

2005 REVISIONS TO THE OREF RESIDENTIAL SALE AGREEMENT FORM

By

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The following summary addresses the latest changes to the OREF residential Real Estate Sale Agreement form. Several changes were stylistic and grammatical, and will not be discussed here as they do not affect Realtor® practice. If you have any questions, please direct them to your principal broker. Note that OREF has also created a raw land and new construction form which will be available on line only. These forms substantially follow, where applicable, the same format and content of the residential form. *This summary should not be relied upon in lieu of a thorough review of the document by each individual broker.*

SECTION 1. DEFINITIONS. For clarification purposes four provisions were added to this Section, stating that: (1) Licensees and Firms are not parties to the Sale Agreement, except as it relates to dispute resolution (Section 35); earnest money deposit issues (Sections 36 and 37); and Realtor®-to-Realtor® issues regarding the commission (Sections 41 and 44). (2) Days will be calculated beginning on the first full business day after the date that the last party has signed accepting the Agreement, including any counteroffer(s), if applicable. (3) The definition of a “business day” is Monday through Friday, except Oregon-recognized legal holidays. (4) Written notices delivered to the Seller or Buyer pursuant to the terms of the Sale Agreement may be delivered to their respective Licensees with the same effect as if delivered to that Seller or Buyer.

SECTION 2. PRICE/PROPERTY DESCRIPTION. The end of the Section now reads “Payable as follows (Describe details of any loan(s) to be obtained)”

SECTION 3. BUYER REPRESENTATIONS/LOAN CONTINGENCY. Two changes were made: (1) After the clause “IF A NEW LOAN IS REQUIRED, THIS TRANSACTION IS SUBJECT TO BUYER AND PROPERTY QUALIFYING FOR THE LOAN” the following language was added: “AND THE LENDER’S APPRAISAL BEING NOT LESS THAN THE PURCHASE PRICE.” The additional language was added to address those situations in which the property may qualify for a loan, but the appraised value is less than the amount of the loan sought. (2) Additionally, the following language was added to facilitate the parties’ agents in obtaining non-confidential information regarding loan status: “Buyer authorizes lender to provide non-confidential information to Listing and Selling Licensees regarding status of the loan.”

SECTION 4. TITLE INSURANCE. This Section was only slightly changed. Since title company personnel are not permitted to actually give “advice” to customers about the condition of title, the clause was changed to instruct parties to contact their title company “for further information” or to seek competent legal advice.

SECTION 10. SELLER REPRESENTATIONS. Primarily as a housekeeping change, some of the Seller’s representations have been relocated. That is, representations from the Seller that

were contained elsewhere in the Sale Agreement have been moved into Section 10, and one provision previously found in Section 10 has been moved elsewhere. Specifically, the provision regarding asbestos (“Buyer acknowledges that asbestos commonly exists in insulation, ceilings, floor coverings and other areas in residential housing and may exist in the Property”) has been relocated to this Section 10, as well as a portion of the FIRPTA provision (“Seller is not a “foreign person” under the Foreign Investment in Real Property Tax Act (“FIRPTA”) as defined in Section 25 below.”). The Seller representation concerning tax deferral status (“If specially assessed, Seller represents that the property is current as to income or other conditions required to preserve its deferred tax status.”) has been relocated to Section 28 LEVY OF ADDITIONAL PROPERTY TAXES.

SECTION 27. IRC 1031 EXCHANGE. This Section has been changed, deleting the check boxes found in the earlier Sale Agreement form, but maintaining the same requirement of mutual cooperation in the exchange, so long as it will not delay the close of escrow or cause additional liability or expense to the other side. Additionally, it has been clarified that “unless otherwise provided herein,” completing a Section 1031 exchange is not a contingency to the closing of the transaction. (Note: Section 1031 exchanges are not generally available for owner occupied housing. However, OREF has included the provision here for use in those transactions where some or all of the property has been put into business use and otherwise qualifies for exchange treatment under the Internal Revenue Code.)

SECTION 39. COUNTERPARTS/DELIVERY. We have added (in bold print) the word “legible” to this Section so that it now reads: “ Delivery of a **legible** photocopy, telefax, carbon or carbonless copy of a signed original of this Agreement shall be treated the same as delivery of the original.”

RISK MANAGEMENT CHANGES TO SALE AGREEMENT

There are several places where changes have been made primarily for risk management purposes. OREF felt that in order to better protect Realtors® from liability, the Sale Agreement should remind Sellers and Buyers that they have primary responsibility for their own due diligence and that their agents are not experts in specialized areas such as land use, title, legal, professional inspections, etc. What follows is a summary of the Sale Agreement Sections containing new risk management language.

1. “Neither the Listing nor Selling Licensees are qualified to advise on specific legal or title issues.” (Added to Section 4. TITLE INSURANCE.)
2. “Buyer acknowledges that the above representations are not warranties regarding the condition of the Property and are not a substitute for, nor in lieu of, Buyer’s own responsibility to conduct a thorough and complete independent investigation, including the use of professionals, where appropriate, regarding all material matters bearing on the condition of the Property, its value and its suitability for Buyer’s intended use. Neither the Listing nor Selling Licensees shall be responsible for conducting any inspection or

investigation of any aspects of the Property.” (Added at the end of Section 10. SELLER REPRESENTATIONS.)

3. “Buyer understands that it is advisable to have a complete inspection of the Property by qualified professional(s), relating to such matters as structural condition, soil condition/compaction, stability, environmental issues, survey, zoning, operating systems, and suitability for the Buyer’s intended purpose. Neither the Listing nor Selling Licensees are qualified to conduct such inspections and shall not be responsible to do so. For further details, Buyer is encouraged to review the Buyer Advisory at “<http://www.or.realtorplace.com/buyadv.htm>” or at “<http://www.rea.state.or.us>”. Note, the Buyer Advisory is the same at both sites. Licensees need to become familiar with the contents of this document in order to properly address any questions from sellers or buyers. (Added at the start of Section 13. INSPECTIONS.)

4. “BUYER'S WAIVER OF INSPECTION CONTINGENCY: Buyer acknowledges that Buyer has been given an opportunity to have the Property fully inspected. Buyer represents to Seller and all Licensees and Firms that Buyer is fully satisfied with the condition of the Property and all elements and systems thereof and elects to waive the right to have any inspections performed as a contingency to the closing of this transaction. Buyer’s election to waive the right of inspection is solely Buyer’s decision and at Buyer’s own risk.” (This provision was substituted for the existing third option that Buyers have regarding their right of inspection at the end of Section 13. INSPECTIONS.)

DISPUTE RESOLUTION CHANGES TO SALE AGREEMENT

Also for risk management purposes, OREF has changed the Sale Agreement to distinguish between disputes between Sellers and Buyers only, and disputes that include Realtors®. This has resulted in the need to create two distinct sections in the Sale Agreement so that it is clear there is no overlap – i.e. seller vs. buyer disputes (or *visa versa*) must be resolved using a certain protocol while seller or buyer vs. Realtor® disputes must use another. Here is a summary of the changes:

1. **Disputes Between Sellers And Buyers.** Generally speaking, disputes between Sellers and Buyers are handled the same way in the new Sale Agreement form as in the previous one: (a) If the matter is within the jurisdictional limit of the Small Claims Court, which is currently capped at \$5,000 or less, it must be resolved there, in lieu of mediation, arbitration, or litigation in any other forum. (b) All other Claims (which are defined to include most disputes except matters involving liens, lien foreclosures, or evictions) are subject to final and binding arbitration in lieu of court litigation. Where applicable, mediation is required through the dispute resolution provisions of the National Association of REALTORS® or another organization-adopted mediation program. If the matter cannot be settled and results in an arbitration award to one side or the other, the arbitrator is empowered to award prevailing attorney fees if he or she is satisfied that that party “offered or agreed in writing to participate in mediation, prior to, or promptly upon,

the filing in arbitration or court.”

2. Disputes Involving Licensees or Firms. (a) If there is a claim involving a Realtor® and the matter is within the jurisdictional limits of the Small Claims Court, it must be resolved there, in the same manner as seller and buyer disputes. (b) All other claims must be resolved through final and binding arbitration following the same protocol as disputes between Sellers and Buyers. Excluded from arbitration are (i) Realtor® vs. Realtor® disputes that are subject to the Professional Standards Arbitration Provisions of the National Association of REALTORS®, and (ii) cases in which the Licensee or Firm has agreed to any alternative dispute resolution provisions in a prior written listing, service or fee agreement. Note: There is no mandatory mediation provision, nor is there any contractual attorney fee provision in this Section.

The practical effect of this change to the dispute resolution provisions is the following: (a) If a dispute involves only the Seller and Buyer (and is outside the jurisdictional limit of Small Claims Court), it must be resolved through mediation and arbitration, just the same as if it arose under the earlier OREF Sale Agreement provisions. (b) However, if the dispute involves the Seller and/or Buyer against one or more of the Licensees or Firms identified in the Final Acknowledgment Section at the top of the Sale Agreement (and is outside the jurisdictional limit of the Small Claims Court), the Licensees or Firms may voluntarily agree to mediate, but are not required to do so. If a Realtor® declines to mediate, the matter will go directly to arbitration. In any event, neither the seller or buyer or Realtor® will be entitled to prevailing attorney fees

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under the new Sale Agreement. (c) If the dispute involves a Buyer vs. Seller (or *visa versa*) and includes one or more Licensees or Firms, the Realtor(s)® may voluntarily participate in the Seller and Buyer mediation, but are not contractually required to do so.

PROHIBITION ON CHANGES TO PRE-PRINTED TEXT OF OREF FORMS

A new provision that will be highlighted in the Sale Agreement is language instructing Sellers, Buyers and their agents not to make modifications to the pre-printed text of the form. If such changes are to be made, they should be placed on a separate addendum. Although this prohibition will only appear in the Sale Agreement, the copyright appearing at the bottom of OREF forms will prohibit modifications to the pre-printed text unless otherwise authorized by OREF.

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Note, however, there may be statutory claims brought against a Licensee or Firm, such as those arising under the Oregon Unlawful Trade Practices Act, which do carry a right of attorney fees to the prevailing party, and could be awarded in arbitration.