

REVISIONS TO THE 2010 OREF SALE AGREEMENTS

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The following summary addresses the changes made to the OREF Residential Real Estate Sale Agreement and other forms that will become available in January 2010. 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 bear on Realtor® practice, the reason for the changes, and their risk management impact. *This summary should not be relied upon in lieu of a thorough review of the documents and provisions by each individual broker and principal broker.*

RESIDENTIAL SALE AGREEMENT

SECTION 6. (DEED) Clarifies that the deed given from seller to buyer may include other forms of deed besides a warranty deed or Personal Representative ("PR") deed – they may be other forms of fiduciary deeds.

Comment: This provision should not affect general Realtor® practice, since it does not require a check box or other form of selection. In most cases, the selection will be determined by the legal capacity of the seller (i.e. grantor signing the deed) sufficient to transfer title.

Risk Management Tip: It is always important for the buyer to make sure he/she reviews the title report, just to make sure that the person vested in title is, in fact, holding title via a proper deed so that upon conveyance at closing, the entire seller's right, title and interest is properly conveyed. If there are any questions about this, the buyer should secure legal counsel who may want to clarify the matter with the title company insuring the buyer's interest in the transaction.

SECTION 7. (ADDITIONAL LAND SALE CONTRACT/TRUST DEED/MORTGAGE AND LEASE-OPTION PROVISIONS) Language has been added noting that Escrow will require a minimum of three (3) business days if they are required to prepare a note and trust deed, or other sort of carry-back security for the seller. Note, Escrow should not be expected to prepare complicated legal security documents such as lease-options or land sales contracts.

Comment: Typically, as soon as most title companies see that this provision has been checked, they quickly provide one or more forms for the parties to agree upon, so the 3-day requirement (which is statutory) does not become an issue. However, it is up to the Realtors® to be vigilant on this issue, since the parties must also agree upon the language of the document, covering such things as principal, interest, and monthly or other periodic payments. The failure to do so in a timely manner may result in a termination of the transaction.

Risk Management Tip: If the transaction is to provide for the seller to carry back a portion of the sale price, both seller and buyer 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.

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SECTION 9. (PERSONAL PROPERTY) [*except for Commercial Sale Agreement*] This section now includes the prefatory words "Only the following personal property...." The reason for this is to avoid confusion and disagreement as to exactly what personal property goes with the seller or remains with the buyer.

Comment: If in doubt, both listing and selling agents should make sure that the item(s) in question are addressed prior to the execution of the Sale Agreement. Thereafter it may be too late. Moreover, confusion can exist when the seller identifies an item in the listing agreement or marketing brochure that is to be removed upon sale (even though it might technically be a fixture, such as an expensive chandelier) but it never gets excluded from sale at the time of closing. One rule of thumb to always follow is to NOT rely upon the listing or promotional literature as the basis of retaining or leaving a fixture or item of personal property. Address it in the Sale Agreement to avoid confusion. The brochure or listing information is not a part of the Sale Agreement, and the latter almost always trumps the former.¹

SECTION 13. (PRIVATE WELL) OREF has included the word "arsenic" as one of the added seller-paid tests on private wells that must be performed before closing. (Note, the Private Well Addendum, OREF Form No. 082 has been changed to add "arsenic" as well.)

Comment: This is required by Senate Bill 739 in the 2009 Legislative Session.

Risk Management Tip: Listing agents should make sure their seller clients are aware of this added test and the cost associated with it. Since these tests may take some time, listing agents should see that the seller commences the process shortly after the transaction is signed up. Note: It is a buyer contingency, so the buyer may reject test results and terminate the transaction. Both brokers should closely monitor these time constraints.

SECTION 15. (LEAD-BASED PAINT) If the buyer wants to have a lead-based paint inspection, he/she may fill in the amount of time they need to be given. A default of 10 days applies if not filled in.

Comment: Since the vast majority of residential transactions in the Northwest do not include a lead-based paint test, it is doubtful that this change will substantively affect Realtor[®] practice. However, as in all cases involving the sale of "target housing" (i.e. homes built before 1978) both listing and selling agent should make sure that the lead-based paint issue is addressed with their respective clients. Technically, federal law makes the seller and his/her agent responsible for non-compliance; from time to time it is ignored by them and this is the reason buyer agents should also be vigilant that compliance occurs.

Risk Management Tip: If the buyer has clearly waived their right of inspection in the Addendum, it is recommended that a line or "0" be drawn through the blank space, so it is clear that there is NO right of inspection at all – even though the space is blank.

SECTION 17. (CLOSING) The language added at Section 7 (ADDITIONAL LAND SALE CONTRACT/TRUST DEED/MORTGAGE AND LEASE-OPTION PROVISIONS) has been cross-referenced noting that Escrow will require a minimum of three (3) business days if they are required to prepare a note and trust deed, or other sort of carry-back security for the seller.

Comment: See Comment discussing Section 7 above.

¹ This is generally because of the "merger" or "integration" clause found in most Sale Agreements which provides that the parties are not bound by any other written agreements or literature, unless expressly included in that document.

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Risk Management Tip: Due to delays as the result of short sales, increased lender qualification and verification criteria, FHA financing, etc., brokers are cautioned to make sure that closing dates are realistic, and if during the transaction it appears an extension of time will be necessary, the issue should be resolved at the earliest possible time in the transaction.

SECTION 30. (LEVY OF ADDITIONAL TAXES) Language has been added allowing the buyer to terminate the transaction if the property tax status changes due to seller's actions.

Comment: Heretofore, the buyer's sole remedy was to secure damages from the seller. Adding the right of rescission clarifies that the buyer may terminate the transaction under such circumstances, rather than seeking monetary damages.

Risk Management Tip: It is incumbent on the listing agent to obtain from the seller all information relative to any tax deferral status in order to be passed along to the buyer and/or buyer's agent and make sure the seller is warned not to do anything during the transaction that could jeopardize that current tax status.

SECTION 37. (RECEIPT FOR EARNEST MONEY) Language has been added to include checkboxes for the parties to select between business or calendar days for earnest money promissory note redemption.

Comment: This change has also been made to the OREF Promissory Note (OREF-060).

Risk Management Tip: Since business days can result in a longer delay in redemption if a weekend or holiday is involved, both brokers should make sure their clients are on the same page. The Sale Agreement provides that the failure to timely redeem an earnest money promissory note is grounds for the seller to terminate the transaction, so buyer agents must be vigilant.

SECTION 40. (COUNTERPARTS/DELIVERY) Language has been added to include email and overnight mail.

Comment: This change simply adds more options to speed up delivery.

Risk Management Tip: When parties are located in different parts of the state or country, all necessary precautions should be taken to add additional time due to unexpected delays and different time zones.

All of the changes noted above were also applied as appropriate to the other Sale Agreements: Commercial, Vacant Land, New Construction and Farms & Ranches.