

# 2009 REVISIONS TO THE OREF SALE AGREEMENTS

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The following summary addresses the changes made to the OREF Residential Real Estate Sale Agreement and other sale agreements that will become available in January 2009. Some changes were stylistic and grammatical, and will not be discussed here as they do not materially affect Realtor® practice. The primary focus of the discussion below will be on the substantive changes which may bear on Realtor® practice, the reason for the changes, and their risk management impact, if any. *This summary should not be relied upon in lieu of a thorough review of the documents and provisions by each individual broker, principal broker and sole proprietor. In all cases, licensees are encouraged to secure competent legal advice on the use of any form through their company attorney.*

## RESIDENTIAL REAL ESTATE SALE AGREEMENT

### Section 1. DEFINITIONS

**Comment:** There were some minor stylistic changes in this section, (e.g. adding the word “expressly” before the word “applicable”). Perhaps<sup>1</sup> the only substantive change in this Section 1 was in the sentence regarding the calculation of days. Originally, the sentence stated that days were measured (or calculated) commencing “...on the first full business day after the date that the last party has signed and accepted this Agreement, including counteroffer(s), if applicable....” The sentence now states that time is calculated “...on the first full business day after the date of Seller’s signature indicating acceptance of Buyer’s offer or counteroffer, or Buyer’s signature indicating acceptance of Seller’s counteroffer.”

**Risk Management Tip:** For Realtors®, the calculation of days is extremely important due to the fact that time is expressly declared to be “of the essence” and the several deadlines for contingencies, closing date, acceptance date, etc., found in the Sale Agreement. As we have recommended repeatedly with regards to the calculation of time, listing and selling Realtors® should always be

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<sup>1</sup> I say “Perhaps” because the reason for the change was not to alter the calculation protocol as previously defined in last year’s form. The consensus of the Forms Committee is that the change does *not* alter the original intent or effect, and Realtors® should not change their method of calculation as originally defined in the clause. Rather, the reason for the change was purely technical due to language found elsewhere in the Sale Agreement form that arguably could have been construed as inconsistent – or at least confusing – with the last year’s clause that has now been removed.

working off the “same page” in order to avoid the argument that a deadline was missed. So if in doubt as to a commencement date and/or an expiration date, Realtors® should confirm all deadlines and dates with each other just to make sure that they are all counting from the same start time. It is also helpful for Realtors® to keep their own timetable of important deadlines, just to avoid missing something. And lastly, if a deadline appears rapidly approaching (such as the inspection contingency) which may need to be extended, don't wait until the 11<sup>th</sup> hour to get the extension addendum signed.

## **Section 7. ADDITIONAL LAND SALES CONTRACT /TRUST DEED/ MORTGAGE PROVISIONS**

**Comment:** Last year this section was relocated from Section 29 to Section 7, due to the fact that we had been seeing instances of seller-carried financing with more frequency. We therefore concluded that what had formerly been a little-used provision in the Sale Agreement should be brought forward toward the front of the document as a reminder. (This section contains a contingency which provides that if the parties have not agreed upon the “terms and conditions” of the seller-carried financing document within a fixed period of time – ten (10) business days if not filled in – the transaction automatically terminated.) This year, due to the increasing use of leases and lease option agreements, the caption and the text of Section 7 of the Sale Agreement now includes reference to lease-options as well as the other existing forms of seller-carried financing.

As is discussed in the 2009 Revisions to OREF Forms, the lease-option agreement is rapidly becoming an important document, and although OREF has had such a form in existence for years, it received little use. Now, with more sellers looking for alternative ways to sell their homes when buyer financing is tight, there has become a place in today's transactions where lease-options may be useful – if properly prepared.

**Risk Management Tip:** If the transaction is to provide for the Seller to carry back a portion of the sale price, both listing and selling brokers must make sure their clients promptly secure legal counsel to negotiate and draft the paperwork. If no final agreement is reached within the applicable time frame (ten business days if no other time is filled in) the transaction will *automatically* terminate. To expedite the negotiations, a buyer might consider having the document prepared and included as a part of the offer.

## **Section 23. HOME WARRANTY PROGRAMS**

**Comment.** Due to the frequent use of home protection or warranty plans, OREF included references in the Sale Agreement to them as a reminder for Realtors® to have when reviewing the Sale Agreement with their clients. This clause merely advises the parties that such plans may be available to help cover homeowner costs of repair or replacement to certain systems and appliances, and allows for the parties to discuss the issue, and negotiate plan provider and allocation of cost.

**Risk Management Tip:** Home warranty programs have gained wide acceptance in the real estate industry. As such, they can be an important marketing tool for sellers. Realtors® are encouraged to make sure that their clients are aware of the availability of these programs.

### **Section 37. RECEIPT FOR EARNEST MONEY**

The text of this clause has been slightly changed solely to conform to the language of the OREF Promissory Note. Other than that formatting change, no substantive change has been made.

As for the other OREF sale agreement forms (Commercial, Vacant Land, New Construction and Farms & Ranches), where applicable they too have been changed consistent with the Residential Sale Agreement form.