither the listing nor selling licensees are qualified to advise on specific legal or title issues.”
 - Ø “Provided, however, Buyer’s failure to timely object shall not relieve Seller of the duty to convey marketable title pursuant to Section 6 below.” The reason for this change is to make it clear that the buyer’s failure to timely object to items in the preliminary title report does not mean that a seller may convey title that still had liens and objectionable encumbrances on the property.
 - Ø “This contingency is solely for Buyer’s benefit and may be waived by Buyer in writing.” This language was added to make it clear that if a buyer requested the seller to remove certain exceptions to title, but the seller declined or was unable to do so, the buyer could waive the objections and still proceed to close.
3. DEED (Section 6). The blank line previously appearing at the end of this section was

deleted for the reason that it was often filled in with words such as “none” or “matters of record” or other such terms that were unnecessary. Since the buyer already has the ability to object to title exceptions under Section 4 (Title Insurance) and the seller is obligated to convey marketable title, the blank line simply invited agents to insert provisions that added nothing more to the parties’ existing rights and duties regarding the quality of the title to be conveyed.

4. AS-IS (Section 11). A clause was added to the last line of this section providing that the AS-IS language “...shall not be construed to limit Buyer’s right to implied new home warranties, if any, that may otherwise exist under Oregon law.” The reason for this exception is because many agents use the Sale Agreement form for new construction. Under Oregon case law, the buyer of a spec home (as opposed to a custom home) may have an automatic implied warranty of habitability. This new clause was inserted to avoid the argument that the existing AS-IS language in the Sale Agreement supercedes any implied new home warranties that Oregon law allows to buyers of spec homes.

5. INSPECTIONS (Section 13).^[1] The following changes were made:

Ø Inserted along side this section is a notice (repeated also at the beginning of the section) that only one box should be selected. This is a significant instruction, since in the past; some agents have checked both the Professional Inspections box and the one for additional inspections. This should not be done, since the time frames and other significant provisions in the Professional Inspection paragraph may be different from those in a separate inspection addendum.

Ø The box entitled “**SEE ATTACHED ADDENDUM REGARDING PROFESSIONAL INSPECTIONS**” was changed to “**SEE ATTACHED ADDENDUM REGARDING ALTERNATIVE PROFESSIONAL INSPECTION PROCEDURES.**” The reason for this change relates to the concern above, i.e. that agents might check both the Professional Inspections box and the one entitled “**SEE ATTACHED ADDENDUM REGARDING PROFESSIONAL INSPECTIONS.**” The change of name was intended to better distinguish the first box from the second box.

Ø The Buyer Inspection section was changed to read as follows: “Buyer or Buyer’s representative will personally inspect the Property and all elements and systems thereof. Buyer is fully satisfied and has elected NOT to have any professional inspections performed. Neither the listing nor selling licensees shall be responsible for inspecting the Property. Buyer’s failure to obtain one or more professional inspections is solely at Buyer’s own risk.” This change was intended

to underscore the buyer's decision to forgo having any professional inspections performed and to help limit Realtor® liability for such decisions. *Caveat:* This inspection section contains no language to indicate that the transaction is intended to be contingent upon the results of such an inspection, and, in fact, confirms that the buyer is "fully satisfied." Accordingly, if the buyer or buyer's agent intends for this non-professional inspection to become a contingency of purchase, appropriate language should be expressly added to the Additional Provisions portion of the Sale Agreement (Section 5) or included in a separate addendum.

6. CLOSING (Section 16). The first two sentences of this section ^[2] in the present Sale Agreement were deleted in their entirety, since they were a source of constant confusion. If an extension period was inserted into the blank line, two misconceptions frequently occurred: (a) Lenders interpreted it to mean they could delay preparation of financing documents until the last minute; and/or (b) agents believed that closing could automatically be extended for any reason or no reason. Furthermore, if the parties thereafter extended the closing date using a separate addendum, questions frequently arose as to whether the additional time inserted into the blank line at Section 16 also applied to the new closing date. Accordingly, the entire portion of this section was removed and the following sentence was inserted: "Closing shall occur on a date mutually agreed upon by Seller and Buyer, but in no event later than _____ ("the closing deadline")." Accordingly, Realtors® are cautioned that under the new Sale Agreement form, if a transaction fails to close by the date designated as "the closing deadline," it may create a substantial risk that the seller or buyer could terminate the sale. For this reason, it is imperative that any extension of the closing date be in writing and signed by the seller and buyer.

7. EARNEST MONEY PAYMENT/REFUND (Section 23). Due to concerns that the previous language could be construed to limit the buyer's liability for matters unrelated to the buyer's refusal to close (e.g. tort liability for injury on the premises, or buyer's unauthorized pre-closing repairs or damage to the property); the language has been changed to: "It is the intention of the parties that Seller's sole remedy against Buyer for Buyer's failure to close this transaction shall be limited to the amount of earnest money paid or agreed to be paid herein."

8. ARBITRATION (Section 33). Due to concerns that an "alternative" arbitrator could be anyone who calls themselves an arbitrator, regardless of legal training or real estate expertise, this section was changed to require that the alternative arbitration service must consist of lawyers with expertise in real estate law.

9. PROPERTY DISCLOSURE LAW (Section 37). This section was changed to conform to the new law (SB 515), which eliminates the seller's right to use a disclaimer.

Agreement to Occupy Before Closing & Agreement to Occupy After Closing

These forms were changed to closely mirror each other, now that Oregon Law specifically provides that neither pre-closing occupancy nor post-closing occupancy create a landlord-tenant relationship, so long as it does not exceed 90 days. (See, ORS 90.110(2))

Termination Agreement

This document has been completely revised due to the Oregon Real Estate Commissioner's opposition to language which provided that the listing and selling firms and agents were to be released from liability upon disbursement of funds and termination of the transaction. In the revised form, there is no such release language, except for the act of disbursing the earnest money per the seller's and buyer's instructions. Language releasing escrow was also deleted, since these companies invariably have their own forms for the parties to sign. This new Termination Agreement form has been approved by Commissioner Taylor with the *caveat* that the "further cooperation" provision should not be used to require the parties to sign a global release.

Promissory Note

This form was changed to recognize the new designation of Principal Broker.

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Professional Inspection Addendum ^[3]

This form was changed to add a "mold/mildew" box. Additionally, under the Time Requirements section at the bottom, paragraphs 1, 2, and 3 were clarified and tightened up. One major change was to clarify that during the Inspection Contingency Period the seller and buyer could "freely negotiate" correction of any items noted in the inspection reports.

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Seller's Property Disclosure Statement

This new form mirrors the statutorily mandated language in Senate Bill 515.

Exterior Siding/Stucco/E.I.F.S. Disclosure

A *caveat* was added near the bottom of the form stating “Commercially made siding can develop problems in the future which may necessitate repair or replacement and could affect the home’s insurability. A professional siding inspection is recommended.” In addition, the requirement that all “yes” answers should be explained was corrected, since questions 1 and 2 did not require an explanation.

Buyer’s Notice to Seller of Revocation and Demand for Refund

The reference to the 7-business day right of revocation under the disclaimer law was eliminated pursuant to SB 515. Inserted instructions that the revocation may be sent to seller’s listing firm, and included a place to insert the identity of the recipient and the title company or holder of the funds.

Buyer’s Waiver of Right to Revoke

Eliminated the reference to the 7-business day right of revocation under the disclaimer law because of its repeal by SB 515.

Miscellaneous

Due to SB 515, three OREF forms will be discontinued:

- (1) “Seller’s Disclosure/Disclaimer Exemption” (The new property disclosure form contains a place to identify the exemptions.)
- (2) “Does Oregon’s Property Disclosure Law Apply to This Transaction?” is no longer necessary.
- (3) “Seller’s Property Disclaimer” is no longer necessary.

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^[1] Oregon Real Estate Forms LLC (“OREF”) occasionally receives suggestions from Realtors® asking that this section be totally revised. However, the OREF Forms Committee was unanimous in its feeling that there would never be an inspection clause that satisfies everyone, and a material revision now would cause more problems than it would solve. There have already been at least three material changes to the professional inspection protocol within the last ten to twelve years. Brokers wishing to use another inspection protocol are free to do so by attaching their own addendum in lieu of checking the Professional Inspection box. However, such decisions to do so should be

approved by company policy and/or the principal broker.

[2] “Closing shall occur on or before _____, or as soon thereafter as financing documents are prepared and marketable title can be delivered, but not to exceed ____ business days (zero (0) if not filled in). This extension is not available if financing documents are prepared and marketable title can be delivered on or before the specified closing date.”

[3] Since the Sale Agreement now refers to this form as the “Alternative Inspection Addendum,” perhaps the title to the actual form should also be changed.