



## Lead-Based Paint Disclosure Obligations

By John Hoops

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Despite the fact that the federal lead-based paint law (“LBP”) has been in effect since 1996, each year there is always some confusion among brokers about the timing of delivery of giving the LBP information. This confusion is usually coupled with some cautionary tale about a broker or company that received a substantial fine for noncompliance.

Sellers of “target housing” i.e. homes built prior to 1978, must provide certain information to buyers, and real estate brokers must assure the seller’s compliance.

While this might sound like a daunting task, a significant portion of the responsibility to inform and disclose is covered by delivery of the Lead-Based Paint Addendum (see, form OREF-021), which is a HUD developed form that OREF has adopted for use with the Oregon Residential Real Estate Sale Agreement

In order to comply with the Federal LBP requirements, a listing agent must:

- (a) Specifically inform the seller of his or her disclosure obligations. (The law says that proper and timely delivery of the LBP Addendum satisfies this disclosure duty.)
- (b) The seller must provide to the buyer:
  - (i) All information the seller has pertaining to any known LBP or LBP hazards on the property which is the subject of the transaction;
  - (ii) Copies of any prior reports or tests for LBP or LBP hazards;
  - (iii) A copy of the EPA publication “Protect Your Family from Lead in Your Home.” You will note that the LBP Disclosure Addendum provides at the top of the OREF form: *“This Addendum must be part of every Real Estate Sale Agreement for the sale of a home built prior to 1978. A photocopy of the completed Addendum may be treated as an original.”*

Similarly, Section 15 of the OREF Real Estate Sale Agreement incorporates the LBP Disclosure Addendum and also makes it a part of the Sale Agreement. In other words, the Sale Agreement and the LBP Disclosure Addendum are incorporated into one another and become a single all-inclusive document.

- (c) The real estate sales contract is to include the required “Lead Warning Statement” which is contained at the top of OREF’s LBP Addendum.
- (d) Both seller and buyer (as well as the brokers) must sign the Disclosure and Acknowledgment portions of the LBP Addendum which confirms that the above-required disclosures have been made. These signature lines are found in the LBP Addendum, which are required by Federal law to be signed by the parties and the broker(s) to the transaction.
- (e) Residential purchasers must also be provided an opportunity to have the property tested for LBP or LBP hazards during a ten (10) calendar day period. When the law first came out in 1996 it required – and still permits – that the purchaser need not become obligated under the contract until after the expiration of the ten (10) day period, which could be modified by the parties – or even waived entirely. However, the California Association of Realtors®, with the assistance of NAR, negotiated with the EPA to interpret the Federal rule to permit sellers to “accept” a buyer’s



offer *before* the buyer's actual receipt of the necessary LBP disclosures, so long as the buyer had

- (i) the unconditional right to cancel the contract upon receipt of the seller's disclosures and
- (ii) was allowed ten calendar days to conduct an inspection for LBP hazards.

It is important to note that under the OREF forms, even though the Sale Agreement makes the LBP inspection a *contingency*, a buyer is not under any obligation to actually *conduct* an inspection during the ten (10) day period. So long as they have not already waived their legal rights in writing under the LBP Addendum, they may unconditionally exercise their contingency and withdraw from the transaction within the ten (10) day period.

Conversely, under the Federal law, sellers and their agents are under no duty to conduct testing of the property for LBP or LBP hazards. The seller's only obligation is to provide known information, reports (if any) and the EPA pamphlet entitled "Protect Your Family from Lead In Your Home." It is not copyrighted and may be photocopied freely.

Thus, between the completed LBP Addendum and completed Real Estate Sale Agreement, upon full execution, together they provide a fully integrated document that protects the brokers and parties alike.

Today, with the advent of the internet, some listing agents put the LBP information on the MLS. Although not a standard practice today, some buyer agents may still wish to secure the LBP information *before* making an offer, which is certainly permissible.<sup>1</sup> However, the Sale Agreement still gives buyers a ten (10) day unilateral right to withdraw from the transaction. So regardless of whether the LBP material is delivered before or after the Sale Agreement is accepted by the seller, the buyer nevertheless has an unconditional 10-day right of cancellation at their sole discretion. For the past 10+ years, this approach has worked exceptionally well in the Oregon real estate industry – primarily because Realtors<sup>®</sup> are used to it, and it is not unduly complicated.

Thus, the best message that brokers should take away from the LBP law, is that the government will not elevate form over substance. In other words, this is primarily a **training issue** and therefore, it is incumbent on all principal brokers to make sure that their agents get all documents properly signed and delivered (including any LBP reports) to the buyer in a timely manner. Secondly, companies must develop checklists and protocols to make sure that no closings of target housing ever occur without paying scrupulous attention to compliance with all delivery requirements of the LBP laws.

Lastly, we feel compelled to address the anecdotal stories about brokers and/or sellers receiving significant fines for noncompliance with the Federal LBP law. In virtually every case, these sanctions have resulted from the failure of the listing agent and/or the seller to actually *deliver* the required LBP information at all – or only *after* closing. We know of *no* Oregon cases (or national for that matter) where an agent or brokerage was ever fined because the EPA objected solely to the drafting of the LBP clause in their sale agreement. This is consistent with Part III of the EPA August 2, 2000 Disclosure of Information form which states that "HUD and EPA will not at this time prescribe the use of particular language or requirements for all contracts, *unless it appears that prevailing practices are failing to meet the intent of the statute and the regulation....*" (Emphasis added.)

<sup>1</sup> Just the same as buyers receipt for delivery of the Seller Property Disclosure form *before* actually making an offer of purchase.



As we know, today, the statewide prevailing practices are generally consistent with the language of the OREF forms. That is one of the great benefits of having statewide forms.

Lest there are still those out there who worry about rumor and innuendo, the record needs to be set straight: To the best of our knowledge and belief, for as long as OREF has existed (1997) neither the LBP clause in the OREF Sale Agreement, nor the OREF LBP Addendum (which mirrors the EPA form) have ever been legally challenged (directly or indirectly) from any party, the party's lawyer, or their real estate agent.