

COMMENTARY
FORM CHANGES FOR 2019

General Changes

- Eliminated Fax numbers and changed all to Phone 1 and Phone 2 based on the fact that very few people or business have a fax any longer
- References to other sections within the agreement now include the title as well. This should enable a quicker review and ease in locating the section.
- The word “immediately” has been eliminated throughout the agreements. The term did not add anything to the agreement and created confusion.
- All references to web sites were modified to refer to the link, not specific page or location. This was done as the specific pages change periodically and the reference is outdated.

OREF 001 Residential Sales Agreement

- Line 14 lines look up lines were deleted. This was not a necessary part of the agreement.
- Lines 57 - 60 These were moved from the Financing section so the section can be used for cash transactions as well financed transactions.
- Section 7 Seller Carried Financing

Removed language regarding Oregon exemptions from Mortgage Loan Originator requirement. This was included in the advisory where it is more useful.

There are only two options available: OREF form or secure separate legal counsel. This allows parties to better understand the options.

There are 10 business days to negotiate terms still to be determined. Please NOTE that if there is no written agreement containing all appropriate terms, the transaction automatically terminates. The tracking of deadlines is extremely important here and throughout the transaction.

- Lines 179-180 The reference to invasive inspections was moved to the Professional Inspection section where it is consistent with the agreement and more noticeable.
- Line 202 (this was a mid year change) The language was changed to more clearly reflect that the buyer is entitled to 10 calendar days if desired.
- A mid year correction -The check box referring to the LBP addendum was eliminated. The box was surplus since it was seldom used.
- The Seller Representation was modified to eliminate the FIRPTA and Smoke Alarm/CO2 Detector. This information is covered in other more relevant sections/addendum.
- Lines 252-254 FIRPTA Withholding requirement has been significantly modified. It now requires EVERY Seller to complete the OREF FIRPTA Certification of Non-Foreign Status (or a similar form if provided by escrow Agent).

BEST PRACTICE - The Seller should fill out the form and send it directly to the escrow agent so that the social security number is not made available to the broker or staff. However, the Buyer's agent, in particular, should confirm that the escrow agent has this form. The certification (or payment) is the only protection that the buyer has that they are exempt from or complied with the requirements of the Act.

It appears that all escrow companies are willing to act as the Qualified Substitute in the event there is a foreign seller; however, some may limit the personnel who can act in this capacity so it will be necessary to check as to the company's position. In this instance the Qualified Substitute (escrow agent) will collect and disburse the appropriate amount to the IRS.

If you are the Seller's broker and they are a foreign person, be sure that they have a Taxpayer Identification Number ("TIN") as the Qualified Substitute (escrow agent) can not disburse funds within the 20 day time limit without this number. It can take weeks to secure this number from the IRS.

It is recognized that the number of Foreign Sellers who will require withholding is a relatively small percentage in most areas; however, the liability of 10-15 % of the gross sales price is significant and should be eliminated. The option of deciding who might be a "foreign seller" is fraught with potential claims of discrimination or outright mistake; herefore, the only safe option is to require this certification from every seller.

- Lines 276-280 Smoke Alarm and CO2 Detectors moved to OREF 080 "Alarm Advisory". The time period is now ___ days to allow installation before the first inspection, if necessary.
- Line 304 Mid year correction - changed "electronic funds" to "wire transfer" and deleted "drawn on collected funds" Line 330 also changed to "wire transfer" Language changes to more accurately reflect current usage and practice.
- Line 362-367 reformatted "check one" section. If "yes" added deposits to be transferred to buyer through escrow. This requirement is to be sure it is covered; however, use of the OREF Investment Property addendum is encouraged.
- Line 382-384 added a definition of agreement to make it clear that the agreement includes all addenda, counter offers, etc. The term "agreement" has been utilized throughout the sales agreement, but had never been defined previously.
- Lines 397-399 A definition of what a "notice" is and clarification of when the time period commences following the notice. There are over 20 different notice sections which are not uniform. It is anticipated that a task force will be created to bring uniformity to them for use in the 2020 forms.
- Line 454 There is no dispute resolution system in NAR, that language was removed and it is all in the local association. The Arbitration Service of Portland is retained as

the primary source. There was protracted discussion of the issue of arbitration at the end of 2018. It will be discussed by the Forms Committee in 2019.

OREF 011 Condo Sale Agreement

- Language changes were made in the introduction, no substantive changes.
- **Seller Delivery and Buyer Review Period** these sections now have a “**hard date**” for delivery and review. It is imperative that an extension be written and agreed to if required. It is suggested that as many, if not all, condo documents be gathered by the Seller prior to the agreement so as not to require an extension or miss the date. If all documents available have been delivered within the required time, plus extensions, OREF 059 should be utilized (receipt and removal of contingency addendum). It should state what documents were provided and that no other documents are available.

OREF 006 New Construction Sale Agreement - No changes were made

OREF 005 Farm Sale Agreement

- Section 16.3 An additional reference to the Agricultural Foreign Investment Act has been added. Although it has been in existence for some time, there has been no previous reference, it basically requires the notice to the Department of Agriculture the fact of purchase of farmland by a foreign buyer.
- Line 308 Language was added as to “or any other applicable government agencies”. There may be other agencies involved in addition to the Forest Service and Bureau of Land Management. The parties will need to identify and comply with any requirements.

OREF 008 Vacant Land Agreement

- A reference to the Agricultural Foreign Investment Act was added to this agreement as in OREF 005.

ADDITIONAL FORMS

OREF 002 ADDENUM

- Line 1 added “Other_____” it should make the form more useful

OREF 003 and 004 Buyer and Seller’s Counter Offer

- Consistent with the sales agreement, eliminated the earnest money distribution language.

OREF 083 Contingent Right to Purchase

- Line 28 added the following “buyer may not accept an offer contingent on the sale of the Offeror’s property without written permission of the Seller”. This will prevent the “chain” of contingent offers, unless the parties wish to accept that risk.

OREF 054 Occupy After Closing

- Line 88 a blank was added so there is space to insert the result of negotiation

OREF 031 Concominium/Townhome Resale Buyer Advisory

- The pre-existing Condominium and Townhome Buyer advisories were combined in that the information contained was similar. This advisory would be appropriate for buyers of either a condominium or townhome. This will eliminate some confusion and should lead to more usage of the form.
- Although not a substantive changes, some changes to the document section to be consistent with OREF 024, as amended.

OREF 024 Townhome/Planned Community/Home Owner’s Association

- Changes, not substantive, to bring the OREF 024 and 031 into conformity. It should reduce confusion and allow for greater and better use of these 3 forms.

OREF 082 Private Well Addendum

- Lines 16-17 Additional language taken directly from the current regulation to clarify who and where samples for testing can be taken. The history has been that often the owner or the broker would take the sample and sometimes after treatment. Both of these procedures are incorrect. The regulation requires that the sample must be taken from a source PRIOR to treatment and by specified individuals.

OREF 081 Septic Onsite Sewage Addendum

- Line 9 reference is to web site only
- Line 36-37 Changed from 10 days to 3 days and upon delivery, not receipt. This clarifies the timeline.

OREF 046 Woodstove Addendum

- No substantive changes, references now to website only.

OREF 070 Investment Property Addendum

- Line 19-22 The information was generally reformatted to make it more understandable and read easier.
- Line 82-87 The prior 3 sections were removed and combined in the Document Review period for greater clarity.
- **NOTE:** There is a “Hard date”, so a written extension is required if not within the original period.

OREF 038 Seller Carried Transaction Worksheet

- The language which previously appeared in the Seller Carried Addendum was removed and placed on this worksheet. The information pertained to the Seller responsibility and as was not required information for the buyer. See OREF 33 Seller Carried addendum.

OREF 033 Seller Carried Addendum

- MLO information removed and placed in OREF 038 as noted.
- Cosmetic changes to Line 1, 23.
- Line 42 the 20 year option was changed to 15 years
- Lines 143-166 Format changes, corrected the A/B boxes and changed the option order for both trust deed and contract of sale.

OREF 064 Notice of Unconditional Disapproval

- Removed language regarding unredeemed promissory note since it is no longer relevant

OREF 057 Termination Agreement

- It is now in two separate sections:
- Termination - Which allows both parties to terminate the transaction, this would require both signatures
- Earnest Money Disbursement - this does NOT require both signatures. By separating the two parts, it allows the parties to argue about the disbursement of earnest money, but at the same time allowing the transaction to terminate allowing the Seller to put the property back on the market.
- Please note that an escrow company should be able to proceed to close if the termination is signed even if they continue to argue over earnest money disbursement.
- Also note that a title/escrow company can NOT require that the company form be signed. ORS 696.581 (8) allows disbursement based on an agreement of the parties (a) and “May not impose additional requirements” Including “...release of liability in favor of the escrow agent.”

OREF Buyer Representation Agreement

- This is a major re-write based on a Forms Committee task force.

- There was consolidation of prior material and re-ordering it to make more sense to the Buyer review.
- Line 9 - provides for termination of the agreement prior to finding a property for Buyer, however, see lines 31-34 below
- Line 31-34 provides for compensation after the agreement is terminated, but Buyer purchases a property they learned of during the course of the agreement. Note it does provide for a 180 day period. Be sure to cover this section carefully to be sure the Buyer understands it. The Buyer's initials, if the 180 days stays, would be a good practice.
- Lines 22-27 Authorizes the agent to acts a disclosed limited agent or to represent more than one buyer on a transaction. If you are in a different agency situation, the relationship should be spelled out in the Additional Provisions section.
- Line 51-58 Dispute Resolution - generally follows the Sales agreement.
- Lines 39-41 Defines "Client" and should avoid the possibility that the Buyer may use some other person to avoid the responsibility of paying the commission. The use of the definition was determined to be used in other states Buyer Broker Agreements.

OREF 090 Buyer's Broker's Compensation

- Re-named for clarity

OREF 020 Seller Property Disclosure

- Line 156 Added legislative change, "suit" after "class action"
- Line 181 Added an N/A

OREF 019 Vacant Land Disclosure

- Section 6 heading changed to "Other Conditions"
- Line 122 - changed to "Are you aware of any other material fact or condition affecting the property" - adds clarity and makes compliance easier.

OREF 093 FIRPTA

- Major Revision, but no substantive change. See OREF 094 and 095 below.

OREF 094 FIRPTA Certification of Non-Non-Foreign Status

See prior discussion under Sales Agreement copied below as well

BEST PRACTICE - The Seller should fill out the form and send it directly to the escrow agent so that the social security number is not made available to the broker or staff. However, the Buyer's agent, in particular, should confirm that the escrow agent has this form. The certification (or payment) is the only protection that the buyer has that they are exempt from or complied with the requirements of the Act.

It appears that all escrow companies are willing to act as the Qualified Substitute in the event there is a foreign seller; however, some may limit the personnel who can act in this capacity so it will be necessary to check as to the company's position. In this instance the Qualified Substitute (escrow agent) will collect and disburse the appropriate amount to the IRS.

If you are the Seller's broker and they are a foreign person, be sure that they have a Taxpayer Identification Number ("TIN") as the Qualified Substitute (escrow agent) can not disburse funds within the 20 day time limit without this number. It can take weeks to secure this number from the IRS.

It is recognized that the number of Foreign Sellers who will require withholding is a relatively small percentage in most areas; however, the liability of 10-15 % of the gross sales price is significant and should be eliminated. The option of deciding who might be a "foreign seller" is fraught with potential claims of discrimination or outright mistake; therefore, the only safe option is to require this certification from every seller.

- Line 13 and 28 If the forwarding address is not available, the current address is acceptable.

Line 21 Example of a Seller that is not a disregarded entity would be an irrevocable trust or entity with multiple owners.

OREF Qualified Substitute Statement

- Note taught the Buyer's Agent, Buyer's Attorney or Title/Escrow company can be a Qualified Substitute. It is not advisable for the Buyer's Agent to act in this manner and some firms are making it a policy that they cannot.
- Lines 13-18 are statements of fact being made by the Qualified Substitute This form does allow the Seller's social security number or employer identification number to be protected against disclosure to the Buyer.

OREF 007 Commercial Sales Agreement

General Comment - One of the key elements to be negotiated in commercial sales can be the valuation of the real v. personal property that is being transferred as the allocation can affect the tax obligations of the Seller and Buyer in significant ways and not similarly. As a consequence this should be discussed with your client and the paragraphs below discussed.

- Lines 45-48 Identifies whether the personal property is part of the purchase price or valued separately.
- Any conveyance of personal property is to be conveyed to the Buyer free clear of liens and encumbrances.
- Provides 5 business days for the purpose of negotiating the price/value attributable to personal property, if necessary.
- Lines 272-277 Provides for a review of existing leases by the Buyer. The Buyer must give written notice within the review period of disapproval of the leases. If the notice

of disapproval is not given then the Buyer will be deemed to have accepted the leases as provided. Again, pay attention to the review period.

- Line 278-285 This provides that Seller is to provide Buyer a signed copy of the Tenant Estoppel Certificate (see discussion OREF 072) from each tenant, The Buyer can only terminate if there is a material default in the lease. The Buyer has had ample opportunity to review and accept the lease terms during the lease review period.
- Lines 284-285 The Seller is required to provide to the Buyer an Assignment and Assumption of leases (OREF 073) or similar form.
- Line 377-378 If personal property is to be transferred, this requires the use of a Bill of Sale, the proper form for transfer of personal property.

OREF 072 Tenant Estoppel Certificate

- This is designed for use with commercial property not residential tenancy.
- Line 12 This is a representation by the tenant that the lease is valid and binding on the tenant, providing assurances to the Buyer that the tenant will not challenge the lease after the purchase.
- The typical commercial lease has a provision that obligates the tenant to complete an estoppel certificate as contemplated by this form. However, there may be instances when the tenant simply refuses to do it. That becomes an issue of negotiation between the Seller and Buyer. If there is financing, the lender may (generally do) require the estoppel certificate, usually in the form of a Subordination and Non-Disturbance agreement (SNDA). The lender is looking for assurance that the tenant will continue subordinate to the new loan. If you have a recalcitrant tenant in this situation, the lender issue might be resolved with the assistance of the title company by agreeing to insure the tenant's interest as subordinate based on the lease term. However, the Seller/Buyer remains to be negotiated.
- Line 15 - relates to the common extension terms found in many commercial tenant leases.
- Line 25 - relates to a common provision in many leases requiring the landlord to give notice of any defect and opportunity to cure it prior to commencing any eviction proceeding.

OREF 073 Assignment and Assumption of Leases

- This is designed for use with commercial property and not residential property.
- Line 8 A commercial buyer will generally want a document that contains indemnification language protecting them against claims by the tenant that might have been created by conduct/behavior of the Seller.

OREF 071 Bill of Sale

- This is designed for use with commercial property; however, it could be used for the sale of a furnished vacation home.
- The amount will typically be set out in the sales agreement (OREF 007). However, if there is an itemized amount, be sure to include it - usually as an exhibit.

- A question to determine is how the funds for personal property are to be transferred, through escrow, personal delivery?
- Lines 31-31. In the event the Bill of Sale is signed outside of escrow and delivered prior to closing, this makes it clear that the Bill of Sale is only valid if the entire transaction is closed.

OREF 012 Manufactured Home in a Park Agreement

- This agreement is NOT for the sale of real estate, but of a Manufactured Home in a Park where the land is leased by the park owners to the manufactured home owner. This agreement has been created for use by the many agents who sell these manufactured homes. The format is similar to the Sale agreement for real property; however, real property specific material is omitted and some relevant phrases added.
- Note that you CANNOT act as an agent for the sale or purchase of the manufactured structure unless you have a license issued by the Department of Consumer and Business Services (“DCBS”). In addition, DCBS issues the forms for the transfer of and creation of lien interests in the Manufactured Home.
- Lines 141-145 This requires approval by the park, some parks require their approval for transfers of the manufactured home located on their property.
- Lines 146-147 This requires the Buyer’s approval of park rules and regulations. How a park is maintained and the limitations/responsibility of tenants can be very significant, much like a Homeowners Association. This allows the Buyer to approve and accept them.
- Lines 294-298 This relates to the transfer of title process.

OREF 080 Smoke Alarm and Carbon Monoxide Advisory

- It appears that agents have been copying or rephrasing an advisory for these two items. By combining and providing a specific form for these two alarms, it should promote clarity and ease of preparation.
- It covers the two required alarm systems smoke alarm and carbon monoxide
- The general requirements for each are identified.

NOTE: This **2019 Forms Summary** is provided by OREF Forms Committee Legal Counsel.

The **2019 Forms continuing education handout** for the January 2019, Forms Changes seminars and webinars will be posted mid-January after the conclusion of the two hour CE courses. Schedule now at <https://orefonline.com/wp-content/uploads/2018/08/2019-Forms-Changes-Seminars-and-Webinars-Events.pdf>

OREF will also provide the two hour **pre-recorded 2019 Forms Changes webinar** for information, education and training purposes. As this is not a live event, no continuing education credits are allowed.

Thank you for being a subscriber! Any questions, call OREF at (503) 459-0195!