

Transactions exempt from disclosure requirements clarified

by Lorie Garland
Assistant vice president
Legal Services

The new lead-based paint disclosure regulations have been in effect now for approximately two months. One of the continuing questions REALTORS® have asked is: "What are the transactions on which I *don't* have to make the new disclosures?"

Part of the confusion is caused by the fact that exemptions from the lead-based paint disclosures are different than those for Ohio's Residential Property Disclosure law. For example, an executor of property in an estate is not required to give a buyer a Residential Property Disclosure form, but is required to provide the Lead-Based Paint Disclosure form and the Environmental Protection Agency pamphlet.

The following is a summary of the transactions that are covered by the Ohio Residential Property Disclosure Act and the federal Lead-Based Paint Regulations, and the transactions that are exempt under each.

Residential Property Disclosure Form

Covered Transactions

- The transfer by sale, land installment contract, lease with option to purchase, exchange, or lease for a term of ninety-nine years and renewable forever of property that is improved by a building or other structure that as one-to-four dwelling units

Excluded Transactions

- Foreclosure sale
- Transfer pursuant to a court order
- Transfer to a mortgagee by a mortgagor by deed in lieu of foreclosure
- Transfer by a mortgagee who has acquired the property by a deed in lieu of foreclosure
- Transfer by a fiduciary in administering an estate, guardianship or trust
 - Transfer between co-owners
 - Transfer to the transferor's spouse
- Transfer between spouses or former spouses as a result of a divorce
 - Transfer to or from the state or other governmental entity
- Transfer of newly constructed residential property not previously inhabited
- Transfer to a transferee who has resided in the property for one or more years immediately prior to transfer
- Transfer by a transferor who had inherited the property and has not resided in the property for one year prior to the transfer

Residential Lead-Based Paint Disclosure Regulations

Covered Transactions

- The sale or lease of housing constructed prior to 1978

Excluded Transactions

- Foreclosure sale
- Leasing of rental properties that have been found to be lead-based paint free by a certified inspector
- Short-term leases of 100 days or less where no lease renewal or extension can occur
 - Lease renewals where lead disclosure has already taken place and no subsequent testing or information has become available
- Housing for the elderly or disabled, unless a child under the age of six resides or is expected to reside in the housing
- 0-bedroom dwellings where the sleeping area is not separated from the living area

Paperwork pitfalls of selling REO properties

by Peg Ritenour

Vice President

Legal Services, Ohio Association of Realtors

As a result of Ohio's high foreclosure rate brokerages are now selling record numbers of "REO" properties. These are "real estate owned" properties that have been acquired by a lender as a result of a borrower's default and a subsequent foreclosure action. Often Ohio brokers who list these properties are dealing with out-of-state entities that are unfamiliar with Ohio's law and customs. This can result in many difficulties for not only the listing broker and agent, but also cooperating REALTORS and the buyers they represent.

This article addresses some of the common problems involving the basic paperwork when selling these properties. These include the listing agreement, agency forms and disclosure documents.

Fair Housing language...Ohio license law requires that all listing agreements used by Ohio brokers for the sale of residential or vacant land must contain specific fair housing language. When selling REO properties, the lender often wants to use its own listing agreement. Such a form must contain this mandatory fair housing language. Therefore if it is not in the lender's form, you will need to use an addendum that contains this paragraph. (Now posted on WebMLS site)

Agency forms...Like any other transaction, the lender/seller must be given the listing brokerage's Consumer Guide to Agency at the time of listing. When an offer to purchase is obtained, the Agency Disclosure Statement signed by the buyer must be presented to the seller before the offer to purchase.

One of the difficulties brokers often face when selling REO properties is getting these forms signed. If the REALTOR is unable to get the necessary signatures, they need to be able to document that they complied with their duty to at least provide these documents to the seller. The REALTOR should note on the form that the seller would not sign the acknowledgement of receipt of the Consumer Guide and/or the Agency Disclosure Statement. Keeping copies of e-mails in which they ask for the return of signed forms is also recommended. (WebMLS policy & AT WILL CONTRACT requires you get all documents signed by the REO seller, no exceptions. They have and will do so if you push for them.)

If you are acting as a dual agent in the sale of an REO property, it is imperative that you obtain the written consent of both parties on the Agency Disclosure Statement. If the lender/seller will not sign this form, you can't act as a dual agent.

Lead-based Paint Disclosures...In the sale of residential property constructed prior to 1978, federal law requires that the seller provide the buyer with the lead-based paint disclosure form and the EPA pamphlet. While these forms are not required at a foreclosure sale (i.e. the sheriff's sale), anyone acquiring the property at that sale must provide them upon resale. Thus, a lender who is selling pre-1978 property they purchase at sheriff sale is required to give the subsequent purchaser the lead-based paint forms.

Residential Property Disclosure form...The same is true of Ohio's Residential Property Disclosure Form. Under Ohio law, the form is not required at the sheriff's sale itself. However if the lender is the successful bidder on the property at the sheriff sale, it must provide a form upon later resale of the property. The only exception that exists under Ohio law is if the lender acquired title to the property by accepting a deed in lieu of foreclosure. In that instance the lender would not be required to provide a Residential Property Disclosure form when it later lists and sells the property.

Therefore it is important for brokers listing such REO properties to determine how the lender

acquired title to the property. If the borrower deeded the property back to the lender in order to avoid foreclosure, upon resale the lender isn't required to provide the buyer with a Residential Property Disclosure Form. However, if the lender bought the property at the sheriff's sale, they need to provide this form to any subsequent purchaser just like any one else buying property at sheriff's sale must do when they turn around and sell it.

In most instances where the lender is required to provide the disclosure form, the lender does not want to do so because of its limited knowledge regarding the condition of the property. If the lender refuses to provide a form to the purchaser, the listing broker should explain that under Ohio law this failure will give the purchaser the right to rescind the purchase contract. This rescission right can be exercised for 30 days after the contract was signed or closing, whichever occurs first. Under Ohio law a buyer who does not receive a Residential Property Disclosure form can waive their right to rescind the purchase contract. Therefore, if the lender refuses to provide such a form, it is advisable to have the buyer acknowledge that they are not receiving the form and waive their rescission rights. **(Most of the REO owners just write "Never Occupied" in big letters across each blank page of the property disclosure and then date and initial/sign each page.)**

When selling REO properties, it is important to remember that all license law provisions apply to your conduct. While these regulations may not be of concern to the lenders, they must be of the utmost importance to you. Although no one likes to turn down listings, because your license could be on the line, REALTORS who experience problems with a lender may want to rethink about accepting future listings from that entity.

May 2007

§ 5302.30. Property disclosure form for residential real property transfers; transferee's right of rescission.

(A) As used in this section:

- (1) "Good faith" means honesty in fact in a transaction involving the transfer of residential real property.
- (2) "Land installment contract" has the same meaning as in section 5313.01 of the Revised Code.
- (3) "Political subdivision" and "state" have the same meanings as in section 2744.01 of the Revised Code.
- (4) "Residential real property" means real property that is improved by a building or other structure that has one to four dwelling units.

(Exceptions)

(B) (1) Except as provided in division (B)(2) of this section, this section applies to any transfer of residential real property that occurs on or after July 1, 1993, by sale, land installment contract, lease with option to purchase, exchange, or lease for a term of ninety-nine years and renewable forever. For purposes of this section, a transfer occurs when the initial contract for transfer is executed, regardless of when legal title is transferred, and references in this section to transfer offers and transfer agreements refer to offers and agreements in respect of the initial contract for transfer.

(2) This section does not apply to any transfer of residential real property that is any of the following:

- (a) A transfer pursuant to court order, including, but not limited to, a transfer ordered by a probate court during the administration of a decedent's estate, a transfer pursuant to a writ of execution, a transfer by a trustee in bankruptcy, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for specific performance of a contract or other agreement between persons;
- (b) A transfer to a mortgagee by a mortgagor by deed in lieu of foreclosure or in satisfaction of the mortgage debt;
- (c) A transfer to a beneficiary of a deed of trust by a trustor in default;
- (d) A transfer by a foreclosure sale that follows a default in the satisfaction of an obligation secured by a mortgage;
- (e) A transfer by a sale under a power of sale following a default in the satisfaction of an obligation that is secured by a deed of trust or another instrument containing a power of sale;
- (f) A transfer by a mortgagee, or a beneficiary under a deed of trust, who has acquired the residential real property at a sale conducted pursuant to a power of sale under a mortgage or a deed of trust or who has acquired the residential real property by a deed in lieu of foreclosure;
- (g) A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship, or a trust;
- (h) A transfer from one co-owner to one or more other co-owners;
- (i) A transfer made to the transferor's spouse or to one or more persons in the lineal line of consanguinity of one or more of the transferors;
- (j) A transfer between spouses or former spouses as a result of a decree of divorce, dissolution of marriage, annulment, or legal separation or as a result of a property settlement agreement incidental to a decree of divorce, dissolution of marriage, annulment, or legal separation;
- (k) A transfer to or from the state, a political subdivision of the state, or another governmental entity;
- (l) A transfer that involves newly constructed residential real property that previously has not been inhabited;
- (m) A transfer to a transferee who has occupied the property as a personal residence for one or more years immediately prior to the transfer;
- (n) A transfer from a transferor who both has not occupied the property as a personal residence within one year immediately prior to the transfer and has acquired the property through inheritance or devise.

(C) Except as provided in division (B)(2) of this section and subject to divisions (E) and (F) of this section, every person who intends to transfer any residential real property on or after July 1, 1993, by sale, land installment contract, lease with option to purchase, exchange, or lease for a term of ninety-nine years and renewable forever shall complete all applicable items in a property disclosure form prescribed under division (D) of this section and shall deliver in accordance with division (I) of this section a signed and dated copy of the completed form to each prospective transferee or his agent as soon as is practicable.

(D) Prior to July 1, 1993, the director of commerce, by rule adopted in accordance with Chapter 119. of the Revised Code, shall prescribe the disclosure form to be completed by transferors. The form prescribed by the director

shall be designed to permit the transferor to disclose material matters relating to the physical condition of the property to be transferred, including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property, including the roof, foundation, walls, and floors; the presence of hazardous materials or substances, including lead-based paint, asbestos, urea-formaldehyde foam insulation, and radon gas; and any material defects in the property that are within the actual knowledge of the transferor.

The form also shall set forth a statement of the purpose of the form, including statements substantially similar to the following: that the form constitutes a statement of the conditions of the property and of information concerning the property actually known by the transferor; that, unless the transferee is otherwise advised in writing, the transferor, other than having lived at or owning the property, possesses no greater knowledge than that which could be obtained by a careful inspection of the property by a potential transferee; that the statement is not a warranty of any kind by the transferor or by any agent or subagent representing the transferor in this transaction; that the statement is not a substitute for any inspections; that the transferee is encouraged to obtain his/her own professional inspection; that the representations are made by the transferor and are not the representations of the transferor's agent or subagent; and that the form and the representations contained therein are provided by the transferor exclusively to potential transferees in a transfer made by the transferor, and are not made to transferees in any subsequent transfers.

The form shall include instructions to the transferor for completing the form, space in which the transferor or transferors shall sign and date the form, and space in which the transferee or transferees shall sign and date the form acknowledging receipt of a copy of the form and stating that the transferee or transferees understand the purpose of the form as stated thereon.

(Good Faith)

(E) (1) Each disclosure of an item of information that is required to be made in the property disclosure form prescribed under division (D) of this section in connection with particular residential real property and each act that may be performed in making any disclosure of an item of information shall be made or performed in good faith.

(2) If an item of information is unknown to the transferor of residential real property at the time the item is required to be disclosed in the property disclosure form and if the approximation is not used for the purpose of circumventing or otherwise evading divisions (C) and (D) of this section, the transferor may make a good faith approximation of the item of information.

(Liability)

(F) (1) A transferor of residential real property is not liable in damages in a civil action for injury, death, or loss to person or property that allegedly arises from any error in, inaccuracy of, or omission of any item of information required to be disclosed in the property disclosure form if the error, inaccuracy, or omission was not within the transferor's actual knowledge.

(2) If any item of information that is disclosed in the property disclosure form is rendered inaccurate after the delivery of the form to the transferee of residential real property or his agent as a result of any act, occurrence, or agreement, the subsequent inaccuracy does not cause, and shall not be construed as causing, the transferor of the residential real property to be in noncompliance with the requirements of divisions (C) and (D) of this section.

(G) Any disclosure of an item of information in the property disclosure form prescribed under division (D) of this section may be amended in writing by the transferor of residential real property at any time following the delivery of the form in accordance with divisions (C) and (I) of this section. The amendment shall be subject to the provisions of this section.

(H) Except as provided in division (B)(2) of this section, every prospective transferee of residential real property who receives in accordance with division (C) of this section a signed and dated copy of a completed property disclosure form as prescribed under division (D) of this section shall acknowledge his receipt of the form by doing both of the following:

- (1) Signing and dating a copy of the form;
- (2) Delivering a signed and dated copy of the form to the transferor or his agent or subagent.

(I) The transferor's delivery under division (C) of this section of a property disclosure form as prescribed under division (D) of this section and the prospective transferee's delivery under division (H) of this section of an acknowledgment of his receipt of that form shall be made by personal delivery to the other party or his agent or

subagent, by ordinary mail or certified mail, return receipt requested, or by facsimile transmission. For the purposes of the delivery requirements of this section, the delivery of a property disclosure form to a prospective co-transferee of residential real property or his agent shall be considered delivery to the other prospective transferees unless otherwise provided by contract.

(J) The specification of items of information that must be disclosed in the property disclosure form as prescribed under division (D) of this section does not limit or abridge, and shall not be construed as limiting or abridging, any obligation to disclose an item of information that is created by any other provision of the Revised Code or the common law of this state or that may exist in order to preclude fraud, either by misrepresentation, concealment, or nondisclosure in a transaction involving the transfer of residential real property. The disclosure requirements of this section do not bar, and shall not be construed as barring, the application of any legal or equitable defense that a transferor of residential real property may assert in a civil action commenced against the transferor by a prospective or actual transferee of that property.

(K) (1) Except as provided in division (K)(2) of this section but subject to divisions (J) and (L) of this section, a transfer of residential real property that is subject to this section shall not be invalidated because of the failure of the transferor to provide to the transferee in accordance with division (C) of this section a completed property disclosure form as prescribed under division (D) of this section.

(2) Subject to division (K)(3)(c) of this section, if a transferee of residential real property that is subject to this section receives a property disclosure form or an amendment of that form as described in division (G) of this section after the transferee has entered into a transfer agreement with respect to the property, the transferee, after his receipt of the form or amendment, may rescind the transfer agreement in a written, signed, and dated document that is delivered to the transferor or his agent or subagent in accordance with divisions (K)(3)(a) and (b) of this section, without incurring any legal liability to the transferor because of the rescission, including, but not limited to, a civil action for specific performance of the transfer agreement. Upon the rescission of the transfer agreement, the transferee is entitled to the return of, and the transferor shall return, any deposits made by the transferee in connection with the proposed transfer of the residential real property.

(3) (a) Subject to division (K)(3)(b) of this section, a rescission of a transfer agreement under division (K)(2) of this section only may occur if the transferee's written, signed, and dated document of rescission is delivered to the transferor or his agent or subagent within three business days following the date on which the transferee or his agent receives the property disclosure form prescribed under division (D) of this section or the amendment of that form as described in division (G) of this section.

(b) A transferee may not rescind a transfer agreement under division (K)(2) of this section unless he rescinds the transfer agreement by the earlier of the date that is thirty days after the date upon which the transferor accepted the transferee's transfer offer or the date of the closing of the transfer of the residential real property.

(c) A transferee of residential real property may waive the right of rescission of a transfer agreement described in division (K)(2) of this section.

(d) A rescission of a transfer agreement is not permissible under division (K)(2) of this section if a transferee of residential real property that is subject to this section receives a property disclosure form as prescribed under division (D) of this section or an amendment of that form as described in division (G) of this section prior to the transferee's submission to the transferor or his agent or subagent of a transfer offer and the transferee's entry into a transfer agreement with respect to the property.

(4) If a transferee of residential real property subject to this section does not receive a property disclosure form from the transferor after the transferee has submitted to the transferor or his agent or subagent a transfer offer and has entered into a transfer agreement with respect to the property, the transferee may rescind the transfer agreement in a written, signed, and dated document that is delivered to the transferor or his agent or subagent in accordance with this paragraph, without incurring any legal liability to the transferor because of the rescission, including, but not limited to, a civil action for specific performance of the transfer agreement. Upon the rescission of the transfer agreement, the transferee is entitled to the return of, and the transferor shall return, any deposits made by the transferee in connection with the proposed transfer of the residential real property. A transferee may not rescind a transfer agreement under this paragraph unless he rescinds the transfer agreement by the earlier of the date that is thirty days after the date upon which the transferor accepted the transferee's transfer offer or the date of the closing of the transfer of the residential real property.

(L) The right of rescission of a transfer agreement described in division (K)(2) of this section or the absence of that right does not affect, and shall not be construed as affecting, any other legal causes of action or other remedies that a transferee or prospective transferee of residential real property may possess against the transferor of that property.

HISTORY: 144 v S 304. Eff 3-19-93.




Mon., July 3

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DISCLOSURE - SELLER DISCLOSURE LAW

I have a mobile home listed for sale. Does the seller have to fill out a seller disclosure form?

Answer: If the seller will only be conveying title to the mobile home, the transaction would not be covered by the property disclosure law and no form would be necessary. However, if the mobile home has been affixed to the land and the land itself will be transferred, then the seller would be required to provide prospective purchasers with a form.

I have a property listed that is zoned for commercial use and has retail space on the first floor. On the second floor there are two apartments. Does the seller have to fill out a disclosure form?

Answer: Probably. The statute provides that a form must be given to any prospective purchaser of "residential real property". Although this property may be zoned for commercial use, how the property is zoned is not determinative of whether a form is required. Instead, whether a form is necessary will depend upon whether the property falls under the definition of residential real property. It defines residential property as "real property that is improved by a building or other structure with one to four dwelling units". Because this building has two dwelling units it would probably be found to fall under this definition, even though it is zoned for commercial use and

contains retail space.

A seller has listed three duplexes for sale with me that he is offering for sale as a package. Because there are a total of six units, is this transaction exempt under the property disclosure law?

Answer: Although these duplexes may be marketed and offered for sale as a package, the answer to this question probably depends upon how title will be transferred. If each duplex has a separate deed and each could be conveyed separately, then the sale of each duplex would probably be found to be a separate transfer. As such, the seller would be required to fill out a disclosure form on each duplex. However, if these three duplexes are situated on one parcel, with title to all of them being conveyed by just one deed, then the transaction would probably be found to be exempt as there are more than four dwelling units.

I have been the property manager of a property for several years. The owner, who lives out of state, is now going to list it for sale with me. Since I know much more about the condition of the property, can I fill out the form for the owner?

Answer: The statute clearly provides that the owner of the property is the person required to complete the residential property disclosure form and provide it to the seller. Therefore, it is necessary that the owner fill out the form that is provided to purchasers. Although you are not required to fill out a form, as the listing agent you still have a duty to disclose to potential purchasers any latent defects of which you have knowledge.

I have property listed for sale that is owned by an elderly woman in a nursing home. Her niece has power of attorney to sign all documents regarding the sale. Who should fill out the seller disclosure form?

Answer: Unfortunately the statute does not provide a specific answer to this question. To meet the intent of

the legislation it is preferred that the owner of the property complete and sign the form. However, if this is not possible, the niece, by virtue of having a power of attorney, could fill it out based upon whatever knowledge she may have of the condition of the property. Another option would be to have the buyers waive their right to receive the disclosure form and their right to rescind the contract because no form was provided by the seller.

Occasionally when a very desirable property goes on the market offers are received almost immediately. When this happens there may not be time to get a disclosure form from the seller without the risk of losing the property to another buyer. In this situation, is it advisable to make the contract contingent upon the seller providing the buyer with a form within three days of acceptance.

Answer: In this situation such a contingency can be advantageous to the buyer, but is not in the best interest of the seller. This is because the statute provides that if the buyer receives the disclosure form after he has entered into a purchase contract, he will have three business days from the date he receives the form to rescind the transaction. Therefore, if such a contingency were included in an offer that the seller accepted, the buyer would have three business days after he received the disclosure form to rescind. This is clearly beneficial to the buyer but contrary to the seller's best interests. Therefore, while buyer's agents may recommend this to their clients, seller's agents should advise their seller not to accept such a contingency and to instead provide the buyer with the form prior to contract to avoid these rescission rights.

Can a single family home be sold when the seller refuses to complete a seller disclosure form?

Answer: Yes. A single family home which does not fall within one of exemptions to the seller disclosure form can be sold without completion of a seller disclosure form. However, if the buyer is never provided with a seller disclosure form, the buyer has a right of rescission for 30 days from the date the contract was

entered into.

TRANSACTIONS COVERED

Does the property disclosure law apply to all sellers, including "for-sale-by-owners," or only to those who have their property listed with REALTORS?

Answer: The seller disclosure law applies to all sellers of residential property unless they fall under one of the exemptions in the bill.

I have a farm listed that has a house on it. Does the seller need to fill out a disclosure form?

Answer: The requirement applies to any property that is improved by a building or any other structure that has one-to-four dwelling units. Because this farm has a house on it, a disclosure form would be needed.

Are investors who have never lived in a property exempt from the requirements of the seller disclosure bill?

Answer: No. However, if an investor has no actual knowledge of the property's condition he may answer accordingly on the form, as long as he is acting in good faith.

Does the law apply to the sale of condominiums?

Answer: Yes. Condominiums are covered unless the sale falls under one of the listed exclusions in the bill.

I have just listed a home that the owner purchased from a builder four months ago. Will this fall under the exemption for "new construction"?

Answer: No. The exemption for new construction only applies to homes that have not been previously inhabited.

I am a licensed auctioneer and REALTOR. Is the seller

required to fill out a disclosure form when property is being sold at auction? If so, when does the form have to be given to the buyer?

Answer: Sales effected by an auction are covered. The law requires the seller to provide the buyer with a form "as soon as practicable." However, the seller must give the form to the buyer before he is bound by a purchase contract or the buyer will have certain rights to rescind the contract. Because a buyer at auction is legally bound to purchase the property by placing his bid, it is recommended that the disclosure form be provided to those attending the auction before it begins.

Is a form required when property is being sold by a "third party" or relocation company?

Answer: Yes, such sales are covered.

A buyer is entering into a lease with an option to purchase. Is the seller required to provide the buyer with a disclosure form now or when the option is exercised?

Answer: The disclosure law applies to any transfer of residential real estate, including leases with an option to purchase. Therefore the form must be provided to the tenant/optionee before the contract to lease with an option to purchase is entered into to avoid the right of rescission.

PROVIDING THE FORM - THE SELLER'S OBLIGATIONS

Can the seller fax the form to the buyer?

Answer: Yes. The form may be delivered in person, by ordinary or certified mail or by fax.

If the seller is a corporation, who signs the form?

Answer: In this situation, the person authorized to act on behalf of the corporation in the sale of its property would sign the disclosure form on its behalf. This would normally be the same person who signs the listing,

such as an officer of the corporation.

If there are several co-owners of a property do they all have to sign the disclosure form?

Answer: The statute states that "every person" who transfers residential property after July 1, 1993, must provide a disclosure form to a prospective purchaser. Therefore, to comply each person who will be transferring an ownership interest after July 1 (i.e. signing the deed) needs to sign the disclosure form.

If the buyer is represented by his own agent, is it sufficient to give the seller disclosure form to his agent?

Answer: The seller is required to deliver a signed and dated form to the buyer "or his agent." Therefore, if the selling agent is acting as a true buyer's agent the seller can give the form to the buyer's agent to fulfill his obligations. On the other hand, if the selling agent is acting as a subagent he represents the seller and giving the form to him would not constitute delivery of the form to the buyer. The seller's obligations would only be satisfied when the subagent actually gives the buyer the form.

A relocation or "third party" company is handling the sale of property for an employee who was transferred out of town. Does this company fill out the form or does the employee?

Answer: The answer to this question depends upon who has legal title to the property. If the property is still in the employee's name and the employee will actually be conveying the deed to the purchaser, then the employee is required to complete the form and provide it to the purchaser. On the other hand, if the title has been conveyed to the relocation or "third party" company by the employee, then that company is required to fill out and provide a disclosure form to the purchaser.

Do I have to give each buyer a form with the seller's

original signature or is a copy sufficient?

Answer: The statute provides that a copy may be given to a prospective purchaser. Therefore an original signature is not necessary on each form delivered to prospective buyers.

For his protection, should a seller have an inspection done before filling out the form?

Answer: It was not the intent of this legislation to require sellers to incur the expense of having a professional inspection done. Instead, the law merely requires that the seller provide the buyer with information regarding the condition of his property that is within his actual knowledge.

Does the seller have to disclose problems that occurred a long time ago and that have been repaired?

Answer: Although the statute does not include any time limit on how far back the seller has to go in his disclosures the mandatory form approved by the Ohio Department of Commerce does, in many places, place a five-year limit on the required disclosures.

If the condition of the property changes after the seller has filled out the disclosure form and given it to the buyer, is he required to fill out a new form?

Answer: The statute states the seller "may" amend the disclosure form in this situation. It does not require the seller to do this. However, it is important to recognize that if the seller does provide a buyer with an amended form after a purchase contract has been entered into the buyer may then have three business days from the date he received the amended form to rescind the contract. For this reason, and because of the seller's obligation to disclose latent defects, it is strongly recommended that the seller be advised to seek legal advice if he has any questions regarding his duty of disclosure and whether an amended form is necessary.

What happens if a buyer writes an offer to purchase before I've had a chance to give him the seller disclosure form?

Answer: To avoid giving the buyer a right to rescind, the seller must provide the disclosure form to the buyer before he is bound by a purchase contract. This can be accomplished by incorporating the disclosure form in a counteroffer back to the purchaser.

To avoid the problem described above, should I pass out disclosure forms to everyone attending an open house?

Answer: This is a practice that some REALTORS follow. If this is done it is crucial to make sure you get a signed and dated copy of the form back from the buyer as proof that the form was provided before a contract was executed.

What should I do if the seller refuses to fill out the seller disclosure form?

Answer: You should refer the seller to his own attorney and note this advice in your file. You might also want to send the seller a letter confirming that he was notified of his legal obligations as further documentation of this advice. Finally, your company might want to consider a policy declining to accept listings unless the seller completes a disclosure form, given the risk of any subsequent transaction being rescinded by the buyer.

THE BUYER'S DUTIES

If there is more than one buyer do they each have to be provided with and sign a form?

Answer: Although that can be done, the statute provides that delivery of the form to one purchaser is considered to be delivery to all of the purchasers unless otherwise agreed. Therefore it is only necessary to give the form to one of the buyers and to obtain one buyer's signature.

Does the seller disclosure form take the place of an inspection contingency in the purchase contract?

Answer: No. As the disclosure form specifically states, it is not a substitute for inspections and the buyer is still encouraged to obtain his own inspections.

What do I do if the buyer refuses to sign the disclosure form?

Answer: This should be noted in your file, as well as the time and date the form was provided to the purchaser. The seller should be notified at once and any legal concerns either the buyer or seller has should be referred to their respective attorneys.

By signing the form does the purchaser waive any rights to sue the seller for concealment, misrepresentation or fraud?

Answer: No. If the seller engages in concealment, fraud, or misrepresentation in the completion of the form the buyer may still bring an action for damages or other available remedies against the seller even though he signed the disclosure form.

BUYER'S RESCISSION RIGHTS

How does the buyer exercise the right to rescind?

Answer: The buyer must rescind the contract by delivering written, signed and dated notice that he is rescinding the contract to the seller, the listing agent or his subagent within the appropriate time period as discussed below.

Could the buyer ever rescind the contract after the transaction has closed?

Answer: No. The right to rescind terminates with the closing.

Does the buyer have any right to rescind the contract if

he receives the disclosure form prior to making an offer?

Answer: The buyer has no right to rescind the contract if he receives a form in a timely manner. The only exception to this would be if the buyer received an amended form after a contract was executed, or if the seller engaged in fraud in filling out the form.

Can a buyer waive the right of rescission?

Answer: Yes, the statute specifically permits the buyer to waive this right if he receives the form or an amended form after entering into a contract.

Is there a time limit or cap on the buyer's right to rescind in these situations?

Answer: Yes. When the buyer receives the form, or an amended form, after the purchase contract has been signed, he must rescind the contract within three business days from the date the buyer or his agent received the form. However, this rescission right must be exercised within 30 days from the date the contract was accepted or closing, whichever occurs first. This same "30 days or the date of closing" rule applies when the seller fails completely to provide the buyer with a form.

Does that mean if a seller waits until 31 days after the contract is accepted to give a buyer the disclosure form that the buyer has no right to rescind?

Answer: Yes.

If a buyer successfully rescinds a purchase contract, is he entitled to get his earnest money?

Answer: Generally, yes. The statute provides that upon rescission of the purchase contract the purchaser is entitled to the return of his earnest money and other deposits made in connection with the contract and that the seller "shall return" these monies.

In most cases the brokerage firm will be holding the earnest money. Is a release or court order necessary to return the earnest money in this situation?

Answer: To avoid problems and bring closure to the transaction a release should be obtained. If the seller refuses to permit you to return the earnest money because he is challenging the buyer's right to rescind, you should maintain the earnest money in your trust account until you receive written permission from the seller or a court order to release it. However, if the seller is not challenging the buyer's right to rescind, then this fact should be documented and the funds can be returned.

When a form is received after a contract is entered into, does the three business days to rescind run from when the buyer receives the form or from when his agent receives the form?

Answer: Again, this depends on whom the agent represents. If the agent is acting as a true buyer's agent, the three business days would run from the agent's receipt of the form. If the agent was acting as a subagent, this time would not begin until the buyer actually received the form.

THE SELLER DISCLOSURE FORM

Where can I get copies of the Residential Property Disclosure Form?

Answer: Forms can be obtained from the Ohio Department of Commerce, Division of Real Estate, by calling (614) 466-4100, or downloaded at its site at: <http://www.com.state.oh.us/real/>. If you are a REALTOR, you may contact OAR's Information Central Service at 1-800-879-4636. Your local Board of REALTORS may also have forms available for your use.

Can I put my company name or logo on the form, reduce it in size or change it in any way?

Answer: According to the Department of Commerce, the form is to be used in the text and format approved by the department. It should not be changed, nor should your company name or logo be added.

Does the Division or Real Estate enforce the property disclosure law? If not, how is it enforced?

Answer: There is no state agency that is responsible for enforcing the seller disclosure law. Instead, the enforcement mechanism is the buyer's right to rescind the purchase contract if the seller fails to give the buyer a disclosure form or gives it to him after the purchase contract has been signed.

As the listing broker do I have to maintain a copy of the disclosure form the seller filled out in my files and, if so, for how long?

Answer: Under the license law you are required to maintain a copy of all records and documents for three years from the date of the transaction. Therefore, you should not only keep a copy of the form after the seller signs it, but more importantly, maintain a copy of the form with the buyer's signature after the transaction is entered into. This will document that the buyer was given the form and the date on which it was given.

As the selling brokerage, should I maintain a copy of the form received from the seller in my files for three years as well?

Answer: Yes, the same record keeping requirements apply to you.

REALTORS' RESPONSIBILITIES AND LIABILITIES

As a listing agent, do I have a duty to tell my seller about his obligations to give the buyer a disclosure form?

Answer: Although such a duty is not imposed upon listing agents by the statute, an agent's fiduciary duties

to the seller probably create such an obligation. Therefore it is recommended that you inform your seller about the law and provide them with a disclosure form to complete.

To what extent am I responsible for helping the seller fill out the disclosure form?

Answer: Again, the statute does not require that you assist sellers in completing this form. For liability reasons, it is recommended that you do not assist or advise the seller in completing the form. Such liability could be created if the agent incorrectly advises the seller that disclosure is unnecessary or recommends that something be explained in a certain manner and that advice later results in damages to the buyer. To avoid giving the seller the opportunity to blame any non-disclosure or misrepresentation on the agent, it is recommended that the form be left with the seller to fill out alone and that any questions be referred to the seller's attorney.

Could I be liable to the seller as a listing agent if I fail to give the buyer the disclosure form after the seller fills it out?

Answer: Possibly. As the seller's agent, if you assume the responsibility of delivering the form to the buyer and you fail to do so before a purchase contract is executed, the buyer will have certain rights to rescind the purchase contract. If this results in damages to the seller, he may be able to bring an action against the agent and his brokerage firm for failing to assure that the buyer received the disclosure form in a timely manner.

What should I do if I believe the seller is intentionally failing to disclose something on the form or misrepresenting the true condition of the property?

Answer: Certainly an effort to tactfully discuss your concerns with the seller should be attempted. If this fails and you still believe the seller is concealing or

misrepresenting the true condition of the property, you should recommend that the seller consult with his attorney, and note this recommendation in you file. Moreover, because you and your firm could possibly have to defend an action for fraud by a buyer if the seller is engaging in concealment or misrepresentation, it is recommended that you decline the listing.

As a buyer's agent do I have a duty to tell the buyer about his right to receive a form from the seller?

Answer: Although the statute does not require this of you, such a duty is probably imposed upon you because of your agency relationship with the buyer. Therefore, when acting as a buyer's agent you should inform your client about their rights .

As a buyer's agent, if I receive a disclosure form from the seller, but I fail to give it to the buyer until after a contract is entered into, could I be liable to the buyer?

Answer: Probably. By giving the form to you, the seller has complied with his duties under Ohio law. Therefore, the buyer will have no right to rescind the contract even though the buyer did not receive the form until after the contract was executed. If certain problems or defects were disclosed on the form, the buyer could probably maintain a cause of action against you for the damages he suffered as a result of your failure to deliver the form to him in a timely manner. These could include the cost to repair the defects and forfeiture of your commission.

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