Legal Update
Part I & II
Edition 9.3

Legal Update
Part I
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Foreword

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Contents

1 **Chapter 1: Statutory Changes to Texas Real Estate License Act (Chapter 1101, Texas Occupations Code) and TREC Rule Updates**

2 Key TREC Rules Updates
3 How Can A License Holder Get Involved in the Rule Making Process?
3 Licensing Related Bills Passed by the 2019 Texas Legislative Session

5 **Chapter 2: Seller's Disclosure**

5 Statutory Changes
5 Selecting the Seller's Disclosure Notice
6 Inspection Reports: Sellers and Future Buyers
7 When is a Seller's Disclosure Notice NOT Required?

8 **Chapter 3: Water Issues**

8 What is my level of flood risk?
9 Municipal Utility Districts
9 Municipal Utility Districts (MUDs) and the Law
10 Hydrostatic Testing
11 Sewer Line Inspection

12 **Chapter 4: Contract Issues**

12 Changes to Promulgated Forms
13 Additional Changes to Other Promulgated Forms
14 Notice of Buyer's Termination of Contract
14 Notice of Seller's Termination of Contract
14 Third Party Financing Addendum
14 One to Four Family Residential Contract (Resale)
15 Smart Homes
15 Paragraph 6, Objections
16 Cure Period Example
16 Effective Date
17 Delivery of Earnest Money and Option Fee
17 Additional Option Period:

18 **Chapter 5: Unauthorized Practice of Law**

18 §537.11 - Use of Standard Contract Forms
19 What License Holders Can Do:
19 What License Holders Cannot Do:
19 Unauthorized Practice of Law Pop Quiz
20 Unauthorized Practice of Law examples from recent TREC Cases:

21 Chapter 6: Property Management
21 Use of Criminal History
22 Protecting Tenants at Foreclosure Act Reinstated
22 Consumer Reports

24 Chapter 7: Security Issues
24 In-Home Surveillance
25 Cyber Fraud
25 Wiring Funds or Cashier's Checks
26 Avoiding Cyber Fraud
26 Definitions
26 HOW do you protect yourself?

28 Appendix A: Updated TREC Seller's Disclosure Notice (OP-H) effective 9/1/2019

32 Appendix B: Brochure "Help Clients Protect Their Investment: Questions & Answers About Flood Insurance for Real Estate Professionals"

36 Appendix C: Sec. 49.452, Notice to Purchasers (Texas Water Code)

42 Appendix D: Addendum for Authorizing Hydrostatic Testing (48-0)

43 Appendix E: Promulgated Contract Forms and Addenda
43 One to Four Family Residential Contract (Resale) (Form #20-15)
53 Notice of Seller's Termination of Contract (Form #50-0)
54 Notice of Buyer's Termination of Contract (Form #38-7)
55 Third Party Financing Addendum (Form #40-9)
57 Addendum Regarding Residential Leases (Form #51-0)
58 Addendum Regarding Fixture Leases (Form #52-0)

59 Appendix F: Six New Property Management and Leasing Laws

61 Appendix G: Article "Is Your Sellers' Surveillance Putting Them At Risk?"

63 Appendix H: Helpful Links

CHAPTER

01 STATUTORY CHANGES TO TEXAS REAL ESTATE LICENSE ACT (CHAPTER 1101, TEXAS OCCUPATIONS CODE) AND TREC RULE UPDATES

Learning Objectives

After this chapter, you will be able to

→ Understand the changes to the Texas Occupations Code (TOC) Chapter 1101 as a result of TREC's 2019 Sunset Review.

→ Identify changes to TREC Rules §535.2, Broker Responsibility, and §535.148, Receiving an Undisclosed Commission or Rebate.

→ Give one example of how a license holder can be involved in the rule making process.

Chapter 1101 (TOC) gives TREC authority to

* Administer Chapters 1101-1102,
* Adopt and enforce rules necessary to administer those chapters, and
* Establish standards of conduct and ethics for all persons licensed under Chapters 1101-1102.

Sunset Review

As a result of the agency's Sunset review, the 86th Texas Legislature amended Chapter 1101 in 2019 by enacting SB 624 that included changes to:

1. Require TREC to dismiss a complaint if it determines the complaint is inappropriate or without merit;
2. Require TREC to protect the identity of a complainant, to the extent possible, by excluding the complainant's identifying information from the notice sent to the respondent;
3. Remove the Texas residency requirement for all licenses regulated by TREC and instead require license holders to have geographic competency;
4. Remove TREC's authority to license instructors but maintain TREC's authority over the education and experience requirements to act as an instructor for TREC approved courses, and requires providers to ensure any instructors they use meet the TREC requirements;
5. Require TREC to determine if an applicant is fit to engage in the occupations regulated by TREC in lieu of determining if an applicant's moral character complies with licensing requirements;

6. Authorize TREC to deny a renewal in the event that the license holder is in violation of a TREC order;
7. Eliminate licensure of branch offices.

Key TREC Rules Updates

§537.20 – 537.59 Standard Contract Forms (effective 4/1/21)

The approved amendments make changes to the standard contract forms and created two new forms. The changes to the promulgated contract forms and newly created forms are covered in detail later in this course in Chapter 4, Contract Issues.

§535.92 Continuing Education Requirements (effective 2/1/2021)

The amendments require three hours of continuing education (CE) to real estate sales agents or broker license renewals, the subject matter of which must be real estate contracts. The proposed amendments additionally clarify which license holders must take the broker responsibility course and updates the professional designations available through CE credit.

§531.18 Consumer Information (effective 2/1/2021)

The amendment to the Consumer Protection Notice adds a statement to alert consumers that inspectors licensed by TREC are required to maintain errors and omissions insurance to cover losses arising from the performance of a real estate inspection in a negligent or incompetent manner. The form is available at www.trec.texas.gov.

§531.3 - Competency (effective 9/1/19)

The amendments clarify the definition of competency to conform with recent changes to §535.2, Broker Responsibility, which requires brokers to ensure their sponsored agents have geographic and property-type competence.

§535.61 - Approval of Providers of Qualifying Course (effective 9/1/19)

The amendments add clarifying terms or timeframes for greater understanding and compliance. The amendments also provides that a provider cannot enroll students in a course 60 days before the expiration of the provider's approval, unless they have submitted an application for a subsequent approval at least 60 days prior to the expiration of the current approval. This will offer greater protection for students who enroll in courses near the end of a provider's approval term and give providers a way to avoid any business disruption when applying for a subsequent approval.

§535.63 - Approval of Instructors of Qualifying Courses and

§535.74 - Approval of Continuing Education Instructors (effective 9/1/19)

The amendments are made in response to the agency's Sunset Bill, which eliminates TREC's authority to approve real estate and inspector instructors but retains TREC's ability to set out qualifications and standards for instructors of TREC-approved courses.

§535.65 - Responsibilities and Operations of Providers of Qualifying Courses and

§535.75 - Responsibilities and Operations of Continuing Education Providers (effective 9/1/19)

The amendments to §535.65 adds that a provider must provide a hyperlink or URL to the TREC website when displaying exam passage rates in any advertisement. This will ensure that the consumers can verify the most current passage rate figures and related information for any or all providers. In addition, the amendments eliminate the waiting period before retesting for students who fail a course exam, leaving the decision as to remedial course work before the retest to the providers. Finally, §535.65 and §535.75 were updated to reflect the Sunset Commission Report directive that instructors of courses be approved by providers based on standards set by the Commission instead of being licensed by the Commission.

§535.148 - Receiving an Undisclosed Commission or Rebate (effective 9/1/19)

The amendments provide clarity about consumer protection issues when paying or receiving funds to/from other settlement service providers. A section was added to define settlement providers that mostly parallels the definition in the Real Estate Settlement Procedures Act (RESPA) for consistency with the federal law. Exemptions from the prohibition provisions were also clarified. TREC currently has a rule that includes these provisions for inspectors but not explicitly for other real estate license holders. The change provides parity for license types subject to TREC's jurisdiction and ensures settlement provider independence. These amendments prohibit license holders from selling referrals or recommending settlement providers to their clients based solely on money or other valuable consideration received in order to ensure that license holders are upholding their fiduciary duty by putting their clients' interest above their own financial gain.

§535.222 - Inspection Reports (effective 9/1/19)

The amendments clarify that the inspector does not have to deliver the inspection report until after receipt of payment for the report and reduces the delivery time after payment from three days to two.

§533.8 - Motions for Rehearing, Failure to Attend Hearing and Default Effective (effective 5/27/19)

The amendments clarify the methods for filing a motion for rehearing with the Commission by adding the email address and facsimile number to which a motion for rehearing may be sent.

§535.141 - Initiation of Investigation; Order Requirements (effective 5/27/19)

The amendments change the caption of the rule to clarify that this section also includes order requirements and clarify how the agency prioritizes complaint investigations as required in Tex. Occ. Code §1101.204.

§535.142 - Consumer Complaint Process (effective 5/27/19)

The new rule sets out the existing processes authorized in statute and followed by the Commission when processing and investigating consumer complaints.

§535.2 - Broker Responsibility (effective 12/9/18)

The amendments requires a broker to designate anyone who leads, supervises, directs, or manages a team in the brokerage to be a delegated supervisor. This will require that person to take a six- hour broker responsibility course as part of their required continuing education for each renewal. The timeframe when a license holder must be delegated as a supervisor was shortened from six months to three consecutive months. The term "work files" was deleted and replace with more specific items. The rule was clarified to require the broker to ensure that a sponsored sales agent has geographic competence in the market area being served. A broker must require that a sales agent receive coaching and assistance from an experienced license holder competent for that activity, when a sales agent performs a real estate brokerage activity for the first time. In recognition of digital communications, the time frames for responding to clients, agents, other brokers, and the Commission were reduced to two and three days respectively.

§535.101 - Fees (effective 3/1/19)

The amendment reduces the fee paid by a broker or sales agent from $20 to $10 each time a sales agent establishes or changes sponsorship.

§535.155 Advertisements (effective 9/4/18)

The proposed amendments to §535.155 clarify that a sign giving directions to property for sale or lease is not considered an advertisement if it only contains the directional arrows or the directional arrows and the listing broker's logo or name only. In addition, the word "realty" was removed from the prohibited terms set out in subsection (d)(5) to allow this word to be used at the beginning or middle of a team name.

The full text of all revised and new rules can be found on TREC's webpage at

https://www.trec.texas.gov/rules-and-laws

How Can A License Holder Get Involved in the Rule Making Process?

There are many ways a license holder can get involved:

* Bring an item to the attention of one of the Commission's Advisory Committees or TREC staff;
* Attend a meeting of an advisory committee or the Commission where a specific issue of concern or rule is being discussed and provide input;
* Provide written comments to the Commission within 30 days after a rule is proposed but before it is adopted by emailing general.counsel@trec.texas.gov;
* Attend a meeting of the Commission when a rule is going to be proposed or adopted and provide comments in person.
* Attend a meeting of the Commission and give your thoughts on a new idea during the public comment on non-agenda items. The Commission can decide to send this idea to an advisory committee for exploration or put it on a future agenda for discussion and possible action.

Licensing Related Bills Passed by the 2019 Texas Legislative Session

Listed below are six licensing related bills passed by the Texas legislature in the 2019 session that you should be aware of:

1. **HB 1342** *Relating to a person's eligibility for an occupational license; providing an administrative penalty.* Effective September 1, 2019

   This bill limits the ability of a licensing authority (like TREC) to suspend or revoke a license, disqualify a person from receiving a license, or deny a person the opportunity to take a licensing exam because of a conviction of a criminal offense that does not directly relate to the duties and responsibilities. The bill adds or modifies considerations that a licensing authority has to take into account when deciding whether to revoke, suspend, or deny, like whether any elements of the crime correlate to the duties and responsibilities of the occupation and whether there is evidence of a person's compliance with any conditions of community supervision or parole.

   A licensing authority can't deny a person a license or the opportunity to take the exam

because of a prior conviction of a criminal offense, unless the licensing authority: (i) provides notice; and (ii) allows the person at least 30 days to submit any relevant information.

2. **SB 37** *Relating to a prohibition on the use of student loan default or breach of a student loan repayment or scholarship contract as a ground for refusal to grant or renew an occupational license or other disciplinary action in relation to an occupational license.* Effective June 7, 2019

   SB 37 removes student loan default or breach of a student loan repayment or scholarship contract as grounds to deny a license or license renewal or to take other disciplinary action against several different types of license holders, including real estate license holders.

3. **SB 1200** *Relating to the authority of certain military spouses to engage in a business or occupation in this state.* Effective September 1, 2019

   Upon notice to and confirmation from the relevant Texas licensing authority, this bill allows a military spouse to use an out-of-state license to engage in a business or occupation in Texas, as long as the spouse is in good standing in the other jurisdiction and the licensing requirements are substantially similar. The military spouse can only engage in the business or occupation for the period during which their spouse is stationed in Texas, but not to exceed three years.

4. **SB 1217** *Relating to the consideration of certain arrests in determining an applicant's eligibility for an occupational license.* Effective June 14, 2019

   For the purpose of determining a person's fitness for a license, the licensing authority can't consider an arrest that did not result in a conviction or placement on deferred adjudication community supervision.

5. **SB 1995** *Relating to the review of certain occupational licensing rules by the office of the governor.* Effective September 1, 2019

   A state agency that issues a license has to submit any proposed rule change affecting market competition to the governor's office for review and approval before the rule is adopted or implemented.

6. **HB 3609** *Relating to the filing of an assumed name certificate by certain business entities.* Effective September 1, 2019.

   Certain business entities, like corporations, LLPs, and LLCs are now only required to file an assumed name certificate with the Secretary of State, instead of both the Secretary of State and the county clerk.

CHAPTER

02 SELLER'S DISCLOSURE

Learning Objectives

After this chapter, you will be able to

- → Identify the statutory changes to the Seller's Disclosure Notice and know when the new form will be required to be used.
- → Describe a negative outcome of a real estate transaction if a seller does not complete the Seller's Disclosure Notice and attach all relevant documents.
- → Identify the best practice to perform to avoid a potential lawsuit claiming failure to disclose a material defect after the seller receives an inspection report for the property.

Statutory Changes

The Legislature made changes to the law regulating the Seller's Disclosure Notice regarding flooding, including whether the seller's property is located wholly or partly in a 500-year floodplain and whether the seller has ever filed a claim for flood damage (HB 3815 and SB 339, 86th Texas Legislative Session, effective Sept. 1, 2019). The Commission has updated the Seller's Disclosure Notice (OP-H) to reflect the changes.

See Appendix A for the revised Seller's Disclosure Notice (OP-H) effective September 1, 2019.

Selecting the Seller's Disclosure Notice

Exercise caution for your brokerage and your sellers when selecting which seller's disclosure notice to provide for the seller to fill out. The TREC Seller's Disclosure Notice is the minimum required by law and mirrors the provision in the Property Code. Other types of seller's disclosure notices exist in some marketplaces within the state of Texas; those are created and provided to members of certain local or state trade associations. When using a seller's disclosure notice that requires other forms to be attached, such as an "on site sewer facility" disclosure for a property with a septic system, be certain that the seller understands the risks involved if they fail to disclose all the information required by the additional document, and actually attach the additional document.

Regardless of what notice a seller selects to use, remember that a seller is in violation of the Deceptive

Trade Practices Act if the seller withholds material information concerning the property in an effort to induce the buyer to buy the house.

Aflalo v. Harris - A Civil Case in Dallas County

Aflalo sued Harris for breach of contract, alleging Harris untimely terminated a contract. Harris (Buyer) entered into a One to Four Family Contract with Aflalo (Seller) for $1,450,000 with $10,000 in earnest money, executed on November 20, 2015, with closing scheduled for December 18, 2015.

The contract provided for the seller to provide a seller's disclosure notice within 3 days of the effective date. On November 20th, the seller provided the trade association seller's disclosure document to the buyer and answered "yes" my property is in a floodway. In addition, the seller wrote in "I have flood insurance, my lender told me it was recently added to a flood area". The seller did not provide an additional document with more information regarding the flood area that the seller's disclosure notice used required.

On November 24th (one day after the 3 day period), the buyer's agent requested this missing attachment form from the seller's agent. The seller did not respond.

On the day before closing, Harris gave notice they were terminating the contract. The seller relisted his property and made a demand to Harris to perform according to the contract.

Three weeks later, Aflalo sued Harris for breach of contract seeking specific performance. The seller said he timely provided the seller's disclosure notice and the buyer could have backed out timely, however waited until the day before closing. Harris filed a counter claim for declaratory judgment saying Aflalo failed to provide the notice since the additional document required by the seller's disclosure document used by Aflalo was not provided.

Following a bench trial, Aflalo lost. The court ruled that by using the trade association's disclosure notice, the disclosure requirement was increased above and beyond the requirements in the Texas Property Code. The court awarded Harris $140,000 in attorney fees.

Aflalo appealed. The Texas Court of Appeals reversed the trial court and rules in favor of Aflalo.

(Aflalo v. Harris continued)

Harris (Buyer) has appealed to the Texas Supreme Court. On May 1, 2020 the Texas Supreme Court declined to review the case, which means the Court of Appeals ruling in favor of Aflalo holds. Per the appellate court, the trade association's seller disclosure notice does not add additional disclosure requirements beyond the Texas Property Code.

The case has been sent back to the trial court.

Note: the seller has sued the listing broker and that case is on hold while this case is put forward.

Inspection Reports: Sellers and Future Buyers

What if a seller receives an inspection report? Must they disclose it to future buyers?

What happens if a seller receives a copy of a recent inspection report? Must they share it with a future buyer? The scenario is not uncommon. The seller lists their home. A buyer submits a contract with an option period. The seller accepts. During the option period, an inspection is conducted. The inspection reveals something unacceptable to the buyer, who subsequently backs out. The buyer's agent sends the inspection report to the seller's agent as an explanation. If a seller's agent receives a copy, the agent must give it to the seller, as it is material information related to the transaction. As such, must it be shared with future buyers as part of the seller's disclosure?

It's been said: "disclose, disclose, disclose." Texas Property Code §5.008 outlines how. The statute, which is intended to be a minimum requirement, does not specifically require inclusion of copies of recent inspection reports. TREC has an approved Seller's Disclosure Notice that mirrors the language of the statute and does not require recent inspection reports to be included. Many trade organizations have their own seller's disclosure notices, some with added provisions intended to reduce risk for a seller, including a directive to list any written inspection reports received within the past four years and to attach copies. Some brokerages also have their own recommended forms.

So must the seller share a copy of the inspection report? No. HOWEVER, they must disclose all knowledge of the condition of the property. Property Code §5.008 requires that the notice be completed to the best of the seller's belief and knowledge as of the date the notice signed by the seller. While the statute does

not require the seller to update any disclosure once an inspection is received, the seller should do so to ensure that any future buyer is made aware of newly revealed conditions. TREC's Canons of Professional Ethics and Conduct require "a real estate broker or sales agent … to exercise integrity in the discharge of the license holder's responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission." One could easily argue that by not advising a client to update the Seller's Disclosure Notice, a license holder is omitting material facts the buyer has a right to know. As such, the seller should be instructed to update the Seller's Disclosure Notice for any future buyer to include all that was learned from the inspection report.

A best practice to avoid a potential lawsuit claiming failure to disclose a material defect against both the seller and the broker, is to include a copy of the prior inspection report with the Seller's Disclosure Notice and provide both by attachment in the Multiple Listing Service entry or other advertising platform. If the seller repairs or corrects any of the items on the inspection report, include invoices, receipts, and any warranties with the Seller's Disclosure Notice, as well.

When is a Seller's Disclosure Notice NOT required?

Disclosing defects of a property is required in all real estate transactions. Doing so using the Seller's Disclosure Notice, however, is only required when transferring residential real property with only one dwelling unit except:

1. pursuant to a court order or foreclosure sale;
2. by a trustee in bankruptcy;
3. to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;
4. by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;
5. by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
6. from one co-owner to one or more other co-owners;
7. made to a spouse or to a person or persons in the lineal line of consanguinity (kinship) of one or more of the transferors;
8. between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;
9. to or from any governmental entity;
10. of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or
11. of real property where the value of any dwelling does not exceed five percent of the value of the property.

Texas Property Code §5.008(e)

CHAPTER

03 WATER ISSUES

Learning Objectives

After this chapter, you will be able to

→ Identify the website to visit and the type of map to view to find out if a property is in a flood plain.
→ Know when a MUD form must be completed and delivered to a buyer.
→ Describe what happens during a hydrostatic test and identify the professional performs the test.

What is my level of flood risk?

There are ways to find out what level of risk a property has with respect to riparian or coastal flood sources. No property is completely without risk, as anywhere it can rain, it can flood. You can go online to the FEMA website (MSC.FEMA.gov) and enter the address of the property. Go to https://msc.fema.gov/portal/search, this allows you to interactively visualize the property and surrounding areas in terms of zones designating 1 and 0.2-percent-annual-chance zones (areas of high and moderate risk of coastal or riparian flooding). This can be accessed on mobile devices and may be a useful tool to discuss with clients. In addition, this site will allow you to find a FIRM map (Flood Insurance Rate Map). The FIRM maps are huge, but you can print out a FIRMETTE, which is letter size. While not all properties require flood insurance, it might be helpful to your clients and customers to look at adding this to their policy. Properties outside of the Special Flood Hazard Area can still flood and are often eligible for Preferred Risk Policies. Encourage them to contact an insurance agent quickly to determine coverage for water or flood damage issues. Maps may change periodically for a variety of factors like new development, weather conditions and erosion. When they do change insurance requirements, that's where the FIRM map can help. You can also get this information from some of the tax sites.

See Appendix B for the brochure, "Help Clients Protect Their Investment: Questions & Answers About Flood Insurance for Real Estate Professionals" from FEMA and the National Flood Insurance Program.

Municipal Utility Districts

If a property is located within a Municipal Utility District (MUD), the seller is required by the Texas Water Code, as well as the TREC contracts, to provide to a buyer prior to the buyer entering into a sales contract a notice regarding the MUD in which the property is located. The notice provides information regarding the tax rate, bonded indebtedness, and standby fee, if any, of the MUD.

Municipal Utility District notices are found in Chapter 49 of the Texas Water Code.

Municipal Utility Districts (MUDs) and the Law

Chapter 49 of the Texas Water Code says IF a person is selling a property that is in a district created under the Texas Water Code or by an act of the legislature to provide certain utilities such as water, sanitary sewer, drainage and flood control and any of these services or facilities have been financed with bonds that are payable by the persons who live in the district, THEN the seller must give notice to the buyer of those potential fees for owning this property. Furthermore, the law says the notice must be given to the buyer prior to the buyer entering into a contract OR as an addendum to the contract at the time the contract is negotiated. If the notice is not timely provided, the buyer can terminate the contract at any time.

In other words, there is NO binding contract if such required notice is not acknowledged by the buyer at or prior to executing the contract! Giving the notice after the contract is executed does not eliminate the buyer's right to terminate the contract any time prior to closing. However, the law does provide that if the seller furnishes the required notice after the contract is executed but at or prior to closing and the purchaser elects to close even though such notice was not timely furnished prior to execution of the contract, "it shall be conclusively presumed that the purchaser has waived all rights to terminate the contract and recover damages or other remedies or rights under the provisions of this section."

Remember: when a license holder takes a listing, which is serviced by a MUD, this form should be filled out by the seller at the time of listing and provided to the buyer at or before a contract to purchase is signed. Determining the information that should be filled out on the form is a job for the seller. They should contact the MUD and obtain the required information, fill out the form and provide it to the listing agent as soon as possible. MUD districts should have the form available, if not, the agent could direct the seller to Chapter 49.452 of the Texas Water Code where this can be found in statute.

See Appendix C for Texas Water Code Chapter 49.452, Notice to Purchasers.

Example of a Notice to Purchaser Form

"The real property, described below, that you are about to purchase is located in the __________ District. The district has taxing authority separate from any other taxing authority and may, subject to voter approval, issue an unlimited amount of bonds and levy an unlimited rate of tax in payment of such bonds. As of this date, the rate of taxes levied by the district on real property located in the district is $__________ on each $100 of assessed valuation. If the district has not yet levied taxes, the most recent projected rate of tax, as of this date, is $__________ on each $100 of assessed valuation. The total amount of bonds, excluding refunding bonds and any bonds or any portion of bonds issued that are payable solely from revenues received or expected to be received under a contract with a governmental entity, approved by the voters and which have been or may, at this date, be issued is $__________, and the aggregate initial principal amounts of all bonds issued for one or more of the specified facilities of the district and payable in whole or in part from property taxes is $__________.

"The district has the authority to adopt and impose a standby fee on property in the district that has water, sanitary sewer, or drainage facilities and services available but not connected and which does not have a house, building, or other improvement located thereon and does not substantially utilize the utility capacity available to the property. The district may exercise the authority without holding an election on the matter. As of this date, the most recent amount of the standby fee is $__________. An unpaid standby fee is a personal obligation of the person that owned the property at the time of imposition and is secured by a lien on the property. Any person may request a certificate from the district stating the amount, if any, of unpaid standby fees on a tract of property in the district.

"The district is located in whole or in part in the extraterritorial jurisdiction of the City of __________.

('Example of a Notice to Purchaser Form' continued)

By law, a district located in the extraterritorial jurisdiction of a municipality may be annexed without the consent of the district or the voters of the district. When a district is annexed, the district is dissolved.

"The purpose of this district is to provide water, sewer, drainage, or flood control facilities and services within the district through the issuance of bonds payable in whole or in part from property taxes. The cost of these utility facilities is not included in the purchase price of your property, and these utility facilities are owned or to be owned by the district. The legal description of the property you are acquiring is as follows:

____

____

____

(Date)

____

Signature of Seller

PURCHASER IS ADVISED THAT THE INFORMATION SHOWN ON THIS FORM IS SUBJECT TO CHANGE BY THE DISTRICT AT ANY TIME. THE DISTRICT ROUTINELY ESTABLISHES TAX RATES DURING THE MONTHS OF SEPTEMBER THROUGH DECEMBER OF EACH YEAR, EFFECTIVE FOR THE YEAR IN WHICH THE TAX RATES ARE APPROVED BY THE DISTRICT. PURCHASER IS ADVISED TO CONTACT THE DISTRICT TO DETERMINE THE STATUS OF ANY CURRENT OR PROPOSED CHANGES TO THE INFORMATION SHOWN ON THIS FORM.

"The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or prior to execution of a binding contract for the purchase of the real property described in such notice or at closing of purchase of the real property.

____

(Date)

____

Signature of Purchaser

Hydrostatic Testing

What is hydrostatic testing? Do I need to do it? I've heard it can damage the pipes and cost thousands of dollars!

A hydrostatic test is a way in which pressure vessels such as pipelines, plumbing, gas cylinders, boilers and fuel tanks can be tested for strength and leaks. The test name HYDRO refers to potable domestic, clean fresh water and STATIC is for sanitary or sewer.

The testing most agents and buyers are really looking for is a water or sewer leak test. This test does not pump pressure into the pipe systems, instead it is a fill-and-hold test. The licensed plumber will run an inflatable ball into the clean out pipe or toilet pipe simulating a stoppage. Next, the system is filled with water until it reaches the slab or grade level. This may take 10 to 30 minutes. The water is then shut off at the main. Your home is created to have a sealed system. The system is watched for 20 minutes to see if the water drops. If the water drops, there may be a leak. Depending on how far down the water drops it may be a clue as to which fixture has the issue: a tub, a toilet or the main. If you utilize a camera, it will give a view of holes, tree roots, disconnects or "bellies" which are dips from settling and could hold solids creating clogs. It most likely will not show you a leak. To do a water pressure test, they may unhook the washer and connect a gauge to see if the pressure drops. It is not unusual to have water pressures ranging from 60 to 80 PSI (potable fresh water) depending on the time of day or the area of Texas where you live. Pressures will spike in the morning as people are preparing for the workday. It may drop for the rest of the day until everyone arrives home for the evening. This test can detect a leak in the hot water, as well. Pier and beam homes are done a bit differently. Since there is a crawl space, you may visually see leakage after filling the system. The fresh water pipes are attached just below the subfloor with pipe fingers.

Currently, there are no promulgated forms for plumbers to use with consumers for these tests. The Texas State Board of Plumbing Examiners is responsible

for licensing, testing, and plumbing codes and have authority over plumbers. The damages that could occur are usually not caused by pressure, but rather weight. A gallon of water is a bit over 8 lbs. – when you fill the home system to full that could create weight on the pipes. If they are suspended, attached or weighted in the soil, that "filling" could create an issue. You could have a separation or "bellies" with the additional weight. Interesting facts about materials used dependent on year:

1954-1971 Clay in yard, cast iron in house. Issues could be the "union" or joining of pipes, collapse, or tree roots.

1971-1984 Cast iron in both yard and house. Since you have water running through metal, issues can include rust and deterioration of whole sections. The "union" process was a bell flare pressing into the other.

1984-Current PVC in yard and house. This is a glue and primer "union" system. PVC had different grades 20, 40, 80 describing their guess of service life in years.

As per the requirements in the TREC contracts in Paragraph 7, Property Condition, you must get permission to perform the test. TREC does provide a promulgated form TREC 48-0 Addendum for Authorizing Hydrostatic Testing.

See Appendix D for the Addendum for Authorizing Hydrostatic Testing.

Sewer Line Inspection

Until recently, the Texas State Board of Examiners (Plumbing Board) prohibited anyone not licensed as a plumber from performing a sewer scope inspection. That prohibition was repealed in August, 2020.

The Standards of Practice (SOP) for Texas inspectors requires an inspector to operate plumbing fixtures, test for drain performance, and to report deficiencies in water supply pipes and waste pipes, but they do not require inspectors to use specialized equipment, such as a camera, to scope a sewer line.

Alternatively, the SOPs do not prohibit an inspector from going beyond the scope required by the SOPs, provided they are competent to do so, which may require the use of specialized equipment.

If it is determined that an inspector who performed a sewer scope inspection was not competent to do so, the inspector could be subject to disciplinary action by TREC.

CHAPTER

04 CONTRACT ISSUES

Learning Objectives

After this chapter, you will be able to

→ Identify the revisions to the One to Four Family Residential Contract (Resale).
→ Identify the key changes to revised TREC addenda.
→ Understand that the Effective Date should be filled in every time in every contract and who should complete that date.

Changes to Promulgated Forms

Much work has been done by the Broker Lawyer Committee and the Commission in 2019 and 2020 to update and approve changes to many standard contract forms. At the November 2019 meeting, the Commission adopted the Broker Lawyer Committee's recommendation to withdraw all proposed amendments with two exceptions – changes to the Third Party Financing Addendum and the Addendum for Authorizing Hydrostatic Testing.

At the November 2020 and February 2021 Commission meeting the Commission adopted changes to several contract forms and created two new forms. The contract forms are required for mandatory use effective April 1, 2021.

The changes apply to all contract forms unless specified otherwise. Paragraph numbers referenced are from the One to Four Family Residential Contract (Resale). The new form is Form #20-15.

Paragraph 2C - ACCESSORIES

Paragraph 2C was amended to add security systems "that are not fixtures." This section also defines "Controls" to include Seller's transferable rights to the (i) software and applications used to access and control improvements or accessories, and (ii) hardware used solely to control improvements or accessories.

Paragraph 4 - LEASES

The LICENSE HOLDER DISCLOSURE language of Paragraph 4 was moved to Paragraph 8 (under Paragraph 8a) which is retitled BROKERS AND SALES AGENTS.

Paragraph 4 contains new language to address disclosure and delivery of leases to which the Seller is a party. The new paragraph requires disclosure of Residential Leases, Fixture Leases, or Natural Resource Leases and delivery of the leases to the Buyer either before or at the time of execution of the contract, or within a period of days set forth in the contract or applicable addenda.

After the lease is delivered, the Buyer may terminate the contract within the period of days set out in the contract or required by addenda, for any reason, and receive the earnest money.

If the leases are not delivered, then the Buyer may seek default remedies under paragraph 15 of the contract by giving Seller notice of default, at any time up to closing.

Paragraph 5 – EARNEST MONEY AND TERMINATION OPTION

Paragraph 5 was amended to require payment of the option fee to the escrow agent separately or combined with earnest money in a single payment.

The language also clarifies the order of application of funds to be credited first to Option Fee and then to the Earnest Money. The contract language authorizes the release of option money without the further consent from Buyer.

Paragraph 5 also now incorporates language previously found in Paragraph 23 relating to the remedy for failure to timely deliver the Option Fee and Earnest Money. This is discussed in more detail later in this chapter.

Paragraph 10 - POSSESSION

Paragraph 10.B was amended by deleting the language regarding Leases which is now under Paragraph 4. The new Paragraph 10.B defines Smart Devices and details Seller's obligation in the event any Smart Devices convey with the Property.

Paragraph 18.A & B - ESCROW

Paragraph 18.A was amended to allow the escrow agent to require any disbursement made under the contract to be made in good funds.

Paragraph 18.B was amended to further define expenses that an escrow agent may deduct.

Paragraph 23

Paragraph 23 was merged with Paragraph 5. Paragraph 24 was renumbered to Paragraph 23.

The New Paragraph 23 (formerly Paragraph 24)

The Option Fee Receipt was amended to strike reference to Seller/Broker and replace with Escrow Agent.

BROKER INFORMATION

Lines were added to add team information. The language at the bottom of the page regarding the Listing Broker's agreement on what to pay Other Broker was deleted in all forms except for the Farm and Ranch Contract form. New language with similar information was added as a disclosure only, making it clear commission split agreements must be pursuant to previous written agreement.

RECEIPT PAGE

The last page of the contract contains spaces for the receipt of the Option Fee, Earnest Money, Contract, and Additional Earnest Money by the escrow agent.

Additional Changes to Other Promulgated Forms (effective April 1, 2021):

These forms may be found at www.trec.texas.gov

New Home Contract (Incomplete Construction) (Form #23-16)

Language was added to the Incomplete Construction Contract to mirror the language in the Complete Construction Contract Paragraph 7.I. regarding Residential Service Contracts. The language was added to the Incomplete Construction Contract as Paragraph 7.J.

Residential Condominium Contract (Resale) (Form #30-14)

In the Residential Condominium Contract, all references to a survey were removed from Paragraph 6.

Notice of Buyer's Termination of Contract (Form No. 38-7)

Item #1 on the form updated to reference Paragraph 5 instead of the previously reference Paragraph 23.

Addendum Changes (effective April 1, 2020)

These forms may be found at www.trec.texas.gov

Short Sale Addendum (Form #45-2)

Item F on the form was updated to reference Paragraph 5 instead of the previously reference Paragraph 23.

The Addendum for Property Subject to Mandatory Membership in a Property Owners Association (Form #36-9)

The Addendum for Property Subject to Mandatory Membership in a Property Owners Association was amended to add deposits and reserves to the list of payments the Buyer will make in association with the transfer of the property.

Two New Promulgated Addenda Forms Created

The Addendum Regarding Residential Leases (Form #51-0)

The Addendum Regarding Residential Leases is a new form that must be attached if the Seller has a residential lease on the property. The form requires the parties to select whether the lease will be (A) terminated by closing and possession of the property given to the Buyer, or (B) assigned by the Seller and assumed by the Buyer. If the lease will be assigned and assumed, the Seller has several new obligations under the contract, including making certain representations about the status of the lease. There is also a paragraph that details what happens if any of those representations become untrue after the contract is executed, including a possible automatic extension of the closing date. License holders will need to help their clients track several new timeframes under this addendum. Please See Appendix E to review.

The Addendum Regarding Fixture Leases (Form #52-0)

The Addendum Regarding Fixture Leases is a new form that must be attached if there are fixture leases in place on the property at the time of contract execution. It allows Buyer to select which fixture leases Buyer will assume or not and what happens when assumed and not assumed. See Appendix E to review.

AND, as a reminder to those who took the last Legal Update courses early in the cycle here is a reminder of previous changes to the several contract forms:

Notice of Buyer's Termination of Contract (effective March 1, 2019)

Changes include:

* New requirements when the election to terminate is due a lender's determination that the property condition is not satisfactory;
* Option to terminate under the Addendum Concerning Right to Terminate Due to Lender's Appraisal;
* Option to terminate under paragraph 6.D. when objections to title or survey are not timely cured.

Notice of Seller's Termination of Contract (effective August 13, 2018)

A new notice was adopted for sellers to use to give notice of termination under rights granted under the mandatory contract forms or addenda (see revised Paragraph 5).

Third Party Financing Addendum (effective March 1, 2019)

Clarifying revisions were made to this addendum in Paragraph 2B, Property Approval, to include a timeframe for buyer to give seller notice and evidence of the lender's determination regarding the loan due to property condition.

Settlement statements were added to the authorization to release information paragraph. It was also reformatted to be consistent with other Commission promulgated addenda.

One to Four Family Residential Contract (Resale)

PARAGRAPH 2

Paragraph 2 has evolved to mirror the way we live today and the SMART home. Paragraph 2 talks about **IMPROVEMENTS (2B) PERMANENTLY INSTALLED and BUILT IN ITEMS and ACCESSORIES (2C)** - these things should remain with the property. How is it determined if it stays? We first must understand the legal tests of a fixture (real property) versus personal property. The main question is what was the intent of installation? Was it meant to remain permanently or to be removable in the future?

The courts use the **"TRIPLE A"** method:

Annexation – can it be removed without causing damage?

Adaptation – is it customized for the property or is it standard?

Agreement – what was their intention?

Before an agent lists a property, the agent should ask the seller if they intend to leave certain items or if they will be removing them. If removing them, the agent should list those items on **2D EXCLUSIONS**. The agent could take page 1 of the contract and highlight paragraph 2 as a talking point. Many issues that come up today relate to décor and tech items sellers want to take to the new property. An agent must work out how this property will be handled. A best practice is to replace or remove the item before the house is shown to prospective buyers so a buyer does not assume it will stay. If the property is too large or the seller has no place to store it, like an antique chandelier, the agent should make sure to call it to the buyer's attention during their tour of the house that the item will not stay. When EXCLUSIONS exist, there are three times they need to be included in the transaction: on the listing agreement, in the MLS, and on the contract. ***If it is NOT in the contract - it will NOT happen.*** When touring the home with the buyer and the buyer wants an item, the agent should make sure to clarify if it will stay with the house. The agent can utilize the NON REALTY ITEM ADDENDUM (TREC OP-M) and attach pictures for clarity. Alternatively, if the MLS remarks state, "seller will leave washer and dryer" it will need to go on a NON-REALTY ITEM ADDENDUM. Without the addendum, the seller may assume the buyer does not want the items. For clarity, everything needs to be in writing and not assumed. Agents have a responsibility to make sure the client's wishes are followed. Note that most of the items listed in paragraph 2 came from previous court cases.

There are many examples of property that require clarification as to whether they will stay with the house. Outdoor kitchen items are a good example. A grill may be removable or easily unhooked and detached, same with a small fridge or wine fridge. While the items may leave an open space, the agent needs to determine whether these items will go or stay. Garage décor cabinets are another example because they could stay or be removed. The buyer may be thinking this will be great for storage only to find upon move-in the cabinets are gone. Consider the rose bush the seller's grandkids gave to her every Mother's Day – she is not going to leave those! Yet according to paragraph 2, they stay. The fruit trees that the buyer thought would be great for canning and holiday goodies could be replaced with a regular tree. Similarly, the seller could replace the entry door keyless lock with a KwikSet lock. The door with the doggie entrance just the right size for the buyer's dog may be replaced with a regular screen door. The pool sweep, nets and brushes the seller just bought can be used at their new home, so the seller took them. Yes, these have really happened!

Smart Homes

With new technology comes new issues. The agent should ask the sellers if they will be leaving their home technology devices. Items to consider include smart doorbells, keyless entry, garage openers, alarms, camera systems, thermostats, speakers (Alexa, Google Home etc.), appliances, robot vacuums and items that are installed like outlets, switches, and lighting (bulbs too).

Many things work with a HUB feature appliance and if taken – nothing works. The agent should include a seller checklist for move out and a buyer checklist for move in as a reminder. Remember that these devices collect data - ***YOUR CLIENT'S DATA*** - and the agent should have their client "consciously uncouple" from them. These devices should be set to factory settings prior to move out. Remember, if the seller leaves the Smart TV as a "gift" their information may be held in the Netflix or Amazon Prime features. Don't let a client's data get used to purchase movies for the new buyer. Many devices can be operated remotely and if the seller still controls the device, the new buyer may be in for a surprise. These conversations will alleviate any misunderstandings, putting everyone on notice regarding what needs to stay for functionality. It's all about disclosure and setting expectations. (Remember paragraph 2.)

If inspectors will need access to these systems, make arrangements for them to have access.

Paragraph 6, Objections:

This paragraph frequently includes redundant references to "sole residence" or "single family residential use." That is a given as the form is named the "**ONE TO FOUR FAMILY RESIDENTIAL** Contract." This blank can be used for so much more to protect the client. The agent should ask the buyers, "What do you plan to do, add, have, bring or run out of this property?" For example, the buyer desires to have an amazing in-ground gunite pool with a cove and swim-up bar. A particular home and lot seem to be perfect. The survey comes back showing that right down the middle of the lot is a gas line that will prevent any digging. Will this keep the buyer from buying? YES, it is the buyer's desire to have the pool and the pool will not be able to be built on the lot. This would give the buyer an out of the contract. The contract states, ***"Buyer may object in writing to defects, exceptions, or encumbrances to the title: disclosed on the survey other than items 6A(1) through (7) above; disclosed in the Commitment other than items 6A(1) through (9) above; or which prohibit the following use or activity:__________."*** That blank gives the buyer opportunity to object if the client wants to **add** a structure or pool, **have an** exotic pet or raise chickens, **bring** their RV or big truck to the property, **run** a day care, beauty shop or group home, and that use or activity would be prohibited. What does the investor **do** with purchased property—he rents it! SO, this blank allows the stipulation that they can do as they desire with the property. Examples of descriptions could include "in-ground gunite pool" or "raise chickens," "potbelly pig pet," "RV on property," "day care," or "**IMMEDIATE** rental occupancy." Consider grandfathering, as well – perhaps it is okay for this owner to have horses, but the next will not be allowed, so one might consider adding "horses allowed on the property."

The second part to the paragraph relates to the timeframe to object. The contract states, ***"Buyer must object the earlier of (i) the Closing date or (ii) ___ days after the Buyer receives the Commitment, Exception Documents, and the survey. Buyer's failure to object within the time allowed will constitute a waiver of Buyer's right to object; except that the requirements in Schedule C of the Commitment are not waived by Buyer."***

The third part to the paragraph relates to the seller's duties after a written objection. The contract states, ***"Provided Seller is not obligated to incur any expense, Seller shall cure any timely objections of the buyer OR third-party lender within 15 days after the Seller receives the objections (CURE PERIOD) and the Closing Date will be extended as necessary."***

The fourth part to this paragraph relates to the buyer's decision and states, ***"If objections are not cured within the Cure Period, Buyer may, by delivering written notice to the Seller within 5 days after the end of the Cure Period: (i) terminate this contract and the earnest money will be refunded to Buyer; or (ii) waive the objections. If Buyer does not terminate within the time required Buyer shall be deemed to have waived the objections."***

The fifth part of this paragraph discusses new discovery or changes, and states, ***"If the Commitment or Survey is revised or any new Exception Document(s) is delivered, Buyer may object to any new matter revealed in the revised Commitment, Survey or new Exception Document(s) within the same time stated in this paragraph to make objections beginning when the revised Commitment, Survey or Exception Document(s) is delivered to the Buyer."***

The agent should have documentation for the buyer to view, and there is a 15-day **CURE PERIOD** with a 5-day decision period. If new documentation comes in, the buyer has the same number of days to object to the new item.

Cure Period Example

A title commitment is issued with an exception to a deed restriction that prohibits having farm animals on the property. The buyer has specifically noted under paragraph 6D that he wants to raise chickens in the backyard. The buyer timely objects to the deed restriction. Timeframes start running for this particular objection.

Ten days later, the commitment is revised with an exception that fences are off the property line as shown on the survey. The buyer timely objects to the exception as to fences being off the property line. The seller has the surveyor come back out to the property and the survey is revised to show the fences are not off the property line. The exception is removed from the title commitment within the 15-day cure period.

The buyer terminates the contract within 5 days of receipt of the revised commitment because the objection to the deed restriction had not been cured. The buyer has waived the objection to the deed restriction because the buyer did not terminate the contract within 20 days of the objection to the deed restriction.

Effective Date

What do you do if you get a contract back with no Effective Date, do you still have a valid contract? The answer is YES you do, BUT it may take a judge to define the starting time for all the deadlines in the contract and their performance timelines. The rule is after acceptance and notification, the last broker who touches it fills in the Effective Date. The Effective Date is the date of final acceptance of all parties.

There are four elements that must be satisfied for final acceptance to take place:

1. The final contract must be in writing;
2. The buyer and seller must sign the final contract, including the initialing of any changes to the initially drafted offer, if applicable;
3. Acceptance must be unequivocal;
4. The last party to accept must communicate acceptance back to the other party or the other party's agent, if applicable.

The Effective Date is the date when the last element (communicating acceptance back) is completed after the other three elements are satisfied.

When you get the contract back and if the Effective Date has been left blank – fill it in using the date you were given notice it was accepted. Notify everyone you have done so and the date inserted. This way the timelines will be properly determined and followed to keep everyone on track in the transaction. Remember, the timelines are counted in **CALENDAR days** so the Effective Date is day 0 and the next day starts day 1 of your contract timelines.

TREC Case Study 1

Buddy Is Going to Love This!

Keller TX - A woman hires an agent to help her move to Texas from out of state. During her fly-in home tour, she continually remarks, "Buddy will love this! This will be Buddy's room, Buddy will love this yard." Even a mediocre agent would have asked her, "What? Right, who is Buddy?" But the agent did not ask.

The buyer finds a great home and puts in an offer. It soon closes and she moves in. One evening she comes home to find Buddy is no longer there. She rushes outside and calls his name frantically. Neighbors rush to see if they can help. They ask, "What's wrong, what's happened?" She begins to tell them that she has lost Buddy and must find him! They begin to ask for a description. "What does he look like? What was he wearing?" She replies "Oh he's about this tall and he has black hair, spots and the cutest pink nose and ears and…" Suddenly, she is interrupted by a neighbor who asks "Is he a PIG?" The other neighbors are shocked at her outburst when the buyer

(TREC Case Study 1 continued)

replies, "YES, he is! He's my potbelly pig- I've had him for 5 years and he is like my soul mate! Have you seen him?" The woman smiles and replies, "YES, I HAVE, I know exactly where Buddy is, he's at animal control. I had him picked up. Didn't anyone tell you that you can't have swine in the city limits!?" Mortified she runs in the house – who do you think she called first? NO, it was to animal control, she must bust her soul mate out of animal jail first! The NEXT call was to her agent. If only she had put "Buddy- potbelly pig" in paragraph 6. The buyer would have known and could have made an informed decision about whether to give up her soul mate or look for another home.

The moral of the story: Don't be that agent! Ask questions and protect your client!

Delivery of Earnest Money and Option Fee

Under the One to Four Contract effective April 1, 2021, paragraph 5 addresses the delivery of the earnest money and option fee, including the termination option. The buyer must deliver to the escrow agent the earnest money and option fee within 3 days after the effective date. The earnest money and option fee shall be made payable to the escrow agent and may be paid separately or combined in one single payment. If the last day to deliver the earnest money, option fee, or the additional earnest money falls on a Saturday, Sunday or legal holiday the time to deliver the earnest money, option fee, or the additional earnest money, as applicable, is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. The amount the escrow agent receives shall be applied first to the option fee, then to the earnest money, and then to the additional earnest money.

The termination option states that the buyer agrees to pay the seller via delivery to the escrow officer a fee within the 3 days after the effective date. This gives the buyer the unrestricted right to terminate within the time frame agreed in the second blank by giving notice before 5pm on the last day. If Buyer gives notice of termination within the time prescribed: (i) the Option Fee will not be refunded and escrow agent shall release any Option Fee remaining with escrow agent to Seller; and (ii) any earnest money will be refunded to Buyer.

If the buyer fails to deliver the earnest money within the time required, the seller may terminate the contract or exercise seller's remedies under Paragraph 15, or both, by providing notice to the buyer before the buyer delivers the earnest money.

If no dollar amount is stated as the option fee or if the buyer fails to deliver the option fee within the time required, the buyer shall not have the unrestricted right to terminate this contract under this paragraph 5.

Time is of the essence for compliance, and timelines must be faithfully followed! Keep in mind, the escrow agent will receive and receipt the option fee and earnest money no matter when it is delivered. It is up to the license holder to contact the title company to check what time each fee was delivered and determine with their client whether that delivery was timely.

This also holds true if you are writing a backup offer. Remember if you never become primary, the option money is still retained by the escrow officer for the seller.

Deliver it in a timely fashion to protect your client.

According to Rule §535.146(b)(3), "Unless a different time to deposit trust money is expressly agreed upon in writing by the principals to the transaction, any trust money received by the broker must be deposited in a trust account or delivered to an authorized escrow agent within a reasonable time, which the Commission has determined to be not later than the close of business of the second working day after the date the broker receives the trust money."

Note that the time for delivery of the option fee and earnest money in the contract is a different time expressly agreed upon in writing by the principals under Rule 535.146(b)(3) and controls. In other words, if your client gives you the money to deliver to the escrow agent on the day it is due under the contract, you have to get it to the escrow agent that day. You do not have two more days to deliver it per Rule 535.146(b)(3). Be responsible when it comes to the money and its receipt.

Additional Option Period:

If the parties to the contract wish to extend the option period, TREC form 39-8, Amendment to Contract, should be used. The Amendment should be signed before the end of the original option period. Just as with the original option period, a fee must be paid for the additional option period for it to be effective. You should note that the Amendment form states that the additional option fee has been paid to the Seller. Make sure payment of the additional option fee takes place when the Amendment is signed. There is no time frame for future delivery.

CHAPTER

05 UNAUTHORIZED PRACTICE OF LAW

Learning Objectives

After this chapter, you will be able to

→ Explain when a license holder must use a TREC promulgated form.
→ Identify what license holders can and cannot do concerning unauthorized practice of law.
→ Give examples of statements intended for paragraph 11 (Special Provisions) that could constitute unauthorized practice of law.

Under Sec. 1101.654 of the Texas Occupations Code, a license holder can be suspended or a license revoked for the unauthorized practice of law. The statute describes the practice of law as drafting "an instrument that transfers or <u>otherwise affects</u> an interest in real property," or advising someone regarding "the <u>validity or legal sufficiency of an instrument</u> or the validity of title to real property." The statute goes on to state that it is not considered the unauthorized practice of law for a license holder to complete a contract form:

(1) adopted by the commission for the type of transaction for which the form is used;
(2) prepared by an attorney licensed in this state and approved by the attorney for the type of transaction for which the form is used; or
(3) prepared by the property owner or by an attorney and required by the property owner."

The underlined language is fairly broad, so the Commission set out some additional detail in TREC Rule §537.11. Subsection (a) sets out the requirement that the license holder use forms adopted by the Commission if there is one for that type of transaction. Effective May 2018, it specifically details what must be included in a form prepared by an attorney or trade association in order for a license holder to use that form with a client. Subsections (b)-(e) provides more guidance on what is or is not the practice of law.

§537.11 - Use of Standard Contract Forms

(b) A license holder may not:
(1) practice law;

(2) directly or indirectly offer, give or attempt to give legal advice;
(3) give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate;
(4) give opinions concerning the status or validity of title to real estate;
(5) draft language defining or affecting the rights, obligations or remedies of the principals of a real estate transaction, including escalation, appraisal or other contingency clauses;
(6) add factual statements or business details to a form approved by the Commission if the Commission has approved a form or addendum for mandatory use for that purpose;
(7) attempt to prevent or in any manner whatsoever discourage any principal to a real estate transaction from employing a lawyer; or
(8) employ or pay for the services of a lawyer, directly or indirectly, to represent a principal to a real estate transaction in which the license holder is acting as an agent.

(c) This section does not limit a license holder's fiduciary obligation to disclose to the license holder's principals all pertinent facts that are within the knowledge of the license holder, including such facts which might affect the status of or title to real estate.

(d) It is not the practice of law for a license holder to fill in the blanks in a contract form authorized for use by this section. A license holder shall only add factual statements and business details or shall strike text as directed in writing by the principals.

(e) This section does not prevent the license holder from explaining to the principals the meaning of the alternative choices, factual statements and business details contained in an instrument so long as the license holder does not offer or give legal advice.

Still not enough clarity? Here are some pointers recycled from last year's Broker Responsibility Course with some extra notes added.

What License Holders Can Do:

* Disclose all relevant facts that you know, including such facts that might affect the status of or title to real estate; *[the fact that an owner recently died and that could affect title should be disclosed, but not your opinion as to how that will affect the title]*
* Fill in the blanks in a contract form authorized for use by license holders under TREC Rules §537.11;
* Add factual statements and business details or shall strike text as directed in writing by the principals on a contract form approved by the Commission; *[this does not include dictating to your client what to write – be sure to retain a copy of the email or other writing the buyer/seller gave to you regarding alterations to the contract form]*
* Explain the meaning of the alternative choices, factual statements and business details contained in an instrument to your client *[be specific but if you start talking about "what if", "but" or "when", you could be crossing the line into giving legal advice or opinions. Also, do not explain forms that are not promulgated by TREC, this includes Builder contracts and REO and relocation addenda]*.

What License Holders Cannot Do:

* Directly or indirectly give or attempt to give legal advice; *["Well if it were me, I would…" could mean you are indirectly attempting to give legal advice.]*
* Give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate; *["This isn't worth the paper it is written on. It's not enforceable."]*
* Give opinions concerning the status or validity of title to real estate; *[That's why you have title companies and attorneys]*
* Draft language defining or affecting the rights, obligations or remedies of the principals of a real estate transaction, including escalation, appraisal or other contingency clauses; *[There are many different approved addenda that deal with contingency situations so you don't have to get in this situation]*
* Add factual statements or business details to an approved contract form if the Commission has approved a separate addendum for that purpose *[Use the addenda and stay out of trouble]*.

Unauthorized Practice of Law Pop Quiz

Ultimately, a judge (SOAH and civil) will decide whether some action or writing was the unauthorized practice of law. In the meantime, let's take a pop quiz and see if you can identify it when you see it (and hopefully before you write it in Special Provisions)! By the way, these are all actual provisions license holders have put in Special Provisions.

Unauthorized Practice of Law examples from recent TREC Cases:

Case 1

Sales agent created a lease purchase document by starting with a lease agreement and then writing her "contract terms" into paragraph 26 of the lease. (Agreed Orders for both the agent and the designated broker.)

Case 2

Sales Agent #1, Bob, represented Seller. When a buyer expressed interest in purchasing Seller's property for $150,000, Sales Agent 1 contacted another agent in his brokerage, Sales Agent #2, John, and offered him $500 if he would put his name in a contract as Buyer's agent. Bob prepared the contract documents, and without consulting with his broker, prepared a notice of intermediary appointment, appointing himself as seller's agent and Sales Agent #2, John, as Buyer's agent. He also prepared an addendum that stated in part: *Seller agrees to refund for requested upgrades and repairs the amount of 70% over appraisal of 155,000. Should the property not appraise above $150,000.00 there will be no seller contributions and no refund of any amounts. This agreement is outside of closing and done as a security for all parties involved*. Appraisal came in at $135,000, Seller was furious and felt Sales Agent #1, Bob, favored the buyer. (Agreed orders for both agents and the broker.)

Case 3

Broker wrote her own "As-Is Clause" for a deal on her own letterhead. (Advisory Letter)

Case 4

A brokerage company was the owner/seller and had prepared their own addendum that they required for their sale transactions that dovetailed with the provisions of the standard 1-4 family resale contract form. Another license holder complained that the form did not address the lengthy list of "prepared by an attorney" requirements of 537.11(a)(4). However, since the brokerage company was the owner of the property, they fit under the exception in 537.11(a)(3) – a form or addenda prepared by a property owner or prepared by a lawyer and required by a property owner. (No violation)

CHAPTER

06 PROPERTY MANAGEMENT

Learning Objectives

After this chapter, you will be able to

→ Given the HUD recommendations, list what may not be considered when using a criminal history during the tenant screening process.
→ Identify the law that protects tenants from eviction due to foreclosure on the property the tenants occupy.
→ List the items that should be included in an adverse action notice.

Use of Criminal History

The Fair Housing Act prohibits discrimination in the sale and rental of housing based on race, color, national origin, religion, sex, familial status, and disability. A housing provider can violate the Fair Housing Act by either intentionally discriminating against a member of a protected class or by engaging in practices that have a discriminatory effect on members of a protected class, even if not intentional.

In April 2016, the U.S. Department of Housing and Urban Development (HUD) issued a warning to landlords and agents on the use of criminal records during the tenant screening process. According to HUD, African Americans and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to their share of the general population. While having a criminal record is not a protected characteristic under the Fair Housing Act, HUD said, criminal history-based restrictions may violate the Act if, without justification, their burden falls more often on applicants or tenants of one race or national origin over another.

If a landlord chooses to consider an applicant's criminal history, HUD made a few things clear:

* Don't consider prior arrests, only convictions
* Don't have a blanket prohibition on individuals with a prior conviction
* Do consider the nature and severity of the conviction and ask yourself, *does this relate to the safety of residents, the safety of property, or the ability to be a good tenant?*

* Do limit “lookback periods” (i.e. the period of time since the conviction)

Ultimately, whether use of criminal history violates the Fair Housing Act will be a case-by-case determination. However, landlords should ensure that their policy or practice is necessary to achieve a substantial, legitimate, and non-discriminatory interest and that the practice or policy actually achieves that interest.

Protecting Tenants at Foreclosure Act Reinstated

A law that expired in December 2014 was restored in June 2018. The Protecting Tenants at Foreclosure Act (PTFA) is intended to shield tenants from eviction because of foreclosure on the property they occupy.

The PTFA applies in the case of any foreclosure on a federally related mortgage loan or on any dwelling or residential real property. Under the PTFA, any immediate successor in interest (i.e. the purchaser) will assume the interest subject to the rights of a bona fide tenant. A bona fide tenant means:

(i) the tenant is not the mortgagor, or the child, spouse, or parent of the mortgagor;
(ii) the lease or tenancy is the result of an arms-length transaction; and
(iii) rent is not substantially less than fair-market rent for the property (or that the rent is reduced or subsidized).

The tenant is allowed to occupy the premises until the end of the remaining term of the lease, with two exceptions. The first exception is if the purchaser will occupy the property as a primary residence. The second exception is if there is no lease or the lease is terminable at will. In those situations, the purchaser must provide to the tenant notice to vacate the property at least 90 days in advance.

Consumer Reports

Frequently, landlords (and their agents) may use consumer reports to evaluate prospective tenants prior to entering into a lease. Commonly, landlords will ask for authorization to do this in a lease or rental application. These reports can provide a wide variety of information about a person’s credit, rental, or criminal history. Examples of these reports could include a credit report from a credit bureau, such as TransUnion®, Experian®, and Equifax® or a report from a tenant screening service that describes the prospective tenant’s rental history based on reports from previous landlords or court records. The businesses who supply these reports are known as consumer reporting agencies.

If using consumer reports in the tenant screening process, landlords and their agents must comply with the federal Fair Credit Reporting Act (FCRA) and Federal Trade Commission (FTC) rules, along with provisions in the Texas Business and Commerce Code. Under both state and federal law, if the landlord takes an adverse action based even partly on information in a consumer report, the landlord must provide the person notice.

What is an adverse action?

An adverse action is any action taken by a landlord that is unfavorable to the interests of a rental applicant or tenant. Examples include:

* Denying the lease application
* Requiring a co-signer on the lease
* Requiring a larger deposit
* Raising the rent

What must an adverse action notice include?

An adverse action can be made orally or in writing; however, compliance may be easier to demonstrate if in writing. In addition to stating what adverse action was taken, the notice must include:

* The name, address, and phone number of the consumer reporting agency that supplied the report (including a toll-free telephone number of the agency, if applicable);
* A statement that the company that supplied the report did not make the decision to take the unfavorable action and can’t give specific reasons for it; and
* A notice of the person’s right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get a free report from the company if the person asks for it within 60 days.

If the consumer report on which the adverse action was based contained a credit score, the landlord must also provide a rental applicant or tenant a written disclosure of any credit score used by the landlord in taking any adverse action based on information in a consumer report, as well as the following information:

* the range of possible credit scores;
* key factors that adversely affected the credit score;
* the date the credit score was created; and
* the name of the person or entity that provided the credit score.

Can a tenant receive the copy of the consumer or credit report used by the landlord or property manager?

Both the FCRA and Texas law state that a consumer reporting agency cannot prohibit a landlord or property manager from sharing the contents or providing a

copy of the report, if an adverse action has been taken. However, there is no requirement in state or federal law that a landlord or property manager must provide a copy of the report to the tenant. Tenants are entitled to receive a free copy of the report, however, directly from the credit reporting agency in a variety of situations, including after an adverse action has been taken.

Can a landlord receive a copy of a consumer or credit report, if the property manager was authorized to request and maintain those records?

Consumer reporting agencies may restrict the property manager from sharing copies of the reports with others; however, the FTC has stated that sharing reports may be acceptable where two users share the report for the same permissible purpose with the consumer's consent.

While sharing may be permissible in this situation, the decision to share a copy of reports may hinge on other factors, like any privacy policy maintained by the property manager. Texas law requires individuals, like landlords or property managers, to have a privacy policy in place if they require a social security number to obtain goods or services from or enter into a business transaction with a person, like a tenant. The privacy policy must include certain information, like who has access to personal information. Therefore, if it is the property manager's responsibility to screen the applicant, a property manager might have a privacy policy that limits the situation when copies of documents like consumer reports are made available to the landlord.

Regardless, property managers are free to discuss pertinent information related to a tenant with a landlord, particularly during the application process. This information could include subjects such as income, employment history, rental history, criminal history, the number of occupants, credit scores, and so on.

Can a homeowners' association require a copy of a consumer report?

If the rental property is subject to mandatory membership in a homeowners' association, under Texas law, the association cannot require a property owner, their agent, or an applicant or tenant, to provide a copy of the applicant's or tenant's consumer or credit report. Note, however, that this prohibition does not apply to condominium associations.

How long and in what way should consumer reports be retained?

Consumer reports must be stored in a secure place where only those who "need to know" have access and that the reports are only used for the permitted purpose. When considering how long to retain a consumer report, landlords or property managers may want to ensure they retain the reports and any related authorizations until the time period for filing a lawsuit or claim has ended. For a claim under the FCRA, the statute of limitations (i.e., the time period within which a claim can be brought) is the earlier of two years after the consumer discovers a violation, or five years after a violation occurs. A lawsuit under the Fair Housing Act has a two-year statute of limitation. Consumer reporting agencies may require the landlord or agent to keep records for a longer period. Agreements between the landlord and property manager may also determine how long records should be kept.

What are the laws regarding disposal of records?

Both state and federal law require that individuals must take appropriate or reasonable measures to protect against unauthorized access to sensitive consumer information, like consumer reports. All users of consumer reports must have in place procedures to properly dispose of records containing consumer information. Proper disposal can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed.

See Appendix F for six new laws relating to property management and leasing.

CHAPTER

07 SECURITY ISSUES

Learning Objectives

After this chapter, you will be able to

→ Discuss how to advise clients regarding in-home surveillance whether they are buying or selling a home.
→ Recognize types of cyber fraud and how to protect yourself and your clients.

In-Home Surveillance

Both state and federal laws cover surveillance. Chapter 16.02 of the Texas Penal Code and federal law Electronic Communications Privacy Act (ECPA) prohibit audio monitoring or recording without the consent of at least one individual who is part of the conversation. Neither Texas law nor federal law allow audio monitoring or recording during a showing without the seller being present and participating in the conversation, even if the monitoring or recording was done inside the seller's own home. Every seller with the capability of having audio monitoring or recording of persons in their home should seek the advice of competent legal counsel before performing any type of audio monitoring or recording.

Silent video is not prohibited by federal law except in places where an individual would have a reasonable expectation of privacy (for instance, a bathroom). Again, every seller with monitoring capability should seek competent legal counsel before videotaping persons in the home.

The fines are significant. Illegal recording is a felony offense in Texas and anyone who has been recorded could bring a civil suit against the seller, which could result in fines up to $10,000 per occurrence and other damages, court costs and attorney fees.

What should the license holder do when listing or showing a home where there might be in-home surveillance?

Sellers should be advised to seek the advice of an attorney before recording audio or video of the showings of their home.

Buyers should be advised to never make comments that could impact their negotiating position inside the home OR on the premises, AND should be advised to contact the security company after closing to make sure all the devices are either disabled or removed from the seller's name and access.

See Appendix G for the article "Is Your Seller's Surveillance Putting them at Risk" from *Texas Realtor®* magazine, November 2017.

Cyber Fraud

In recent years, fraudsters have increasingly targeted real estate transactions, and they have been so successful that wire fraud is now a multi-billion dollar industry. The perpetrators use various methods to deceive parties into wiring funds to fraudulent accounts, and they do not even need to hack into or gain unauthorized access to email accounts. Rather, they are able to intercept information sent over the internet. They are able to gather enough information about a transaction (such as the property address, the names of the parties, agents, and escrow officer, and the date and time of closing), to be able to effectively impersonate others involved in the transaction.

For example, the scam may look like this: a fraudster creates an email address that, on first glance, looks like it belongs to the escrow officer (e.g. janesmith@tit1e-company.com). The buyer receives an email that purports to be from their escrow officer, Jane Smith, but the buyer does not notice that there is a "1" instead of an "l" in the word "tit1e" in the email address. The fraudster's email provides bogus wiring instructions for the closing, and the buyer wires their closing funds to the fraudulent account, thinking they have been sent to the title company. By the time the buyers realize the error, the funds may be overseas with no ability to get the funds back.

The more information the scammer has about the transaction, the more believable it is to the unsuspecting victim, so it is essential for real estate agents to be aware of how information sent over the internet can be used. Many title companies have policies that require the settlement statement/closing disclosure (amongst other documents) to be sent to the parties using special encryption software. Encryption programs allow information to be sent over the internet without being accessible by those that would intercept it. However, if the agent receives an encrypted attachment from the title company, but then forwards the document to the client unencrypted, the information is then exposed. If a fraudster has a settlement statement, they can craft a more specific email that also contains the exact amount of the funds the buyer needs to wire for closing.

It is in the best interest of all involved in a real estate transaction to be cautious about the details of a transaction that are sent over email. Real estate agents should inform their clients about the prevalence of wire fraud and ensure that they know to verify all wire instructions via known phone numbers. (It does not do any good to call the phone number found in the signature block of the "escrow officer" in the fraudulent email! The fraudsters are more than happy to confirm their intended destination!)

Wiring Funds or Cashier's Checks

Real estate agents and their clients need to be aware of the potential of wire fraud and be cautious; however, wire transfer is a popular and legitimate form of transferring funds in a real estate transaction. With the potential of wire fraud, the client may prefer to use a cashier's check to transfer funds. Ultimately, the client needs to follow the actual title company or escrow agent's directions. Always double check any wiring instructions directly with the escrow agent by phone or in person.

Case Study 2

Follow the Rules

Capcor at KirbyMain LLC v. Moody National Kirby Houston, LLC, Court of Appeals, Texas, Houston (1st District) 509 S.W. 3d 379

Moody National Kirby Houston, L.L.P. (Moody Kirby) owned a vacant lot near the Texas Medical Center. Capcor agreed to purchase the land from Moody Kirby using a standard "Unimproved Property Contract" promulgated by the Texas Real Estate Commission. The contract specified a definite date for closing and provided that Buyer pay the Sales Price in good funds acceptable to the escrow agent. If a party failed to close the sale by the closing date, the other party was entitled to exercise its contractual remedies, which included terminating the contract and receiving the earnest money as liquidated damages.

The parties agreed to use Moody National Title

(case study continued)

Company, L.P. (Moody Title), a company wholly owned by Moody Kirby's sole owner, Brett Moody, as the title company. The day prior to closing, the Moody Title escrow agent informed Capcor's lawyer that Moody Title needed to receive the purchase funds in the form of a wire transfer. She informed Capcor's principal of the same requirement when he arrived at Moody Title's office the next morning to sign the closing documents, noting that the wired funds must be received by 3:30 p.m. Sometime after 5:00 p.m. on the day of closing, Capcor's principal showed up with a cashier's check for the balance due for closing. The title company informed Capcor that it could not accept the check because it was against their underwriter's policies. The seller terminated the contract the next morning for failure of the buyer to close. Capcor refused to sign a release of earnest money and sued Moody Kirby and Moody Title.

The appellate court affirmed the trial court who found that Capcor had defaulted and that the title company had not breached its fiduciary duty. While the Texas Department of Insurance says a cashier's check is good funds, it does not require a title company to accept a cashier's check. The TREC form specifies, "Buyer shall pay the Sales Price in good funds acceptable to the escrow agent." (Paragraph 9.B.2.) The title company during trial testified that a cashier's check is subject to a three-day hold, and it is their policy not to accept them as good funds. The contract affirmatively bestowed upon Moody Kirby the right to terminate if Capcor defaulted by failing to timely deliver good funds acceptable to the escrow agent. Escrow funds and attorney fees were awarded to Moody Kirby.

Avoiding Cyber Fraud

Just when you think you have learned everything you can to protect yourself and your clients, another scam appears. License holders should be aware of the types of cyber fraud and how to protect themselves and their clients.

Definitions

Cybercrime - criminal activities carried out by means of computers or the internet.

Spoofing - imitate something, a technique used to gain unauthorized access to computers where the intruder sends a message to a computer with an IP address indicating that the message is coming from a trusted source.

Wire Fraud - (man-in-the-middle attack) a hacker hijacks (spoofs) information between a trusted person and a network server and uses the information to replace the client's IP address with its own IP address. The hacker then continues to communicate with the client (buyer or seller) and the communication still appears to be from a trusted source (real estate agent, title, mortgage, etc…). The FBI estimates from June 2016 to May 2018, there was a loss of more than $1.6 BILLION in the US alone.

Phishing - the fraudulent practice of sending emails purporting to be from a reputable company in order to induce individuals to reveal personal information, such as passwords and credit card numbers.

Social Engineering - the use of deception to manipulate individuals into divulging confidential or personal information that may be used for fraudulent purposes.

Malware - software that is intended to damage or disable computers and computer systems.

Ransomware - a type of malicious software designed to block access to a computer system until a sum of money is paid.

Typo Squatting - the purchase of misspelled versions of a popular domain names for the purpose of attracting visitors who make typographical errors when entering web addresses, so that hackers can introduce malware into the user's computer.

Spyware - unwanted software that infiltrates your computer, stealing your internet usage data and sensitive information. It is a type of malware.

HOW do you protect yourself?

- ✓ THINK before you click on anything!
- ✓ Have MULTIPLE step authentications on all your accounts.
- ✓ Challenge telemarketers.
- ✓ If anyone initiates contact with you without your invitation, consider it a scam.
- ✓ Never sign into a public WIFI system.
- ✓ Be very careful when you type in website addresses.
- ✓ Do not download anything you were not expecting.
- ✓ Hover your cursor over the "from" email before you open it. Hover your cursor over any "click here" to be sure this is what you were expecting, if not, do NOT "click here".
- ✓ Know that nothing is free.
- ✓ Back up your data.

- ✓ Install antivirus/anti-malware software.
- ✓ Keep your software updated.
- ✓ Make your passwords HARD and illogical. Change them often. Consider using a password manager.

In Closing…

At the closing table on a $450,000 cash transaction, when the title officer asks for the cashier's check, you do not want to hear your buyer say, "I wired the funds to the title company 3 days ago, like your email said."

The FBI will now begin a relationship with you and your client!

APPENDIX

UPDATED TREC SELLER'S DISCLOSURE NOTICE (OH-H) EFFECTIVE 9/1/2019)

8-12-2019 [8-7-2017]

APPROVED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

SELLER'S DISCLOSURE NOTICE

EQUAL HOUSING OPPORTUNITY

CONCERNING THE PROPERTY AT_______________________________________
(Street Address and City)

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER OR SELLER'S AGENTS.

Seller ☐ is ☐ is not occupying the Property. If unoccupied, how long since Seller has occupied the Property? ____________

1. The Property has the items checked below [Write Yes (Y), No (N), or Unknown (U)]:

_____Range	_____Oven	_____Microwave
_____Dishwasher	_____Trash Compactor	_____Disposal
_____Washer/Dryer Hookups	_____Window Screens	_____Rain Gutters
_____Security System	_____Fire Detection Equipment	_____Intercom System
	_____Smoke Detector	
	_____Smoke Detector-Hearing Impaired	
	_____Carbon Monoxide Alarm	
	_____Emergency Escape Ladder(s)	
_____TV Antenna	_____Cable TV Wiring	_____Satellite Dish
_____Ceiling Fan(s)	_____Attic Fan(s)	_____Exhaust Fan(s)
_____Central A/C	_____Central Heating	_____Wall/Window Air Conditioning
_____Plumbing System	_____Septic System	_____Public Sewer System
_____Patio/Decking	_____Outdoor Grill	_____Fences
_____Pool	_____Sauna	_____Spa _____Hot Tub
_____Pool Equipment	_____Pool Heater	_____Automatic Lawn Sprinkler System
_____Fireplace(s) & Chimney (Wood burning)		_____Fireplace(s) & Chimney (Mock)
_____Natural Gas Lines		_____Gas Fixtures
_____Liquid Propane Gas	_____LP Community (Captive)	_____LP on Property
Garage: _____Attached	_____Not Attached	_____Carport
Garage Door Opener(s):	_____Electronic	_____Control(s)
Water Heater:	_____Gas	_____Electric
Water Supply: _____City	_____Well _____MUD	_____Co-op

Roof Type:_______________________________ Age:_______________ (approx.)

Are you (Seller) aware of any of the above items that are not in working condition, that have known defects, or that are in need of repair? ☐ Yes ☐ No ☐ Unknown. If yes, then describe. (Attach additional sheets if necessary):____________

____

____

____

TREC No. OP-H

2. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766, Health and Safety Code?* ☐ Yes ☐ No ☐ Unknown. If the answer to this question is no or unknown, explain (Attach additional sheets if necessary): ______________________

____

____

____

* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer's family who will reside in the dwelling is hearing impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within 10 days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for the installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

3. Are you (Seller) aware of any known defects/malfunctions in any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware.

______Interior Walls	______Ceilings	______Floors
______Exterior Walls	______Doors	______Windows
______Roof	______Foundation/Slab(s)	______Sidewalks
______Walls/Fences	______Driveways	______Intercom System
______Plumbing/Sewers/Septics	______Electrical Systems	______Lighting Fixtures

______Other Structural Components (Describe): ______________________

____

____

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): ______________________

____

____

4. Are you (Seller) aware of any of the following conditions? Write Yes (Y) if you are aware, write No (N) if you are not aware.

______Active Termites (includes wood destroying insects)	______Previous Structural or Roof Repair
______Termite or Wood Rot Damage Needing Repair	______Hazardous or Toxic Waste
______Previous Termite Damage	______Asbestos Components
______Previous Termite Treatment	______Urea-formaldehyde Insulation
______[~~Previous Flooding~~]	______Radon Gas
______Improper Drainage	______Lead Based Paint
______Water Damage Not Due to a Flood Event [~~Penetration~~]	______Aluminum Wiring
______[~~Located in 100-Year Floodplain~~]	______Previous Fires
______[~~Present Flood Insurance Coverage~~]	______Unplatted Easements
______Landfill, Settling, Soil Movement, Fault Lines	______Subsurface Structure or Pits
______Single Blockable Main Drain in Pool/Hot Tub/Spa*	______Previous Use of Premises for Manufacture of Methamphetamine

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): ______________________

____

____

* A single blockable main drain may cause a suction entrapment hazard for an individual.

5. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair? ☐ Yes (if you are aware) ☐ No (if you are not aware). If yes, explain (attach additional sheets if necessary). ______________________________

____

____

6. Are you (Seller) aware of any of the following conditions?* Write Yes (Y) if you are aware, write No (N) if you are not aware.

_____ Present flood insurance coverage

_____ Previous flooding due to a failure or breach of a reservoir or a controlled or emergency release of water from a reservoir

_____ Previous water penetration into a structure on the property due to a natural flood event

Write Yes (Y) if you are aware, and check wholly or partly as applicable, write No (N) if you are not aware.

_____ Located ( ) wholly ( ) partly in a 100-year floodplain (Special Flood Hazard Area-Zone A, V, A99, AE, AO, AH, VE, or AR)

_____ Located ( ) wholly ( ) partly in a 500-year floodplain (Moderate Flood Hazard Area-Zone X (shaded))

_____ Located ( ) wholly ( ) partly in a floodway

_____ Located ( ) wholly ( ) partly in a flood pool

_____ Located ( ) wholly ( ) partly in a reservoir

If the answer to any of the above is yes, explain (attach additional sheets if necessary): ______________________________

____

*For purposes of this notice:

"100-year floodplain" means any area of land that:

(A) is identified on the flood insurance rate map as a special flood hazard area, which is designated as Zone A, V, A99, AE, AO, AH, VE, or AR on the map;

(B) has on percent annual chance of flooding, which is considered to be a high risk of flooding; and

(C) may include regulatory floodway, flood pool, or reservoir.

"500-year floodplain" means any area of land that:

(A) is identified on the flood insurance rate map as a moderate flood hazard area, which is designated on the map as Zone X (shaded); and

(B) has a two-tenths of one percent annual chance of flooding, which is considered to be a moderate risk of flooding.

"Flood pool" means the area adjacent to a reservoir that lies above the normal maximum operating level of the reservoir and that is subject to controlled inundation under the management of the United States Army Corps of Engineers.

"Flood insurance rate map" means the most recent flood hazard map published by the Federal Emergency Management Agency under the National Flood Insurance Act of 1968 (42 U.S.C. Section 4001 et seq.).

"Floodway" means an area that is identified on the flood insurance rate map as a regulatory floodway, which includes the channel of a river or other watercourse and the adjacent land areas that must be reserved for the discharge of a base flood, also referred to as a 100-year flood, without cumulatively increasing the water surface area of land.

7. Have you (Seller) ever filed a claim for flood damage to the property with any insurance provider, including the National Flood Insurance Program (NFIP)?* ☐ Yes ☐ No . If yes, explain (attach additional sheets as necessary): ______________________________

____

*Homes in high risk flood zones with mortgages from federally regulated or insured lenders are required to have flood insurance. Even when not required, the Federal Emergency Management Agency (FEMA) encourages homeowners in high risk, moderate risk, and low risk flood zones to purchase flood insurance that covers the structure(s) and the personal property within the structure(s).

8. Have you (Seller) ever received assistance from FEMA or the U.S. Small Business Administration (SBA) for flood damage to the property? ☐ Yes ☐ No . If yes, explain (attach additional sheets as necessary): ______________________________

____

9. [6.] Are you (Seller) aware of any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware.

______ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

______ Homeowners' Association or maintenance fees or assessments.

______ Any "common area" (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

______ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

______ Any lawsuits directly or indirectly affecting the Property.

______ Any condition on the Property which materially affects the physical health or safety of an individual.

______ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.

______ Any portion of the property that is located in a groundwater conservation district or a subsidence district.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary): ______________________________

____

____

10. [7.] If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit maybe required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

11. [8.] This property may be located near a military installation and may be affected by high noise or air installation compatible use zones or other operations. Information relating to high noise and compatible use zones is available in the most recent Air Installation Compatible Use Zone Study or Joint Land Use Study prepared for a military installation and may be accessed on the Internet website of the military installation and of the county and any municipality in which the military installation is located.

Signature of Seller ______ Date ______ Signature of Seller ______ Date ______

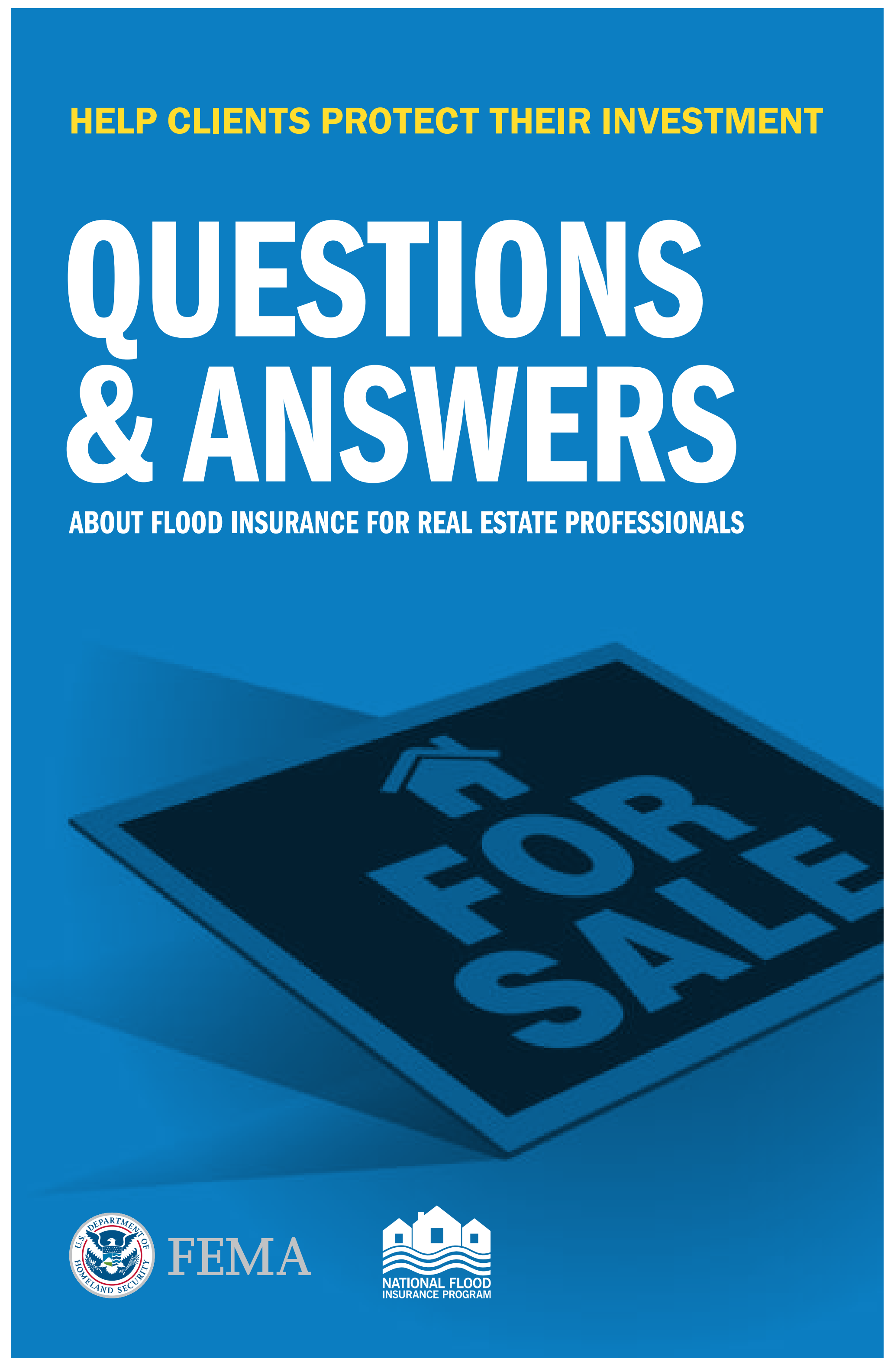
The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

Signature of Purchaser ______ Date ______ Signature of Purchaser ______ Date ______

TREC No. OP-H

APPENDIX B

HELP CLIENTS PROTECT THEIR INVESTMENT: QUESTION & ANSWERS ABOUT FLOOD INSURANCE FOR REAL ESTATE PROFESSIONALS



Why should I talk to my clients about flood insurance?

Flooding can happen anywhere at any time. You should encourage your clients to purchase flood insurance to protect their properties from flood damage and the economic devastation it can bring.

A property does not have to be near water to flood. In fact, more than 20 percent of all National Flood Insurance Program (NFIP) flood claims come from outside of the areas at the highest risk for flood (Special Flood Hazard Areas). Floods can result from storms, melting snow, hurricanes, drainage system backups, broken water mains, and changes to land from new construction, among other things.

It is important to let your client know that homeowner's insurance policies typically do not cover floods. If a property is in a Special Flood Hazard Area or designated high-risk flood area, then federally regulated or insured lenders must require the buyer to purchase flood insurance as a condition of their mortgage loan.

Flood insurance can help with recovery regardless of whether there is a Presidential Disaster Declaration. In the event of flood, federal disaster assistance, such as individual assistance from FEMA, including federally funded grants, or loans from the U.S. Small Business Administration, offers very limited help following a flood loss. Such assistance is only available when there is an official Presidential Disaster Declaration for federal disaster assistance. Most federal disaster assistance comes in the form of low-interest disaster loans that recipients must repay with interest in addition to their existing mortgages, other loans, and debts.

Your client will never have to repay money received from a verified claim on their NFIP flood insurance policy.

Who can purchase flood insurance?

Anyone in a community that participates in the NFIP can purchase building and/or contents coverage, with few exceptions. Licensed insurance agents can tell you if a specific community participates in the NFIP. Coastal Barrier Resources System Areas (CBRS), undeveloped coastal areas established for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes (Otherwise Protected Areas), and buildings principally below ground or entirely over water may not be eligible for NFIP flood insurance coverage.

How do clients obtain a flood insurance policy?

The NFIP also has resources to help your client find an agent. Your client can visit **fema.gov/nfip** or call their local insurance agent for more information on purchasing a policy. Your client can purchase NFIP flood insurance from the many companies writing and servicing flood insurance on behalf of FEMA or from NFIP Direct. Only a licensed property and casualty insurance agent can sell NFIP flood insurance.

Regardless of who writes the policy, NFIP flood insurance is the same. The premium and amount of coverage for an individual risk policy is the same regardless of who the agent is.

There are other legal requirements to ensure that your client has flood insurance when they need it the most. If the mortgage company requires flood insurance as a condition of the loan, and the mortgage company escrows for other insurance premiums, the mortgage company must also escrow flood insurance premiums.

How much will flood insurance cost?

Flood insurance premiums will vary depending on the construction date and flooding risk for the building, among other things. A licensed insurance agent can provide a price quote and you should encourage a prospective buyer to get a quote for both building and contents coverage. In most cases, they are separate coverages with separate deductibles. Costs vary depending on whether the property falls within a flood risk designation. As an example, if your client's property is outside the high-risk area, they may qualify for a Preferred Risk Policy that starts as low as $395 a year.

If FEMA maps your client's property into a high-risk flood area, your client may need to obtain an Elevation Certificate (EC) to receive a flood insurance quote. To find out if a property already has an EC, contact the local building permit office, the local planning and zoning office, or the current owner or a flood insurance agent. If your client is unable to identify an existing EC for their property, the client may have to hire a licensed land surveyor, engineer, or architect to provide one. Should you or your client need more information about ECs, how the NFIP uses them, and why they may need one, visit **fema.gov/media-library/assets/documents/32330**.

When is the best time to buy flood insurance coverage?

Now! A flood can happen anywhere, at any time—even outside of high-risk flood areas. Additionally, there is typically a 30-day waiting period between submitting the policy application and premium and the policy effective date. However, there are exceptions to this rule. For example, if a buyer purchases an NFIP policy in connection with a loan closing, there is no waiting period.

If a seller transfers his/her policy to the new property owner, regardless of whether or not there is a mortgage involved, the policy will not lapse and coverage continues uninterrupted upon sale. Personal property coverage and building coverage for a property under construction do not transfer.

What are Special Flood Hazard Areas (SFHAs)?

These are the areas with the highest risk for floods or zones beginning with the letters A or V on Flood Insurance Rate Maps.

How will I know if a building is in an SFHA?

Your clients can check with their local community or visit **fema.gov/nfip** to learn more about their flood risk. Anyone can view and download flood maps from **msc.fema.gov**. Lenders will notify borrowers if they must purchase flood insurance as a condition of a mortgage loan.

Am I legally liable if I do not disclose the fact that a property is in a high-risk flood area?

Many states have disclosure laws for real estate professionals that address all natural hazards, including floods. Check with your local Board of Realtors for disclosure laws. You can better help your client understand flood risk by learning more about it yourself. Visit **fema.gov/nfip** to learn more about flood risk and NFIP flood insurance.

For more information about NFIP flood insurance, contact your insurer or agent, or call **1-800-427-4661**.

If you are deaf/hard of hearing or have a speech disability and use relay services, call **711** from your TTY.

F-435
10/2017

APPENDIX

SE. 49.952, NOTICE TO PURCHASERS (TEXAS WATER CODE)

Sec. 49.452. NOTICE TO PURCHASERS.

(a) (1) Any person who proposes to sell or convey real property located in a district created under this title or by a special Act of the legislature that is providing or proposing to provide, as the district's principal function, water, sanitary sewer, drainage, and flood control or protection facilities or services, or any of these facilities or services that have been financed or are proposed to be financed with bonds of the district payable in whole or part from taxes of the district, or by imposition of a standby fee, if any, to household or commercial users, other than agricultural, irrigation, or industrial users, and which district includes less than all the territory in at least one county and which, if located within the corporate area of a city, includes less than 75 percent of the incorporated area of the city or which is located outside the corporate area of a city in whole or in substantial part, must first give to the purchaser the written notice provided in this section.

(2) The provisions of this section shall not be applicable to:

(A) transfers of title under any type of lien foreclosure;

(B) transfers of title by deed in cancellation of indebtedness secured by a lien upon the property conveyed;

(C) transfers of title by reason of a will or probate proceedings; or

(D) transfers of title to a governmental entity.

(b) The prescribed notice for districts located in whole or in part in the extraterritorial jurisdiction of one or more home-rule municipalities and not located within the corporate boundaries of a municipality shall be executed by the seller and shall read as follows:

"The real property, described below, that you are about to purchase is located in the __________ District. The district has taxing authority separate from any other taxing authority and may, subject to voter approval, issue an unlimited amount of bonds and levy an unlimited rate of tax in payment of such bonds. As of this date, the rate of taxes levied by the district on real property located in the district is $__________ on each $100 of assessed valuation. If the district has not yet levied taxes, the most recent projected rate of tax, as of this date, is $__________ on each $100 of assessed valuation. The total amount of bonds, excluding refunding bonds and any bonds or any portion of bonds issued that are payable solely from revenues received or expected to be received under a contract with a governmental entity, approved by the voters and which have been or may, at this date, be issued is $__________, and the aggregate initial principal amounts of all bonds issued for one or more of the specified facilities of the district and payable in whole or in part from property taxes is $__________.

"The district has the authority to adopt and impose a standby fee on property in the district that has water, sanitary sewer, or drainage facilities and services available but not connected and which does not have a house, building, or other improvement located thereon and does not substantially utilize the utility capacity available to the property. The district may exercise the authority without holding an election on the matter. As of this date, the most recent amount of the standby fee is $__________. An unpaid standby fee is a personal obligation of the person that owned the property at the time of imposition and is secured by a lien on the property. Any person may request a certificate from the district stating the amount, if any, of unpaid standby fees on a tract of property in the district.

"The district is located in whole or in part in the extraterritorial jurisdiction of the City of __________. By law, a district located in the extraterritorial jurisdiction of a municipality may be annexed without the consent of the district or the voters of the district. When a district is annexed, the district is dissolved.

"The purpose of this district is to provide water, sewer, drainage, or flood control facilities and services within the district through the issuance of bonds payable in whole or in part from property taxes. The cost of these utility facilities is not included in the

purchase price of your property, and these utility facilities are owned or to be owned by the district. The legal description of the property you are acquiring is as follows:

____
____

____

(Date)

____

Signature of Seller

PURCHASER IS ADVISED THAT THE INFORMATION SHOWN ON THIS FORM IS SUBJECT TO CHANGE BY THE DISTRICT AT ANY TIME. THE DISTRICT ROUTINELY ESTABLISHES TAX RATES DURING THE MONTHS OF SEPTEMBER THROUGH DECEMBER OF EACH YEAR, EFFECTIVE FOR THE YEAR IN WHICH THE TAX RATES ARE APPROVED BY THE DISTRICT. PURCHASER IS ADVISED TO CONTACT THE DISTRICT TO DETERMINE THE STATUS OF ANY CURRENT OR PROPOSED CHANGES TO THE INFORMATION SHOWN ON THIS FORM.

"The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or prior to execution of a binding contract for the purchase of the real property described in such notice or at closing of purchase of the real property.

____
____

____

(Date)

____

Signature of Purchaser

"(Note: Correct district name, tax rate, bond amounts, and legal description are to be placed in the appropriate space.) Except for notices included as an addendum or paragraph of a purchase contract, the notice shall be executed by the seller and purchaser, as indicated. If the district does not propose to provide one or more of the specified facilities and services, the appropriate purpose may be eliminated. If the district has not yet levied taxes, a statement of the district's most recent projected rate of tax is to be placed in the appropriate space. If the district does not have approval from the commission to adopt and impose a standby fee, the second paragraph of the notice may be deleted. For the purposes of the notice form required to be given to the prospective purchaser prior to execution of a binding contract of sale and purchase, a seller and any agent, representative, or person acting on the seller's behalf may modify the notice by substitution of the words 'January 1, ___' for the words 'this date' and place the correct calendar year in the appropriate space."

(c) The prescribed notice for districts located in whole or in part within the corporate boundaries of a municipality shall be executed by the seller and shall read as follows:

"The real property, described below, that you are about to purchase is located in the __________ District. The district has taxing authority separate from any other taxing authority and may, subject to voter approval, issue an unlimited amount of bonds and levy an unlimited rate of tax in payment of such bonds. As of this date, the rate of taxes levied by the district on real property located in the district is $__________ on each $100 of assessed valuation. If the district has not yet levied taxes, the most recent projected rate of tax, as of this date, is $__________ on each $100 of assessed valuation. The total amount of bonds, excluding refunding bonds and any bonds or any portion of bonds issued that are payable solely from revenues received or expected to be received under a contract with a governmental entity, approved by the voters and which have been or may, at this date, be issued is $__________, and the aggregate initial principal amounts of all bonds issued for one or more of the specified facilities of the district and payable in whole or in part from property taxes is $__________.

"The district has the authority to adopt and impose a standby fee on property in the district that has water, sanitary sewer, or drainage facilities and services available but not connected and which does not have a house, building, or other improvement located thereon and does not substantially utilize the utility capacity available to the property. The district may exercise the authority without holding an election on the matter. As of this date, the most recent amount of the standby fee is $__________. An unpaid standby fee is a personal obligation of the person that owned the property at the time of imposition and is secured by a lien on the property. Any person may request a certificate from the district stating the amount, if any, of unpaid standby fees on a tract of property in the district.

"The district is located in whole or in part within the corporate boundaries of the City of __________. The taxpayers of the district are subject to the taxes imposed by the municipality and by the district until the district is dissolved. By law, a district located within the corporate boundaries of a municipality may be dissolved by municipal ordinance without the consent of the district or the voters of the district.

"The purpose of this district is to provide water,

sewer, drainage, or flood control facilities and services within the district through the issuance of bonds payable in whole or in part from property taxes. The cost of these utility facilities is not included in the purchase price of your property, and these utility facilities are owned or to be owned by the district. The legal description of the property you are acquiring is as follows:

____
____

____

(Date)

____

Signature of Seller

PURCHASER IS ADVISED THAT THE INFORMATION SHOWN ON THIS FORM IS SUBJECT TO CHANGE BY THE DISTRICT AT ANY TIME. THE DISTRICT ROUTINELY ESTABLISHES TAX RATES DURING THE MONTHS OF SEPTEMBER THROUGH DECEMBER OF EACH YEAR, EFFECTIVE FOR THE YEAR IN WHICH THE TAX RATES ARE APPROVED BY THE DISTRICT. PURCHASER IS ADVISED TO CONTACT THE DISTRICT TO DETERMINE THE STATUS OF ANY CURRENT OR PROPOSED CHANGES TO THE INFORMATION SHOWN ON THIS FORM.

"The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or prior to execution of a binding contract for the purchase of the real property described in such notice or at closing of purchase of the real property.

____
____

____

(Date)

____

Signature of Purchaser

"(Note: Correct district name, tax rate, bond amounts, and legal description are to be placed in the appropriate space.) Except for notices included as an addendum or paragraph of a purchase contract, the notice shall be executed by the seller and purchaser, as indicated. If the district does not propose to provide one or more of the specified facilities and services, the appropriate purpose may be eliminated. If the district has not yet levied taxes, a statement of the district's most recent projected rate of tax is to be placed in the appropriate space. If the district does not have approval from the commission to adopt and impose a standby fee, the second paragraph of the notice may be deleted. For the purposes of the notice form required to be given to the prospective purchaser prior to execution of a binding contract of sale and purchase, a seller and any agent, representative, or person acting on the seller's behalf may modify the notice by substitution of the words 'January 1,__________' for the words 'this date' and place the correct calendar year in the appropriate space."

(d) The prescribed notice for districts that are not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities shall be executed by the seller and shall read as follows:

"The real property, described below, that you are about to purchase is located in the __________ District. The district has taxing authority separate from any other taxing authority and may, subject to voter approval, issue an unlimited amount of bonds and levy an unlimited rate of tax in payment of such bonds. As of this date, the rate of taxes levied by the district on real property located in the district is $__________ on each $100 of assessed valuation. If the district has not yet levied taxes, the most recent projected rate of tax, as of this date, is $__________ on each $100 of assessed valuation. The total amount of bonds, excluding refunding bonds and any bonds or any portion of bonds issued that are payable solely from revenues received or expected to be received under a contract with a governmental entity, approved by the voters and which have been or may, at this date, be issued is $__________, and the aggregate initial principal amounts of all bonds issued for one or more of the specified facilities of the district and payable in whole or in part from property taxes is $__________.

"The district has the authority to adopt and impose a standby fee on property in the district that has water, sanitary sewer, or drainage facilities and services available but not connected and which does not have a house, building, or other improvement located thereon and does not substantially utilize the utility capacity available to the property. The district may exercise the authority without holding an election on the matter. As of this date, the most recent amount of the standby fee is $__________. An unpaid standby fee is a personal obligation of the person that owned the property at the time of imposition and is secured by a lien on the property. Any person may request a certificate from the district stating the amount, if any, of unpaid standby fees on a tract of property in the district.

"The purpose of this district is to provide water, sewer, drainage, or flood control facilities and services within the district through the issuance of bonds

payable in whole or in part from property taxes. The cost of these utility facilities is not included in the purchase price of your property, and these utility facilities are owned or to be owned by the district. The legal description of the property you are acquiring is as follows:

____
____

____

(Date)

____

Signature of Seller

PURCHASER IS ADVISED THAT THE INFORMATION SHOWN ON THIS FORM IS SUBJECT TO CHANGE BY THE DISTRICT AT ANY TIME. THE DISTRICT ROUTINELY ESTABLISHES TAX RATES DURING THE MONTHS OF SEPTEMBER THROUGH DECEMBER OF EACH YEAR, EFFECTIVE FOR THE YEAR IN WHICH THE TAX RATES ARE APPROVED BY THE DISTRICT. PURCHASER IS ADVISED TO CONTACT THE DISTRICT TO DETERMINE THE STATUS OF ANY CURRENT OR PROPOSED CHANGES TO THE INFORMATION SHOWN ON THIS FORM.

"The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or prior to execution of a binding contract for the purchase of the real property described in such notice or at closing of purchase of the real property.

____
____

____

(Date)

____

Signature of Purchaser

"(Note: Correct district name, tax rate, bond amounts, and legal description are to be placed in the appropriate space.) Except for notices included as an addendum or paragraph of a purchase contract, the notice shall be executed by the seller and purchaser, as indicated. If the district does not propose to provide one or more of the specified facilities and services, the appropriate purpose may be eliminated. If the district has not yet levied taxes, a statement of the district's most recent projected rate of tax is to be placed in the appropriate space. If the district does not have approval from the commission to adopt and impose a standby fee, the second paragraph of the notice may be deleted. For the purposes of the notice form required to be given to the prospective purchaser prior to execution of a binding contract of sale and purchase, a seller and any agent, representative, or person acting on the seller's behalf may modify the notice by substitution of the words 'January 1, ______' for the words 'this date' and place the correct calendar year in the appropriate space."

(e) If the law relating to annexation or district dissolution is amended and causes inaccuracies in the content of the notices prescribed by this section, the district shall revise the content of the notices to accurately reflect current law.

(f) The notice required by this section shall be given to the prospective purchaser prior to execution of a binding contract of sale and purchase either separately or as an addendum or paragraph of a purchase contract. In the event a contract of purchase and sale is entered into without the seller providing the notice required by this subsection, the purchaser shall be entitled to terminate the contract. If, however, the seller furnishes the required notice at or prior to closing the purchase and sale contract and the purchaser elects to close even though such notice was not timely furnished prior to execution of the contract, it shall be conclusively presumed that the purchaser has waived all rights to terminate the contract and recover damages or other remedies or rights under the provisions of this section. Notwithstanding any provision of this subchapter to the contrary, all sellers, title companies, real estate brokers, and examining attorneys, and any agent, representative, or person acting on their behalf, shall not be liable for damages under the provisions of either Subsection (o) or (p) or liable for any other damages to any person for:
   (1) failing to provide the notice required by this section to a purchaser prior to execution of a binding contract of a purchase and sale or at or prior to the closing of the purchase and sale contract when the district has not filed the information form and map or plat as required under Section 49.455; or
   (2) unintentionally providing a notice prescribed by this section that is not the correct notice under the circumstances prior to execution of a binding contract of purchase and sale or at or prior to the closing of the purchase and sale contract.

(g) The purchaser shall sign the notice or purchase contract including such notice to evidence the receipt of notice.

(h) At the closing of purchase and sale, a separate copy of such notice with current information

shall be executed by the seller and purchaser, acknowledged, and thereafter recorded in the deed records of the county in which the property is located. For the purposes of this section, all sellers, title companies, real estate brokers, and examining attorneys, and any agent, representative, or person acting on their behalf, shall be entitled to rely on the accuracy of the information form and map or plat as last filed by each district under Section 49.455 or the information contained in or shown on the notice form issued by the district under Section 49.453 in completing the notice form to be executed by the seller and purchaser at the closing of purchase and sale. Any information taken from the information form or map or plat as last filed by each district and the information contained in or shown on the notice form issued by the district under Section 49.453 shall be, for purposes of this section, conclusively presumed as a matter of law to be correct. All subsequent sellers, purchasers, title insurance companies, real estate brokers, examining attorneys, and lienholders shall be entitled to rely upon the information form and map or plat filed by the district or the notice form issued by the district under Section 49.453.

(i) For the purposes of this section, an executory contract of purchase and sale having a performance period of more than six months shall be considered a sale under Subsection (a).

(j) For the purposes of the notice form to be given to the prospective purchaser prior to execution of a binding contract of sale and purchase, a seller and any agent, representative, or person acting in the seller's behalf may modify the notice by substitution of the words "January 1, ___" for the words "this date" and place the correct calendar year in the appropriate space. All sellers, and all persons completing the prescribed notice in the sellers' behalf, shall be entitled to rely on the information contained in or shown on the information form and map or plat filed of record by the district under Section 49.455 in completing the prescribed form to be given to the prospective purchaser prior to execution of a binding contract of sale and purchase. Except as otherwise provided in Subsection (h), any information taken from the information form or map or plat filed of record by the district in effect as of January 1 of each year shall be, for purposes of the notice to be given to the prospective purchaser prior to execution of a binding contract of sale and purchase, conclusively presumed as a matter of law to be correct for the period January 1 through December 31 of such calendar year. A seller and any persons completing the prescribed notice in the seller's behalf may provide more recent information, if available, than the information contained in or shown on the information form and map or plat filed of record by the district under Section 49.455 in effect as of January 1 of each year in completing the prescribed form to be given to the purchaser prior to execution of a binding contract of sale and purchase. Nothing contained in the preceding sentence shall be construed to create an affirmative duty on the part of a seller or any persons completing the prescribed notice in the seller's behalf to provide more recent information than the information taken from the information form and map or plat filed of record by the district as of January 1 of each year in completing the prescribed notice to be given to the purchaser prior to execution of a binding contract of sale and purchase. All subsequent sellers, purchasers, title insurance companies, real estate brokers, examining attorneys, and lienholders shall be entitled to rely upon the information form and map or plat filed by the district.

(k) If such notice is given at closing as provided in Subsection (h), a purchaser, or the purchaser's heirs, successors, or assigns, shall not be entitled to maintain any action for damages or maintain any action against a seller, title insurance company, real estate brokers, or lienholder, or any agent, representative, or person acting in their behalf, by reason of use by the seller of the information filed for record by the district or reliance by the seller on the filed plat and filed legal description of the district in determining whether the property to be sold and purchased is within the district. No action may be maintained against any title company for failure to disclose the inclusion of the described real property within a district when the district has not filed for record the information form, map, or plat with the clerk of the county or counties in which the district is located.

(l) Any purchaser who purchases any real property in a district and who thereafter sells or conveys the same shall on closing of such subsequent sale be conclusively considered as having waived any prior right to damages under this section.

(m) It is the express intent of this section that all

sellers, title insurance companies, examining attorneys, vendors of property and tax information, real estate brokers, and lienholders, and any agent, representative, or person acting on their behalf, shall be entitled to rely on the accuracy of the information form and map or plat as last filed by each district or the information contained in or shown on the notice form issued by the district under Section 49.453, or for the purposes of the notice to be given the purchaser prior to execution of a binding contract of sale and purchase the information contained in or shown on the information form and map or plat filed of record by the district in effect as of January 1 of each year for the period January 1 through December 31 of such calendar year.

(n) Except as otherwise provided in Subsection (f), if any sale or conveyance of real property within a district is not made in compliance with the provisions of this section, the purchaser may institute a suit for damages under the provisions of either Subsection (o) or (p).

(o) A purchaser of real property covered by the provisions of this section, if the sale or conveyance of the property is not made in compliance with this section, may institute a suit for damages in the amount of all costs relative to the purchase of the property plus interest and reasonable attorney's fees. The suit for damages may be instituted jointly or severally against the person, firm, corporation, partnership, organization, business trust, estate, trust, association, or other legal entity that sold or conveyed the property to the purchaser. Following the recovery of damages under this subsection, the amount of the damages shall first be paid to satisfy all unpaid obligations on each outstanding lien or liens on the property and the remainder of the damage amount shall be paid to the purchaser. On payment of all damages respectively to the lienholders and purchaser, the purchaser shall reconvey the property to the seller.

(p) A purchaser of real property covered by the provisions of this section, if the sale or conveyance of the property is not made in compliance with this section, may institute a suit for damages in an amount not to exceed $5,000, plus reasonable attorney's fees.

(q) A purchaser is not entitled to recover damages under both Subsections (o) and (p), and entry of a final decision awarding damages to the purchaser under either Subsection (o) or (p) shall preclude the purchaser from recovering damages under the other subsection. Notwithstanding any part or provision of the general or special laws or the common law of the state to the contrary, the relief provided under Subsections (o) and (p) shall be the exclusive remedies for a purchaser aggrieved by the seller's failure to comply with the provisions of this section. Any action for damages shall not, however, apply to, affect, alter, or impair the validity of any existing vendor's lien, mechanic's lien, or deed of trust lien on the property.

(r) A suit for damages under the provisions of this section must be brought within 90 days after the purchaser receives the first district tax notice or within four years after the property is sold or conveyed to the purchaser, whichever time occurs first, or the purchaser loses the right to seek damages under this section.

(s) Notwithstanding any provisions of this subchapter to the contrary, a purchaser may not recover damages of any kind under this section if that person:
   (1) purchases an equity in real property and in conjunction with the purchase assumes any liens, whether purchase money or otherwise; and
   (2) does not require proof of title by abstract, title policy, or any other proof of title.

APPENDIX

ADDENDUM FOR AUTHORIZING HYDROSTATIC TESTING

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

11-13-19 [~~2-12-18~~]

ADDENDUM FOR AUTHORIZING HYDROSTATIC TESTING

CONCERNING THE PROPERTY AT:____
(Street Address and City)

Consult a licensed plumber about the scope of hydrostatic testing and risks associated with the [~~hydrostatic~~] testing before signing this form.

A. **AUTHORIZATION:** Seller authorizes Buyer, at Buyer's expense, to engage a licensed plumber to perform a hydrostatic plumbing test on the Property.

B. **ALLOCATION OF RISK**:

- ❑ (1) Seller shall be liable for damages caused by the hydrostatic plumbing test.
- ❑ (2) Buyer shall be liable for damages caused by the hydrostatic plumbing test.
- ❑ (3) Buyer shall be liable for damages caused by the hydrostatic plumbing test in an amount not to exceed $________________________.

____________________________ Buyer	____________________________ Seller
____________________________ Buyer	____________________________ Seller

The form of this addendum has been approved by the Texas Real Estate Commission for use only with similarly approved or promulgated forms of contracts. Such approval relates to this contract form only. TREC forms are intended for use only by trained real estate license holders. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, (512) 936-3000 (www.trec.texas.gov) TREC No. 48-1 [~~48-0~~].

TREC NO. 48-1 [~~48-0~~]

APPENDIX

PROMULGATED CONTRACT FORMS AND ADDENDA

[illegible] [illegible]

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

ONE TO FOUR FAMILY RESIDENTIAL CONTRACT (RESALE)

NOTICE: Not For Use For Condominium Transactions

1. **PARTIES:** The parties to this contract are ______________________ (Seller) and ______________________ (Buyer). Seller agrees to sell and convey to Buyer and Buyer agrees to buy from Seller the Property defined below.

2. **PROPERTY:** The land, improvements and accessories are collectively referred to as the [\"] Property[\"] (Property).
   A. LAND: Lot __________ Block __________, ______________________ Addition, City of ______________________, County of ______________________, Texas, known as ______________________ (address/zip code), or as described on attached exhibit.
   B. IMPROVEMENTS: The house, garage and all other fixtures and improvements attached to the above-described real property, including without limitation, the following permanently installed and built-in items, if any: all equipment and appliances, valances, screens, shutters, awnings, wall-to-wall carpeting, mirrors, ceiling fans, attic fans, mail boxes, television antennas, mounts and brackets for televisions and speakers, heating and air-conditioning units, security and fire detection equipment, wiring, plumbing and lighting fixtures, chandeliers, water softener system, kitchen equipment, garage door openers, cleaning equipment, shrubbery, landscaping, outdoor cooking equipment, and all other property [~~owned by Seller and~~] attached to the above described real property.
   C. ACCESSORIES: The following described related accessories, if any: window air conditioning units, stove, fireplace screens, curtains and rods, blinds, window shades, draperies and rods, door keys, mailbox keys, above ground pool, swimming pool equipment and maintenance accessories, artificial fireplace logs, security systems that are not fixtures, and controls for: (i) garage doors, (ii) entry gates, and (iii) other improvements and accessories. "Controls" includes Seller's transferable rights to the (i) software and applications used to access and control improvements or accessories, and (ii) hardware used solely to control improvements or accessories.
   D. EXCLUSIONS: The following improvements and accessories will be retained by Seller and must be removed prior to delivery of possession: ______________________.
   E. RESERVATIONS: Any reservation for oil, gas, or other minerals, water, timber, or other interests is made in accordance with an attached addendum.

3. **SALES PRICE:**
   A. Cash portion of Sales Price payable by Buyer at closing .... $__________
   B. Sum of all financing described in the attached: ❑ Third Party Financing Addendum, ❑ Loan Assumption Addendum, ❑ Seller Financing Addendum .... $__________
   C. Sales Price (Sum of A and B) .... $__________

4. LEASES: Except as disclosed in this contract, Seller is not aware of any leases affecting the Property. After the Effective Date, Seller may not, without Buyer's written consent, create a new lease, amend any existing lease, or convey any interest in the Property. (Check all applicable boxes)
   ❑ A. RESIDENTIAL LEASES: The Property is subject to one or more residential leases and the Addendum Regarding Residential Leases is attached to this contract.
   ❑ B. FIXTURE LEASES: Fixtures on the Property are subject to one or more fixture leases (for example, solar panels, propane tanks, water softener, security system) and the Addendum Regarding Fixture Leases is attached to this contract.
   ❑ C. NATURAL RESOURCE LEASES: "Natural Resource Lease" means an existing oil and gas, mineral, water, wind, or other natural resource lease affecting the Property to which Seller is a party.
   ❑(1) Seller has delivered to Buyer a copy of all the Natural Resource Leases.
   ❑(2) Seller has not delivered to Buyer a copy of all the Natural Resource Leases. Seller shall provide to Buyer a copy of all the Natural Resource Leases within 3 days after the Effective Date. Buyer may terminate the contract within ______ days after the date the Buyer receives all the Natural Resource Leases and the earnest money shall be refunded to Buyer.

[~~LICENSE HOLDER DISCLOSURE: Texas law requires a real estate license holder who is a party to a transaction or acting on behalf of a spouse, parent, child, business entity in which the license holder owns more than 10%, or a trust for which the license holder acts as a trustee or of which the license holder or the license holder's spouse, parent or child is a beneficiary, to notify the other party in writing before entering into a contract of sale. Disclose if applicable:~~ ______________________.]

Initialed for identification by Buyer ______ ______ and Seller ______ ______ TREC NO. 20-15 [~~20-14~~]

5. EARNEST MONEY AND TERMINATION OPTION:

A. DELIVERY OF EARNEST MONEY AND OPTION FEE: Within 3 days after the Effective Date, Buyer must deliver to ______________________, as escrow agent, at ______________________ (address): $__________ as earnest money and $__________ as the Option Fee. The earnest money and Option Fee shall be made payable to escrow agent and may be paid separately or combined in a single payment.

(1) Buyer shall deliver additional earnest money of $__________ to escrow agent within ______ days after the Effective Date of this contract.

(2) If the last day to deliver the earnest money, Option Fee, or the additional earnest money falls on a Saturday, Sunday, or legal holiday, the time to deliver the earnest money, Option Fee, or the additional earnest money, as applicable, is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(3) The amount(s) escrow agent receives under this paragraph shall be applied first to the Option Fee, then to the earnest money, and then to the additional earnest money.

(4) Buyer authorizes escrow agent to release and deliver the Option Fee to Seller at any time without further notice to or consent from Buyer, and releases escrow agent from liability for delivery of the Option Fee to Seller. The Option Fee will be credited to the Sales Price at closing.

B. TERMINATION OPTION: For nominal consideration, the receipt of which Seller acknowledges, and Buyer's agreement to pay the Option Fee within the time required, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within ______ days after the Effective Date of this contract (Option Period). Notices under this paragraph must be given by 5:00 p.m. (local time where the Property is located) by the date specified. If Buyer gives notice of termination within the time prescribed: (i) the Option Fee will not be refunded and escrow agent shall release any Option Fee remaining with escrow agent to Seller; and (ii) any earnest money will be refunded to Buyer.

C. FAILURE TO TIMELY DELIVER EARNEST MONEY: If Buyer fails to deliver the earnest money within the time required, Seller may terminate this contract or exercise Seller's remedies under Paragraph 15, or both, by providing notice to Buyer before Buyer delivers the earnest money.

D. FAILURE TO TIMELY DELIVER OPTION FEE: If no dollar amount is stated as the Option Fee or if Buyer fails to deliver the Option Fee within the time required, Buyer shall not have the unrestricted right to terminate this contract under this paragraph 5.

E. TIME: Time is of the essence for this paragraph and strict compliance with the time for performance is required.

[~~EARNEST MONEY: Within 3 days after the Effective Date, Buyer must deliver $__________ as earnest money to ______________________, as escrow agent, at ______________________ (address). Buyer shall deliver additional earnest money of $__________ to escrow agent within ______ days after the Effective Date of this contract. If Buyer fails to deliver the earnest money within the time required, Seller may terminate this contract or exercise Seller's remedies under Paragraph 15, or both, by providing notice to Buyer before Buyer delivers the earnest money. If the last day to deliver the earnest money falls on a Saturday, Sunday, or legal holiday, the time to deliver the earnest money is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Time is of the essence for this paragraph.~~]

6. TITLE POLICY AND SURVEY:

A. TITLE POLICY: Seller shall furnish to Buyer at ☐ Seller's ☐ Buyer's expense an owner policy of title insurance (Title Policy) issued by ______________________ (Title Company) in the amount of the Sales Price, dated at or after closing, insuring Buyer against loss under the provisions of the Title Policy, subject to the promulgated exclusions (including existing building and zoning ordinances) and the following exceptions:

(1) Restrictive covenants common to the platted subdivision in which the Property is located.

(2) The standard printed exception for standby fees, taxes and assessments.

(3) Liens created as part of the financing described in Paragraph 3.

(4) Utility easements created by the dedication deed or plat of the subdivision in which the Property is located.

(5) Reservations or exceptions otherwise permitted by this contract or as may be approved by Buyer in writing.

(6) The standard printed exception as to marital rights.

(7) The standard printed exception as to waters, tidelands, beaches, streams, and related matters.

(8) The standard printed exception as to discrepancies, conflicts, shortages in area or boundary lines, encroachments or protrusions, or overlapping improvements:
☐(i) will not be amended or deleted from the title policy; or
☐(ii) will be amended to read, "shortages in area" at the expense of ☐Buyer ☐Seller.

(9) The exception or exclusion regarding minerals approved by the Texas Department of Insurance.

B. COMMITMENT: Within 20 days after the Title Company receives a copy of this contract, Seller shall furnish to Buyer a commitment for title insurance (Commitment) and, at Buyer's expense, legible copies of restrictive covenants and documents evidencing exceptions in the Commitment (Exception Documents) other than the standard printed exceptions. Seller authorizes the Title Company to deliver the Commitment and Exception Documents to Buyer at Buyer's address shown in Paragraph 21. If the Commitment and Exception Documents are not delivered to Buyer within the specified time, the time for delivery will be automatically extended up to 15 days or 3 days before the Closing Date, whichever is earlier. If the Commitment and Exception Documents are not delivered within the time required, Buyer may terminate this contract and the earnest money will be refunded to Buyer.

C. SURVEY: The survey must be made by a registered professional land surveyor acceptable to the Title Company and Buyer's lender(s). (Check one box only)

❑(1) Within ______ days after the Effective Date of this contract, Seller shall furnish to Buyer and Title Company Seller's existing survey of the Property and a Residential Real Property Affidavit promulgated by the Texas Department of Insurance (T-47 Affidavit). **If Seller fails to furnish the existing survey or affidavit within the time prescribed, Buyer shall obtain a new survey at Seller's expense no later than 3 days prior to Closing Date.** If the existing survey or affidavit is not acceptable to Title Company or Buyer's lender(s), Buyer shall obtain a new survey at ❑Seller's ❑Buyer's expense no later than 3 days prior to Closing Date.

❑(2) Within ______ days after the Effective Date of this contract, Buyer shall obtain a new survey at Buyer's expense. Buyer is deemed to receive the survey on the date of actual receipt or the date specified in this paragraph, whichever is earlier.

❑(3) Within ________ days after the Effective Date of this contract, Seller, at Seller's expense shall furnish a new survey to Buyer.

D. OBJECTIONS: Buyer may object in writing to defects, exceptions, or encumbrances to title: disclosed on the survey other than items 6A(1) through (7) above; disclosed in the Commitment other than items 6A(1) through (9) above; or which prohibit the following use or activity: ____.

Buyer must object the earlier of (i) the Closing Date or (ii) ______ days after Buyer receives the Commitment, Exception Documents, and the survey. Buyer's failure to object within the time allowed will constitute a waiver of Buyer's right to object; except that the requirements in Schedule C of the Commitment are not waived by Buyer. Provided Seller is not obligated to incur any expense, Seller shall cure any timely objections of Buyer or any third party lender within 15 days after Seller receives the objections (Cure Period) and the Closing Date will be extended as necessary. If objections are not cured within the Cure Period, Buyer may, by delivering notice to Seller within 5 days after the end of the Cure Period: (i) terminate this contract and the earnest money will be refunded to Buyer; or (ii) waive the objections. If Buyer does not terminate within the time required, Buyer shall be deemed to have waived the objections. If the Commitment or Survey is revised or any new Exception Document(s) is delivered, Buyer may object to any new matter revealed in the revised Commitment or Survey or new Exception Document(s) within the same time stated in this paragraph to make objections beginning when the revised Commitment, Survey, or Exception Document(s) is delivered to Buyer.

E. TITLE NOTICES:

(1) ABSTRACT OR TITLE POLICY: Broker advises Buyer to have an abstract of title covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy. If a Title Policy is furnished, the Commitment should be promptly reviewed by an attorney of Buyer's choice due to the time limitations on Buyer's right to object.

(2) MEMBERSHIP IN PROPERTY OWNERS ASSOCIATION(S): The Property ❑is ❑is not subject to mandatory membership in a property owners association(s). If the Property is subject to mandatory membership in a property owners association(s), Seller notifies Buyer under §5.012, Texas Property Code, that, as a purchaser of property in the residential community identified in Paragraph 2A in which the Property is located, you are obligated to be a member of the property owners association(s). Restrictive covenants governing the use and occupancy of the Property and all dedicatory instruments governing the establishment, maintenance, or operation of this residential community have been or will be recorded in the Real Property Records of the county in which the Property is located. Copies of the restrictive covenants and dedicatory instruments may be obtained from the county clerk. **You are obligated to pay assessments to the property owners association(s). The amount of the assessments is subject to change. Your failure to pay the assessments could result in enforcement of the association's lien on and the**

foreclosure of the Property.
Section 207.003, Property Code, entitles an owner to receive copies of any document that governs the establishment, maintenance, or operation of a subdivision, including, but not limited to, restrictions, bylaws, rules and regulations, and a resale certificate from a property owners' association. A resale certificate contains information including, but not limited to, statements specifying the amount and frequency of regular assessments and the style and cause number of lawsuits to which the property owners' association is a party, other than lawsuits relating to unpaid ad valorem taxes of an individual member of the association. These documents must be made available to you by the property owners' association or the association's agent on your request.

If Buyer is concerned about these matters, the TREC promulgated Addendum for Property Subject to Mandatory Membership in a Property Owners Association(s) should be used.

(3) STATUTORY TAX DISTRICTS: If the Property is situated in a utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 49, Texas Water Code, requires Seller to deliver and Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fee of the district prior to final execution of this contract.

(4) TIDE WATERS: If the Property abuts the tidally influenced waters of the state, §33.135, Texas Natural Resources Code, requires a notice regarding coastal area property to be included in the contract. An addendum containing the notice promulgated by TREC or required by the parties must be used.

(5) ANNEXATION: If the Property is located outside the limits of a municipality, Seller notifies Buyer under §5.011, Texas Property Code, that the Property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction or is likely to be located within a municipality's extraterritorial jurisdiction, contact all municipalities located in the general proximity of the Property for further information.

(6) PROPERTY LOCATED IN A CERTIFICATED SERVICE AREA OF A UTILITY SERVICE PROVIDER: Notice required by §13.257, Water Code: The real property, described in Paragraph 2, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property. The undersigned Buyer hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in Paragraph 2 or at closing of purchase of the real property.

(7) PUBLIC IMPROVEMENT DISTRICTS: If the Property is in a public improvement district, §5.014, Property Code, requires Seller to notify Buyer as follows: As a purchaser of this parcel of real property you are obligated to pay an assessment to a municipality or county for an improvement project undertaken by a public improvement district under Chapter 372, Local Government Code. The assessment may be due annually or in periodic installments. More information concerning the amount of the assessment and the due dates of that assessment may be obtained from the municipality or county levying the assessment. The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your property.

(8) TRANSFER FEES: If the Property is subject to a private transfer fee obligation, §5.205, Property Code, requires Seller to notify Buyer as follows: The private transfer fee obligation may be governed by Chapter 5, Subchapter G of the Texas Property Code.

(9) PROPANE GAS SYSTEM SERVICE AREA: If the Property is located in a propane gas system service area owned by a distribution system retailer, Seller must give Buyer written notice as required by §141.010, Texas Utilities Code. An addendum containing the notice approved by TREC or required by the parties should be used.

(10) NOTICE OF WATER LEVEL FLUCTUATIONS: If the Property adjoins an impoundment of water, including a reservoir or lake, constructed and maintained under Chapter 11, Water Code, that has a storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, Seller hereby notifies Buyer: "The water level of the impoundment of water adjoining the Property fluctuates for various reasons, including as a result of: (1) an entity lawfully exercising its right to use the water stored in the

impoundment; or (2) drought or flood conditions."

7. PROPERTY CONDITION:

A. ACCESS, INSPECTIONS AND UTILITIES: Seller shall permit Buyer and Buyer's agents access to the Property at reasonable times. Buyer may have the Property inspected by inspectors selected by Buyer and licensed by TREC or otherwise permitted by law to make inspections. Any hydrostatic testing must be separately authorized by Seller in writing. Seller at Seller's expense shall immediately cause existing utilities to be turned on and shall keep the utilities on during the time this contract is in effect.

B. SELLER'S DISCLOSURE NOTICE PURSUANT TO §5.008, TEXAS PROPERTY CODE (Notice): (Check one box only)

❑ (1) Buyer has received the Notice.

❑ (2) Buyer has not received the Notice. Within ______ days after the Effective Date of this contract, Seller shall deliver the Notice to Buyer. If Buyer does not receive the Notice, Buyer may terminate this contract at any time prior to the closing and the earnest money will be refunded to Buyer. If Seller delivers the Notice, Buyer may terminate this contract for any reason within 7 days after Buyer receives the Notice or prior to the closing, whichever first occurs, and the earnest money will be refunded to Buyer.

❑ (3)The Seller is not required to furnish the notice under the Texas Property Code.

C. SELLER'S DISCLOSURE OF LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS is required by Federal law for a residential dwelling constructed prior to 1978.

D. ACCEPTANCE OF PROPERTY CONDITION: "As Is" means the present condition of the Property with any and all defects and without warranty except for the warranties of title and the warranties in this contract. Buyer's agreement to accept the Property As Is under Paragraph 7D(1) or (2) does not preclude Buyer from inspecting the Property under Paragraph 7A, from negotiating repairs or treatments in a subsequent amendment, or from terminating this contract during the Option Period, if any.

(Check one box only)

❑ (1) Buyer accepts the Property As Is.

❑ (2) Buyer accepts the Property As Is provided Seller, at Seller's expense, shall complete the following specific repairs and treatments: ______________________________________
____
____.
(Do not insert general phrases, such as "subject to inspections" that do not identify specific repairs and treatments.)

E. LENDER REQUIRED REPAIRS AND TREATMENTS: Unless otherwise agreed in writing, neither party is obligated to pay for lender required repairs, which includes treatment for wood destroying insects. If the parties do not agree to pay for the lender required repairs or treatments, this contract will terminate and the earnest money will be refunded to Buyer. If the cost of lender required repairs and treatments exceeds 5% of the Sales Price, Buyer may terminate this contract and the earnest money will be refunded to Buyer.

F. COMPLETION OF REPAIRS AND TREATMENTS: Unless otherwise agreed in writing: (i) Seller shall complete all agreed repairs and treatments prior to the Closing Date; and (ii) all required permits must be obtained, and repairs and treatments must be performed by persons who are licensed to provide such repairs or treatments or, if no license is required by law, are commercially engaged in the trade of providing such repairs or treatments. At Buyer's election, any transferable warranties received by Seller with respect to the repairs and treatments will be transferred to Buyer at Buyer's expense. If Seller fails to complete any agreed repairs and treatments prior to the Closing Date, Buyer may exercise remedies under Paragraph 15 or extend the Closing Date up to 5 days if necessary for Seller to complete the repairs and treatments.

G. ENVIRONMENTAL MATTERS: Buyer is advised that the presence of wetlands, toxic substances, including asbestos and wastes or other environmental hazards, or the presence of a threatened or endangered species or its habitat may affect Buyer's intended use of the Property. If Buyer is concerned about these matters, an addendum promulgated by TREC or required by the parties should be used.

H. RESIDENTIAL SERVICE CONTRACTS: Buyer may purchase a residential service contract from a residential service company licensed by TREC. If Buyer purchases a residential service contract, Seller shall reimburse Buyer at closing for the cost of the residential service contract in an amount not exceeding $_______________. Buyer should review any residential service contract for the scope of coverage, exclusions and limitations. **The purchase of a residential service contract is optional. Similar coverage may be purchased from various companies authorized to do business in Texas.**

8. BROKERS AND SALES AGENTS:

A. BROKER OR SALES AGENT DISCLOSURE: Texas law requires a real estate broker or sales agent who is a party to a transaction or acting on behalf of a spouse, parent, child, business entity in which the broker or sales agent owns more than 10%, or a trust for which the broker or sales agent acts as a trustee or of which the broker or sales agent or the broker or

sales agent's spouse, parent or child is a beneficiary, to notify the other party in writing before entering into a contract of sale. Disclose if applicable: ____

B. BROKERS' FEES: All obligations of the parties for payment of brokers' fees are contained in separate written agreements.
[~~BROKERS' FEES: All obligations of the parties for payment of brokers' fees are contained in separate written agreements.~~]

9. CLOSING:

A. The closing of the sale will be on or before ______________________, 20____, or within 7 days after objections made under Paragraph 6D have been cured or waived, whichever date is later (Closing Date). If either party fails to close the sale by the Closing Date, the non-defaulting party may exercise the remedies contained in Paragraph 15.

B. At closing:

(1) Seller shall execute and deliver a general warranty deed conveying title to the Property to Buyer and showing no additional exceptions to those permitted in Paragraph 6 and furnish tax statements or certificates showing no delinquent taxes on the Property.

(2) Buyer shall pay the Sales Price in good funds acceptable to the escrow agent.

(3) Seller and Buyer shall execute and deliver any notices, statements, certificates, affidavits, releases, loan documents and other documents reasonably required for the closing of the sale and the issuance of the Title Policy.

(4) There will be no liens, assessments, or security interests against the Property which will not be satisfied out of the sales proceeds unless securing the payment of any loans assumed by Buyer and assumed loans will not be in default.

[~~(5) If the Property is subject to a residential lease, Seller shall transfer security deposits (as defined under §92.102, Property Code), if any, to Buyer. In such an event, Buyer shall deliver to the tenant a signed statement acknowledging that the Buyer has acquired the Property and is responsible for the return of the security deposit, and specifying the exact dollar amount of the security deposit.~~]

10. POSSESSION:

A. BUYER'S POSSESSION [~~Buyer's Possession~~]: Seller shall deliver to Buyer possession of the Property in its present or required condition, ordinary wear and tear excepted: ☐upon closing and funding ☐according to a temporary residential lease form promulgated by TREC or other written lease required by the parties. Any possession by Buyer prior to closing or by Seller after closing which is not authorized by a written lease will establish a tenancy at sufferance relationship between the parties. **Consult your insurance agent prior to change of ownership and possession because insurance coverage may be limited or terminated. The absence of a written lease or appropriate insurance coverage may expose the parties to economic loss.**

B. SMART DEVICES: "Smart Device" means a device that connects to the internet to enable remote use, monitoring, and management of: (i) the Property; (ii) items identified in any Non-Realty Items Addendum; or (iii) items in a Fixture Lease assigned to Buyer. At the time Seller delivers possession of the Property to Buyer, Seller shall:

(1) deliver to Buyer written information containing all access codes, usernames, passwords, and applications Buyer will need to access, operate, manage, and control the Smart Devices; and

(2) terminate and remove all access and connections to the improvements and accessories from any of Seller's personal devices including but not limited to phones and computers.

[~~Leases:~~

~~(1) After the Effective Date, Seller may not execute any lease (including but not limited to mineral leases) or convey any interest in the Property without Buyer's written consent.~~

~~(2) If the Property is subject to any lease to which Seller is a party, Seller shall deliver to Buyer copies of the lease(s) and any move-in condition form signed by the tenant within 7 days after the Effective Date of the contract.~~]

11. SPECIAL PROVISIONS: (Insert only factual statements and business details applicable to the sale. TREC rules prohibit license holders from adding factual statements or business details for which a contract addendum, lease or other form has been promulgated by TREC for mandatory use.)

12. SETTLEMENT AND OTHER EXPENSES:

A. The following expenses must be paid at or prior to closing:

(1) Expenses payable by Seller (Seller's Expenses):

(a) Releases of existing liens, including prepayment penalties and recording fees; release of Seller's loan liability; tax statements or certificates; preparation of deed; one-half of escrow fee; and other expenses payable by Seller under this contract.

(b) Seller shall also pay an amount not to exceed $______________ to be applied in the

following order: Buyer's Expenses which Buyer is prohibited from paying by FHA, VA, Texas Veterans Land Board or other governmental loan programs, and then to other Buyer's Expenses as allowed by the lender.

(2) Expenses payable by Buyer (Buyer's Expenses): Appraisal fees; loan application fees; origination charges; credit reports; preparation of loan documents; interest on the notes from date of disbursement to one month prior to dates of first monthly payments; recording fees; copies of easements and restrictions; loan title policy with endorsements required by lender; loan-related inspection fees; photos; amortization schedules; one-half of escrow fee; all prepaid items, including required premiums for flood and hazard insurance, reserve deposits for insurance, ad valorem taxes and special governmental assessments; final compliance inspection; courier fee; repair inspection; underwriting fee; wire transfer fee; expenses incident to any loan; Private Mortgage Insurance Premium (PMI), VA Loan Funding Fee, or FHA Mortgage Insurance Premium (MIP) as required by the lender; and other expenses payable by Buyer under this contract.

B. If any expense exceeds an amount expressly stated in this contract for such expense to be paid by a party, that party may terminate this contract unless the other party agrees to pay such excess. Buyer may not pay charges and fees expressly prohibited by FHA, VA, Texas Veterans Land Board or other governmental loan program regulations.

13. PRORATIONS: Taxes for the current year, interest, maintenance fees, assessments, dues and rents will be prorated through the Closing Date. The tax proration may be calculated taking into consideration any change in exemptions that will affect the current year's taxes. If taxes for the current year vary from the amount prorated at closing, the parties shall adjust the prorations when tax statements for the current year are available. If taxes are not paid at or prior to closing, Buyer shall pay taxes for the current year.

14. CASUALTY LOSS: If any part of the Property is damaged or destroyed by fire or other casualty after the Effective Date of this contract, Seller shall restore the Property to its previous condition as soon as reasonably possible, but in any event by the Closing Date. If Seller fails to do so due to factors beyond Seller's control, Buyer may (a) terminate this contract and the earnest money will be refunded to Buyer (b) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (c) accept the Property in its damaged condition with an assignment of insurance proceeds, if permitted by Seller's insurance carrier, and receive credit from Seller at closing in the amount of the deductible under the insurance policy. Seller's obligations under this paragraph are independent of any other obligations of Seller under this contract.

15. DEFAULT: If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If Seller fails to comply with this contract, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.

16. MEDIATION: It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation. Any dispute between Seller and Buyer related to this contract which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

17. ATTORNEY'S FEES: A Buyer, Seller, Listing Broker, Other Broker, or escrow agent who prevails in any legal proceeding related to this contract is entitled to recover reasonable attorney's fees and all costs of such proceeding.

18. ESCROW:

A. ESCROW: The escrow agent is not (i) a party to this contract and does not have liability for the performance or nonperformance of any party to this contract, (ii) liable for interest on the earnest money and (iii) liable for the loss of any earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent. Escrow agent may require any disbursement made in connection with this contract to be conditioned on escrow agent's collection of good funds acceptable to escrow agent.

B. EXPENSES: At closing, the earnest money must be applied first to any cash down payment, then to Buyer's Expenses and any excess refunded to Buyer. If no closing occurs, escrow agent may: (i) require a written release of liability of the escrow agent from all parties; [,] and (ii) require payment of unpaid expenses incurred on behalf of a party. [~~, and (iii) only~~] Escrow agent may deduct authorized expenses from the earnest money payable to a party. "Authorized expenses" means [~~the amount of unpaid~~] expenses incurred by escrow agent on behalf of the party entitled [~~receiving~~] to the earnest money that were authorized by this

contract or that party.

C. DEMAND: Upon termination of this contract, either party or the escrow agent may send a release of earnest money to each party and the parties shall execute counterparts of the release and deliver same to the escrow agent. If either party fails to execute the release, either party may make a written demand to the escrow agent for the earnest money. If only one party makes written demand for the earnest money, escrow agent shall promptly provide a copy of the demand to the other party. If escrow agent does not receive written objection to the demand from the other party within 15 days, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursal of the earnest money.

D. DAMAGES: Any party who wrongfully fails or refuses to sign a release acceptable to the escrow agent within 7 days of receipt of the request will be liable to the other party for (i) damages; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.

E. NOTICES: Escrow agent's notices will be effective when sent in compliance with Paragraph 21. Notice of objection to the demand will be deemed effective upon receipt by escrow agent.

19. REPRESENTATIONS: All covenants, representations and warranties in this contract survive closing. If any representation of Seller in this contract is untrue on the Closing Date, Seller will be in default. Unless expressly prohibited by written agreement, Seller may continue to show the Property and receive, negotiate and accept back up offers.

20. FEDERAL TAX REQUIREMENTS: If Seller is a "foreign person," as defined by Internal Revenue Code and its regulations, or if Seller fails to deliver an affidavit or a certificate of non-foreign status to Buyer that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax forms. Internal Revenue Service regulations require filing written reports if currency in excess of specified amounts is received in the transaction.

21. NOTICES: All notices from one party to the other must be in writing and are effective when mailed to, hand-delivered at, or transmitted by fax or electronic transmission as follows:

To Buyer at: ______________________	To Seller at: ______________________
______________________	______________________
Phone: ( ) ______________	Phone: ( ) ______________
E-mail/Fax: [( )] ______________	E-mail/Fax: [( )] ______________
E-mail/Fax: ______________	E-mail/Fax: ______________

22. AGREEMENT OF PARTIES: This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are (Check all applicable boxes):

- ❑ Third Party Financing Addendum
- ❑ Seller Financing Addendum
- ❑ Addendum for Property Subject to Mandatory Membership in a Property Owners Association
- ❑ Buyer's Temporary Residential Lease
- ❑ Loan Assumption Addendum
- ❑ Addendum for Sale of Other Property by Buyer
- ❑ Addendum for Reservation of Oil, Gas and Other Minerals
- ❑ Addendum for "Back-Up" Contract
- ❑ Addendum for Coastal Area Property
- ❑ Addendum for Authorizing Hydrostatic Testing
- ❑ Addendum Concerning Right to Terminate Due to Lender's Appraisal
- ❑ Environmental Assessment, Threatened or Endangered Species and Wetlands Addendum
- ❑ Seller's Temporary Residential Lease
- ❑ Short Sale Addendum
- ❑ Addendum for Property Located Seaward of the Gulf Intracoastal Waterway
- ❑ Addendum for Seller's Disclosure of Information on Lead-based Paint and Lead-based Paint Hazards as Required by Federal Law
- ❑ Addendum for Property in a Propane Gas System Service Area
- ❑ Addendum Regarding Residential Leases
- ❑ Addendum Regarding Fixture Leases
- ❑ Other (list): ______________________

[23. TERMINATION OPTION: For nominal consideration, the receipt of which is hereby acknowledged by Seller, and Buyer's agreement to pay Seller $__________ (Option Fee) within 3 days after the Effective Date of this contract, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within _______ days after the Effective Date of this contract (Option Period). Notices under this paragraph must be given by 5:00 p.m. (local time where the Property is located) by the date specified. If no dollar amount is stated as the Option Fee or if Buyer fails to pay the Option Fee to Seller within the time prescribed, this paragraph will not be a part of this contract and Buyer shall not have the unrestricted right to terminate this contract. If Buyer gives notice of termination within the time prescribed, the Option Fee will not be refunded; however, any earnest money will be refunded to Buyer. The Option Fee ☐ will ☐ will not be credited to the Sales Price at closing. Time is of the essence for this paragraph and strict compliance with the time for performance is required.]

23. [24.] **CONSULT AN ATTORNEY BEFORE SIGNING:** TREC rules prohibit real estate license holders from giving legal advice. READ THIS CONTRACT CAREFULLY.

Buyer's Attorney is: ______________________	Seller's Attorney is: ______________________
Phone: ( ) ______	Phone: ( ) ______
Fax: ( ) ______	Fax: ( ) ______
E-mail: ______	E-mail: ______

EXECUTED the ______ day of ______________________, 20____ (Effective Date).
(BROKER: FILL IN THE DATE OF FINAL ACCEPTANCE.)

______________________	______________________
Buyer	Seller
______________________	______________________
Buyer	Seller

The form of this contract has been approved by the Texas Real Estate Commission. TREC forms are intended for use only by trained real estate license holders. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, (512) 936-3000 (http://www.trec.texas.gov) TREC NO. 20-15 [20-14]. This form replaces TREC NO. 20-14 [20-13].

BROKER INFORMATION
(Print name(s) only. Do not sign)

Other Broker Firm — License No.	Listing Broker Firm — License No.
represents ☐ Buyer only as Buyer's agent ☐ Seller as Listing Broker's subagent	represents ☐ Seller and Buyer as an intermediary ☐ Seller only as Seller's agent
Associate's Name — License No.	Listing Associate's Name — License No.
Team Name	Team Name
Associate's Email Address — Phone	Listing Associate's Email Address — Phone
Licensed Supervisor of Associate — License No.	Licensed Supervisor of Listing Associate — License No.
Other Broker's Address — Phone	Listing Broker's Office Address — Phone
City — State — Zip	City — State — Zip
	Selling Associate's Name — License No.
	Team Name
	Selling Associate's Email Address — Phone
	Licensed Supervisor of Selling Associate — License No.
	Selling Associate's Office Address
	City — State — Zip

Disclosure: Pursuant to a previous, separate agreement (such as a MLS offer of compensation or other agreement between brokers) Listing Broker has agreed to pay Other Broker a fee ______ (______). This disclosure is for informational purposes and does not change the previous agreement between brokers to pay or share a commission. [Listing Broker has agreed to pay Other Broker ______ of the total sales price when the Listing Broker's fee is received. Escrow agent is authorized and directed to pay Other Broker from Listing Broker's fee at closing.]

OPTION FEE RECEIPT

Receipt of $__________________ (Option Fee) in the form of ______________________________ is acknowledged.

______________________________ ______________________________
Escrow Agent [Seller or Listing Broker] Date

EARNEST MONEY RECEIPT

Receipt of $__________________ Earnest Money in the form of ______________________________ is acknowledged.

Escrow Agent	Received by	Email Address	Date/Time
Address			Phone
City	State	Zip	Fax

CONTRACT RECEIPT

Receipt of the Contract is acknowledged.

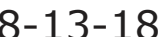
Escrow Agent	Received by	Email Address	Date
Address			Phone
City	State	Zip	Fax

ADDITIONAL EARNEST MONEY RECEIPT

Receipt of $__________________ additional Earnest Money in the form of ______________________________ is acknowledged.

Escrow Agent	Received by	Email Address	Date/Time
Address			Phone
City	State	Zip	Fax

TREC NO. 20-15 [20-14]



PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

NOTICE OF SELLER'S TERMINATION OF CONTRACT

CONCERNING THE CONTRACT FOR THE SALE OF THE PROPERTY AT

____
(Street Address and City)

BETWEEN THE UNDERSIGNED SELLER AND ____

____ (BUYER)

Seller notifies Buyer that the contract is terminated pursuant to the following:

❑ (1) Buyer failed to deliver the earnest money within the time required under Paragraph 5 of the contract and before the time Seller provided this notice to Buyer.

❑ (2) Other *(identify the paragraph number of contract or the addendum)*:

____
____
____
____
____
____

NOTE: This notice is not an election of remedies. Release of the earnest money is governed by the contract.

CONSULT AN ATTORNEY BEFORE SIGNING: TREC rules prohibit real estate license holders from giving legal advice. READ THIS FORM CAREFULLY.

______________________________ ______________________________
Seller Date Seller Date

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TREC No. 50-0

02-16-21[11-15-18]

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

NOTICE OF BUYER'S TERMINATION OF CONTRACT

CONCERNING THE CONTRACT FOR THE SALE OF THE PROPERTY AT

____
(Street Address and City)

BETWEEN THE UNDERSIGNED BUYER AND ______________________________________
____ (SELLER)

Buyer notifies Seller that the contract is terminated pursuant to the following:

☐(1) The unrestricted right of Buyer to terminate the contract under Paragraph 5[23] of the contract.

☐(2) Buyer cannot obtain Buyer Approval in accordance with the Third Party Financing Addendum to the contract.

☐(3) The Property does not satisfy Property Approval in accordance with the Third Party Financing Addendum to the contract. Buyer has delivered to Seller lender's written statement setting forth the reason(s) for lender's determination.

☐(4) Buyer elects to terminate under Paragraph A of the Addendum for Property Subject to Mandatory Membership in a Property Owners' Association.

☐(5) Buyer elects to terminate under Paragraph 7B(2) of the contract relating to the Seller's Disclosure Notice.

☐(6) Buyer elects to terminate under Paragraph (3) of the Addendum Concerning Right to Terminate Due to Lender's Appraisal. Buyer has delivered a copy of the Appraisal to Seller.

☐(7) Buyer elects to terminate under Paragraph 6.D. of the contract (6.C. for Residential Condominium Contract) because timely objections were not cured by the end of the Cure Period.

☐(8) Other *(identify the paragraph number of contract or the addendum)*: ____________________
____
____
____
____

***NOTE:** This notice is not an election of remedies. Release of the earnest money is governed by the contract.*

CONSULT AN ATTORNEY BEFORE SIGNING: TREC rules prohibit real estate license holders from giving legal advice. READ THIS FORM CAREFULLY.

______________________________		______________________________	
Buyer	Date	Buyer	Date

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TREC No. 38-7[38-6]

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

THIRD PARTY FINANCING ADDENDUM

TO CONTRACT CONCERNING THE PROPERTY AT

____

(Street Address and City)

1. TYPE OF FINANCING AND DUTY TO APPLY AND OBTAIN APPROVAL: Buyer shall apply promptly for all financing described below and make every reasonable effort to obtain approval for the financing, including but not limited to furnishing all information and documents required by Buyer's lender. (Check applicable boxes):

❑ A. CONVENTIONAL FINANCING:

❑ (1) A first mortgage loan in the principal amount of $_________________ (excluding any financed PMI premium), due in full in ______ year(s), with interest not to exceed _____% per annum for the first _______ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _______% of the loan.

❑ (2) A second mortgage loan in the principal amount of $_______________ (excluding any financed PMI premium), due in full in ___________ year(s), with interest not to exceed _____% per annum for the first ________ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _________% of the loan.

❑ B. TEXAS VETERANS LOAN: A loan(s) from the Texas Veterans Land Board of $________________ for a period in the total amount of _______ years at the interest rate established by the Texas Veterans Land Board.

❑ C. FHA INSURED FINANCING: A Section _________________ FHA insured loan of not less than $_________________(excluding any financed MIP), amortizable monthly for not less than ________ years, with interest not to exceed _______% per annum for the first _______ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed ______ % of the loan.

❑ D. VA GUARANTEED FINANCING: A VA guaranteed loan of not less than $_________________ (excluding any financed Funding Fee), amortizable monthly for not less than ______ years, with interest not to exceed ______% per annum for the first ______ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _______% of the loan.

❑ E. USDA GUARANTEED FINANCING: A USDA-guaranteed loan of not less than $_____________ (excluding any financed Funding Fee), amortizable monthly for not less than _______ years, with interest not to exceed _____% per annum for the first _______ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed _____% of the loan.

❑ F. REVERSE MORTGAGE FINANCING: A reverse mortgage loan (also known as a Home Equity Conversion Mortgage loan) in the original principal amount of $ _____________ (excluding any financed PMI premium or other costs), with interest not to exceed ______% per annum for the first _______ year(s) of the loan with Origination Charges as shown on Buyer's Loan Estimate for the loan not to exceed ____% of the loan. The reverse mortgage loan ❑will ❑ will not be an FHA insured loan.

2. APPROVAL OF FINANCING: Approval for the financing described above will be deemed to have been obtained when Buyer Approval and Property Approval are obtained. **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

A. BUYER APPROVAL *(Check one box only)*:

❑ This contract is subject to Buyer obtaining Buyer Approval. If Buyer cannot obtain Buyer Approval, Buyer may give written notice to Seller within ______ days after the effective date of this contract and this contract will terminate and the earnest money will be refunded to Buyer. If Buyer does not terminate the contract under this provision, the

Initialed for identification by Buyer____ _____ and Seller_____ _____ TREC NO. 40-9[40-8]

____
(Address of Property)

contract shall no longer be subject to the Buyer obtaining Buyer Approval. Buyer Approval will be deemed to have been obtained when (i) the terms of the loan(s) described above are available and (ii) lender determines that Buyer has satisfied all of lender's requirements related to Buyer's assets, income and credit history.

❑ This contract is not subject to Buyer obtaining Buyer Approval.

B. PROPERTY APPROVAL: If Buyer's lender determines that the Property does not satisfy lender's underwriting requirements for the loan (including but not limited to appraisal, insurability, and lender required repairs) Buyer, not later than 3 days before the Closing Date, may terminate this contract by giving Seller: (i) notice of termination; and (ii) a copy of a written statement from the lender setting forth the reason(s) for lender's determination. If Buyer terminates under this paragraph, the earnest money will be refunded to Buyer. If Buyer does not terminate under this paragraph, Property Approval is deemed to have been obtained.

[~~C. Time is of the essence for this paragraph and strict compliance with the time for performance is required.~~]

3. SECURITY: Each note for the financing described above must be secured by vendor's and deed of trust liens.

4. FHA/VA REQUIRED PROVISION: If the financing described above involves FHA insured or VA financing, it is expressly agreed that, notwithstanding any other provision of this contract, the purchaser (Buyer) shall not be obligated to complete the purchase of the Property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise: (i) unless the Buyer has been given in accordance with HUD/FHA or VA requirements a written statement issued by the Federal Housing Commissioner, Department of Veterans Affairs, or a Direct Endorsement Lender setting forth the appraised value of the Property of not less than $________________[~~:~~] or (ii) if the contract purchase price or cost exceeds the reasonable value of the Property established by the Department of Veterans Affairs. The 3-day notice of termination requirements in 2.B. does not apply to this Paragraph 4.

A. The Buyer shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation or the reasonable value established by the Department of Veterans Affairs.

B. If FHA financing is involved, the appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or the condition of the Property. The Buyer should satisfy himself/herself that the price and the condition of the Property are acceptable.

C. If VA financing is involved and if Buyer elects to complete the purchase at an amount in excess of the reasonable value established by the VA, Buyer shall pay such excess amount in cash from a source which Buyer agrees to disclose to the VA and which Buyer represents will not be from borrowed funds except as approved by VA. If VA reasonable value of the Property is less than the Sales Prices, Seller may reduce the Sales Price to an amount equal to the VA reasonable value and the sale will be closed at the lower Sales Price with proportionate adjustments to the down payment and the loan amount.

5. AUTHORIZATION TO RELEASE INFORMATION:

A. Buyer authorizes Buyer's lender to furnish to Seller or Buyer or their representatives information relating to the status of the approval for the financing.

B. Seller and Buyer authorize Buyer's lender, title company, and escrow agent to disclose and furnish a copy of the closing disclosures and settlement statements provided in relation to the closing of this sale to the parties' respective brokers and sales agents provided under Broker Information.

Buyer	Seller
Buyer	Seller

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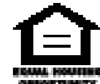
PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC) 11-10-2020

ADDENDUM REGARDING RESIDENTIAL LEASES



CONCERNING THE PROPERTY AT: ______________________________
(Street Address and City)

"Residential Lease" means any lease of the Property to a tenant including any addendum, amendment, or move-in condition form.

Seller may not execute any new Residential Lease or amend any Residential Lease without Buyer's written consent. Existing Residential Leases will have the following status at closing. (Check only A or B)

☐ A. Termination of Residential Leases: All Residential Leases must be terminated by closing. Seller shall deliver possession of the Property in accordance with Paragraph 10 of the contract with no tenant or other person in possession or having rights to occupy the Property. [Notice: This paragraph will not amend or terminate any existing lease. Consult an attorney and refer to the Residential Leases for rights to terminate before agreeing to this provision.]

☐ B. Assignment and Assumption of Residential Leases: Existing Residential Leases shall be assigned by Seller and assumed by Buyer at closing.

(1) Delivery of Residential Leases: (Check one box only)
☐ (a) Buyer has received a copy of all Residential Leases.
☐ (b) Buyer has not received a copy of all Residential Leases. Seller shall provide a copy of the Residential Leases within 3 days after the Effective Date. Buyer may terminate the contract within _____ days after the date the Buyer receives the Residential Leases and the earnest money shall be refunded to Buyer.

(2) At closing, Seller shall transfer security deposits (as defined under §92.102, Property Code), if any, to Buyer. At closing, Buyer shall deliver to the tenant a signed statement acknowledging that the Buyer has acquired the Property and is responsible for the return of the security deposit, and specifying the exact dollar amount of the security deposit.

(3) Except as described below, and to Seller's knowledge for each Residential Lease:
(a) the Residential Lease is in full force and effect;
(b) no tenant is in default or in violation of the Residential Lease;
(c) no tenant has prepaid any rent;
(d) no tenant is entitled to any offset against rent;
(e) there are no outstanding tenant claims against Seller involving the Property;
(f) there are no pending disputes with any tenant or prior tenant; and
(g) there are no other agreements, options, or rights outside the Lease between Landlord and Tenant regarding the Property.

Explain if any of the above is not accurate (attach additional sheets if necessary): ______________________________
____
____

(4) Seller will promptly notify Buyer if Seller learns that any statement in Paragraph B(3) becomes untrue after the Effective Date. Seller shall cure the condition making the statement untrue within 7 days after providing the notice to Buyer. If the statement remains untrue beyond the 7-day period, Buyer may, as Buyer's sole remedy, terminate the contract within 5 days after the expiration of the 7-day period, by delivering notice to the Seller and the earnest money will be refunded to Buyer. If Buyer does not terminate the contract within the time required, Buyer waives the right to terminate. The Closing Date will be extended daily as necessary to afford the parties their rights and time to provide notices under this paragraph.

______________________ ______________________
Buyer Seller

______________________ ______________________
Buyer Seller

TREC

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TREC NO. 51-0

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

11-10-2020

ADDENDUM REGARDING FIXTURE LEASES

CONCERNING THE PROPERTY AT: ______________________________________
(Street Address and City)

A. Leased Fixtures are those fixtures in or on the Property that Seller leases and does not own, specifically the: ☐ solar panels, ☐ propane tanks, ☐ water softener, ☐ security system, ☐ ____________ (collectively, the Leased Fixtures). All rights to the Leased Fixtures are governed by Fixture Leases.

(1) Buyer shall assume, and Seller shall assign to Buyer the Fixture Leases at closing, except the following: ______________________________. Buyer shall pay the first $ ____________ of any cost necessary to assume or receive an assignment of the Fixture Leases and Seller shall pay the remainder. Buyer and Seller agree to sign any documents required by the lessor in the Fixture Leases to assume or assign the Fixture Leases.

(2) Prior to closing, Seller ☐ will ☐ will not remove the Leased Fixtures covered by the Fixture Leases that Buyer does not assume. Seller will repair any damage to the Property caused by any removal. Notice: Any Leased Fixture remaining in the Property are subject to the rights of the lessor under the Fixture Lease.

B. Delivery of Fixture Leases: (Check one box only)

☐ (1) Buyer has received a copy of all Fixture Leases Buyer has agreed to assume.

☐ (2) Buyer has not received a copy of all Fixture Leases Buyer has agreed to assume. Seller shall provide a copy of the Fixture Leases within 5 days after the Effective Date. Buyer may terminate the contract within 7 days after the date the Buyer receives the Fixture Leases and the earnest money shall be refunded to Buyer.

C. At closing, there will be no liens or security interests against Leased Fixtures which will not be satisfied out of the sales proceeds except for Leased Fixtures covered by Fixture Leases Buyer agrees to assume.

Notice: Seller and Buyer should consult with the lessor and their attorneys regarding the assignment, assumption, or termination of any Fixture Leases.

______________________________	______________________________
Buyer	Seller
______________________________	______________________________
Buyer	Seller

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APPENDIX

SIX NEW PROPERTY MANAGEMENT AND LEASING LAWS

1. **HB 69** *Relating to the right to vacate and avoid liability under a residential lease after a tenant's death.* Effective January 1, 2020.

   This bill addresses the death of a tenant who is the sole occupant of a rental dwelling and the tenant's obligations under the lease. Under HB 69, a representative of the tenant's estate can terminate the lease and avoid liability for future rent and other sums, if the following conditions are met:

   * the representative provides to the landlord or agent a written notice of the termination;
   * the tenant's property is removed according to the procedure outlined in Texas Property Code Section 92.014 ("Personal Property and Security Deposit of Deceased Tenant"); and
   * if the landlord or agent requires, the representative signs an inventory of the removed property.

   The landlord—upon receiving the termination notice—has to provide a copy of the lease to the representative, if requested in writing by that person.

   Termination is effective on the later of: (i) the 30th day after the date the termination notice was provided; or (ii) the date on which all of the conditions above have been met.

   The tenant's estate will still remain liable for delinquent, unpaid rent and damages to the leased premises not caused by normal wear and tear.

   A landlord or agent who lawfully permits a representative to enter a rental dwelling for the purposes outlined in this bill is not liable for any act or omission that happens as a result of permitting entry.

2. **HB 1002** *Relating to the term of a parking permit issued to a residential tenant by a landlord.* Effective January 1, 2020.

   Under this bill, a landlord who issues a parking permit to a tenant must issue the permit for the same amount of time as the tenant's lease term and can't terminate or suspend the permit until the date the tenant's right of possession ends.

3. **SB 234** *Relating to the right to vacate and avoid residential lease liability following the occurrence of family violence.* Effective September 1, 2019.

   Chapter 92 of the Texas Property Code allows a tenant to terminate the lease early in situations where the tenant is a victim of family violence, if a tenant complies with specific requirements, including providing the landlord with a copy of a certain documentation.

   This bill expands the types of documentation that a tenant can provide to a landlord as proof to terminate the lease. The new categories include a copy of: (i) an order of emergency protection; (ii) documentation from a licensed health or mental care services provider who examined the victim; or (iii) a victim's advocate (as that term is defined in Chapter 93 of the Texas Family Code).

   This bill also adds that these types of documentation would be sufficient in a cotenant family violence situation (where a tenant does not have to provide the 30-day written notice of termination).

4. **SB 1414** *Relating to fees regarding a residential tenant's failure to timely pay rent.* Effective September 1, 2019.

   SB 1414 amends the section in Chapter 92 of the Texas Property Code regulating fees for the late payment of rent.

   The bill prohibits the collection of late fees until any portion of the rent has remain unpaid for two full days after the original due date, instead of one day.

   While the bill continues to require that any late fee be reasonable, the bill establishes a "safe harbor" where if late fees do not exceed a certain percentage, the fee is deemed reasonable under the law.

   While the bill continues to require that any late fee be reasonable, the bill establishes a "safe harbor" where if late fees do not exceed a certain percentage, the fee is automatically considered reasonable under the law.

   Under the safe harbor, for a rental dwelling located in a structure with no more than four dwelling units, a late fee is considered reasonable if the fee is not more than 12% of the amount of

rent for the rental period under the lease (ex. The tenant's monthly rent is $1,000. The tenant fails to timely pay rent. To fall under the safe harbor, the total amount of late fees the landlord collects for that late rent payment should be no more than $120.). For a rental dwelling located in a structure that contains more than four dwelling units, a late fee is considered reasonable if the fee is not more than 10% of the amount of rent for the rental period under the lease.

Even if a late fee exceeds those amounts, the fee can still be considered reasonable, as long as the fee is not more than uncertain damages to the landlord related to the late payment of rent, including things like overhead associated with the collection of late payment,.

Finally, the bill allows a tenant to request that the landlord provide a written statement of whether the tenant owes a late fee to the landlord and, if so, the amount of the late fee. The landlord must provide the statement to the tenant through an established means regularly used for written communication between the landlord and the tenant. A landlord's failure to respond, however, doesn't affect the tenant's liability for any late fee owed to the landlord.

5. **HB 302** *Relating to the carrying, storage, or possession of a firearm or firearm ammunition by certain persons on certain residential or commercial property.* Effective September 1, 2019.

This bill creates a defense under various criminal trespass laws protecting owners of condominiums (and their tenants and guests), as well as residential tenants and tenants occupying a manufactured home lot (and their guests), from prosecution for lawfully carrying or storing a firearm or ammunition in or on the property, in a vehicle, or directly en route to the property or vehicle.

Unless possession of a firearm or ammunition on the property is prohibited by state or federal law, a condo owner, guest or tenant of the owner, or guest of a tenant can't be prohibited from lawfully possessing, carrying, transporting, or storing a firearm or ammunition: (1) in the property; (2) in a vehicle located in the parking area; or (3) in other common element locations as necessary to enter or exit.

Similarly, a landlord under both Chapters 92 (residential tenancies) and 94 (manufactured housing tenancies) of the Texas Property Code cannot prohibit a tenant or tenant's guest from lawfully possessing, carrying, transporting, or storing a firearm or ammunition: (1) in the property; (2) in a vehicle located in the parking area; or (3) in other locations controlled by the landlord necessary to enter or exit. This prohibition does not affect the enforceability of a provision in a lease agreement entered into or renewed before September 1, 2019.

6. **SB 772** *Relating to evidence in certain civil actions of a person's failure to forbid handguns on certain property.* Effective September 1, 2019.

This bill provides that a failure to post a sign or card (see Tex. Penal Code § 30.06 and § 30.07) or otherwise forbidding the carrying of a handgun on a property cannot be used as evidence in a trial (or support a lawsuit) against a person or business who owns, controls, or manages the property, where the trial is based on an injury occurring on the property.

APPENDIX G

IS YOUR SELLERS' SURVEILLANCE PUTTING THEM AT RISK?

IS YOUR SELLERS' SURVEILLANCE PUTTING THEM AT RISK?

Technology makes it easy for homeowners to order toilet paper with a voice command, but there are legal considerations when listings have devices that can record audio or video.

by Wes Bearden

Photo & Image: Africa Studio, Italyan/Shutterstock.com

Selling a home can be frustrating to homeowners. They're asked to allow strangers into their home. They may never receive feedback and are left to wonder, "Why didn't that last buyer bite?" What do anxious sellers do? They get an extra set of ears.

Many homeowners have installed security cameras and smart-home devices. These installations can be an ultra high-tech security system or a simple baby monitor, and they all can be abused.

A number of notable cases have emerged where sellers listened to a potential buyer's showing. Sometimes it's to gain advantage in negotiations, while other times it's simply to better stage the property. So, can a seller covertly record or monitor a buyer's showing?

The rules in Texas

Both the Federal Electronic Communications Privacy Act (ECPA) and Section 16.02 of the Texas Penal Code prohibit audio recordings without the consent of at least one individual who is part of the conversation. The Texas rule, commonly referred to as the one-party rule, requires at least one party to consent to recording conversations.

What that rule allows is any individual to covertly—and legally—record his own conversations with a broker, neighbor, or other party. Whenever you speak, it's best to follow the old saying: Say what you mean and mean what you say. The other person in the conversation may be recording every word.

Why a seller cannot record audio of a showing

Texas law does not allow audio recording or audio monitoring of conversations that you are not a part of. If the seller is not present and participating in the showing, he cannot record it. Even though the conversation happens inside a seller's home, he is prohibited from recording any conversations that he is not a part of.

Buyers have an expectation of privacy that their conversations during a showing are only between the parties participating in those discussions.

But what about video?

Many homes today have security cameras installed that record video. Some have audio recording, similar to a baby monitor, and some without.

The ECPA does not prohibit video recording. In fact, silent video—like from security cameras—is generally allowed as long as it isn't in an area where an individual would have a reasonable expectation of privacy. For instance, silent bathroom video recording is not allowed. But silent video recording of the foyer, kid's playroom, exterior of a home, and a garage are likely permitted.

Is your listing breaking the law?

Most professional alarm and security camera installers are familiar with the law. Normally, they install video cameras without audio and are leery to place inside cameras in any location other than a foyer.

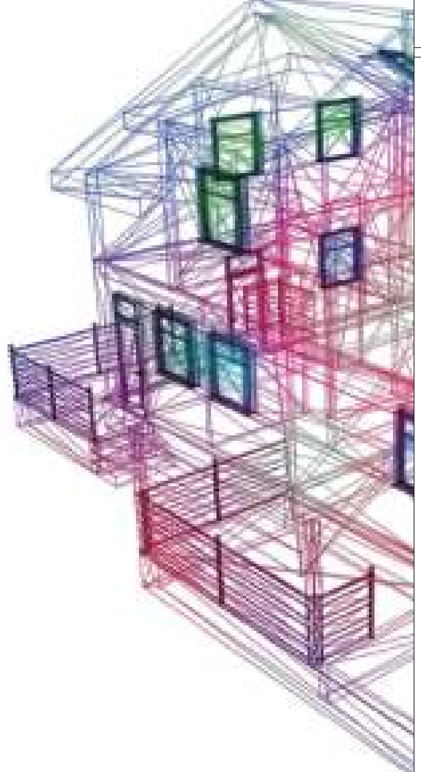
However, when your seller is a do-it-yourselfer, you may want to ask questions. Have sellers tell you what the system will record. If audio is recorded, the seller may have a problem. If it is silent video, have sellers show you where the cameras are located. Make sure they aren't video recording in a private area, such as a bathroom. Courts have traditionally upheld individual privacy rights over the property rights in a residential home. Consider limiting the use of cameras to the exterior of the residence.

Violating state and federal recording laws can involve criminal penalties. In addition, Texas, like many states, recognizes several types of common law invasion of privacy claims. At its essence, invasion of privacy protects a person against unreasonable intrusion upon his seclusion, solitude, or private affairs. Even though recording may be in the seller's house, courts have found that a visiting party can have a valid claim when the homeowner overreaches.

Illegal recording is a felony offense in Texas, and anyone who has been recorded in violation of the law can bring a civil suit to recover $10,000 for each occurrence, actual damages in excess of $10,000, punitive damages, attorney's fees, and court costs.

Help your sellers avoid criminal or civil liability by encouraging them to concentrate on feedback given with consent and leave the mics and hidden cameras out.

WES BEARDEN *is an attorney and CEO of Bearden Investigative Agency with offices in Dallas, Houston, Fort Worth, and New Orleans.*



HELP YOUR BUYERS BE SMART ABOUT SURVEILLANCE

- Don't discuss confidential negotiations within a home.
- Be careful about over-enthusiasm of particular features in a residence.
- Realize that most video recordings are legal. You and your client's body language and gestures sometimes tell more than you think.
- If talking on the telephone, make sure that the owner's neighbors can't overhear your conversations. Neighbors are often nosier than the owner.
- If you are really worried that someone is playing unfair, turn on a faucet. The audio tones from running water create white noise that masks voice tones and makes it difficult for microphones to do their job.

Don't be too paranoid. Be security smart, but don't let it ruin your real purpose to be at the house.

If a seller is not present and participating in the showing, he cannot record audio ... even if the conversation happens inside the seller's home.

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APPENDIX

HELPFUL LINKS

TREC Rules

https://www.trec.texas.gov/rules-and-laws

FEMA Flood Map Service Center

https://msc.fema.gov/portal/search

TEXAS Water Code, Chapter 49

https://statutes.capitol.texas.gov/Docs/WA/htm/WA.49.htm

U.S. Department of Housing and Urban Development Office of General Council Guidance on Application of Fair Housing Act Standards of the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

TREC News and Articles

https://www.trec.texas.gov/news-articles

Commission & Committee Meeting Schedules

https://www.trec.texas.gov/apps/meetings/

Legal Update
Part II
Edition 9.3

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Contents

1 Chapter 1: Ethics Requirements

1 Ethics Requirements for Real Estate Professionals
3 Unrepresented Buyers

4 Chapter 2: Agency

4 Residential Rental Locators
4 Examples of Recent TREC Cases with Violations by Apartment Locators
4 Seller Term Requirement Sheets or Seller Offer Guidelines
5 Intermediary Refresher - Intermediary Means “Enter the Middle”
6 Recent TREC Cases - Agency Violations
6 Rebates and Referral Fees
7 Recent TREC Cases - Rebate Violations

8 Chapter 3: Advertising Issues

8 §535.155 - Advertisements
9 Social Media Litmus Test
9 Using Copyrighted Material
9 Copyright Definition
9 Copyright Ownership
9 Copyright Ownership Rights
9 Sharing Copyright Ownership Rights
10 Copyright Infringement
10 Protection from Copyright Infringement Claims

11 Chapter 4: Title Issues and Closing

11 Closing LLCs
12 Closing Trusts
12 Commission Disbursement Authorizations and Instructions
13 T-47 Misconceptions
13 Back-Up and Second Contracts
14 Escrow Requests to Avoid
15 FIRPTA Best Practices

16 Chapter 5: RESPA Compliance

16 Rule P-53
17 Marketing Service Agreements

20 Chapter 6: Inspector and Lender Relationships and Duties in the Real Estate Transaction

21 Inspector FAQ's
21 Article - Where Does That Inspection Report Go?
22 Lender Relationships and Duties

23 Appendix A: Rule §535.148, Receiving an Undisclosed Commission or Rebate

25 Appendix B: RESPA Do's and Don'ts for Co-Marketing, Social Media, & Other Web-Based Marketing Tools

27 Appendix C: Helpful Links

CHAPTER

01 ETHICS REQUIREMENTS

Learning Objectives

After this chapter, you will be able to

→ Identify and define the three basic types of ethics.
→ Name the three elements of the Canons of Professional Ethics and Conduct.
→ Define competency and why it is important in the real estate profession.
→ Explain how to handle an unrepresented buyer.

Ethics Requirements for Real Estate Professionals

Remember back in Real Estate 101 when you learned about your fiduciary duties? Was there also a conversation about your ethical duties to the clients? To consumers? To other professionals?

There are three basic types of ethics.

* Personal Ethics – integrity and responsibility
* Business Ethics – industry standards/expectations
* Legal Ethics – required by law

Personal ethics relate to the impression you want to present to your peers and consumers. What level of integrity is important to you? Is it important that others see you as responsible? A strong sense of what is right and wrong is a foundation of your personal ethics code.

Personal ethics are reflected in your level of professionalism. Professionalism is always a hot topic in business. Professionalism is something that is often difficult to identify and regulate, as it is different from one person to the next. We often disagree about what is appropriate professional behavior and what is not.

When considering what is professional, an excellent starting place is empathy. How would you feel in the other person's position? What is their perspective?

Consider this...

John has 12 listings and the market is HOT! Every listing gets at least three offers and many get more. He is so busy that he doesn't have time to respond to all of the text, emails and phone calls from buyer agents asking questions about his listings. (Especially since so few of those calls turn into anything. After all, if their buyer is serious, they'll submit an offer.)

Jane is working with a buyer who is interested in one of John's listings. The market is so tight for buyers that her clients are getting discouraged. They've submitted four offers, all at list price or above, and still don't have a contract. They are stressing. They like John's listing but are concerned about previous foundation work. They want to know if there is a transferrable warranty on the work before they waste everyone's time with an offer.

Jane has reached out to John by text, email and voicemail but cannot get a response. Her buyers are doubting her. After all, it doesn't make sense that the listing agent wouldn't be working to get the house sold. Right?

1. Can you understand John's point of view?
2. Can you understand Jane's point of view?
3. Can you understand how Jane's clients are feeling?
4. How could John and Jane handle this situation better?

Business ethics are guidelines agreed upon by members of a particular business or even an industry. Generally, these guidelines are put forth as Codes. Doctors, lawyers, some real estate associations and other professionals often subscribe to a Code of Ethics.

Legal ethics in real estate are those rules that are required by the Texas Real Estate License Act (TRELA), the Rules of the Commission and other various Texas codes and federal acts & requirements.

Most brokers have a set of business ethics within their brokerages. Sometimes they are in writing but in every case, the sales staff is likely to follow the example of leadership. A Broker who expects their staff to do business at a level of professionalism that they do not subscribe to themselves will often be disappointed.

The Texas Administrative Code lays out what we refer to as the Canons of Professional Ethics and Conduct. They are:

* Fidelity

  This has to do with our fiduciary duties. We have a primary obligation to our clients and their best interest. Our own interests are never placed above that of the client. This means our position should be known, clearly, to all parties. We are required to be honest with all parties whether we represent them or not. In addition, license holders must be faithful and observant to the trust placed in them by the consumer. Always remember that though an agent may be working on multiple transactions, the consumer is focused on one and it is of vital importance to them. License holders must treat the transaction and the parties with great respect.

* Integrity

  Real estate professionals have an obligation to avoid misrepresentation of anything while performing their duties. This means consistent exercise of prudence and caution when serving the public.

* Competency

  A real estate license alone does not determine one's competency in the market place. Competency is an all-inclusive term for knowledge and understanding of anything a reasonable person would consider when buying or selling real estate. What is happening in the neighborhood as far as construction, schools, property related lawsuits, drainage issues, etc. are all topics a reasonable buyer would want to know about. A competent professional can have these conversations and direct their clients to sources for accurate information on topics they are concerned about. Competency often means knowing what questions to ask. Your real estate license, a Multiple Listing Service (MLS) or even the location of your brokerage are not the determining factor of geographic competence.

  Competency can be geographical or by discipline. Discipline has to do with the type of real estate you have knowledge of. A residential broker/agent likely is not competent to sell raw land, commercial properties, industrial parks or etc. Competency means getting the proper training whether it is residential sales, property management, farm and ranch, raw land, leasing, industrial or any other discipline.

Consider this...

Greg is a relatively new commercial agent working for a commercial real estate firm. He does not have vast knowledge of any marketplace. So, when his brother says he is moving back to Texas and only about 1 ½ hours from Greg, he offers to represent him on his home purchase. After all, it is the same Multiple Listing Service and residential sales are the easiest.

1. What information, if any, should Greg share with his brother?
2. Is Greg putting his brother's interest before his own?
3. What is the best way for Greg to have handled this situation?

Unrepresented Buyers

An unrepresented buyer calls you on one of your listings, they insist upon seeing the property as soon as possible, and you set the appointment and show the property. Now what?

The law says you will provide the Information About Brokerage Services (IABS) form to this buyer. The law also requires that you disclose who you represent orally or in writing, at first contact. Make sure the buyer understands that you represent the seller and only the seller and the buyer has several choices regarding representation. For example, if the buyer wants representation, your broker could find someone in your brokerage to represent them as an appointed person by the intermediary (your broker), or the buyer could find an agent from another company, or the buyer could hire an attorney to represent them. The buyer may insist on not being represented. Often a buyer may not want to be represented believing they will save money if there is no other agent involved. How these types of situations are handled is a decision between you and your broker.

A buyer can be unrepresented; however, be sure you are not caught in a trap of wanting to help them which causes you to give advice or assistance in ways that could be considered representation of the buyer.

No Thank You. Just Looking.

Christa is a listing agent and has a property listed. Today she gets a call from unrepresented buyers, Steve and Suzie, who want to see the property. She agrees to meet them at the home at 3:30 pm.

Later at the property:

Christa: Hi, I am Christa with We Sell It All Realty.

Steve: Good afternoon, I am Steve. This is my wife, Suzie and our new baby Franky.

Christa: Oh my goodness, he is sooooo cute!!

Suzie: Franky is a girl.

Christa: My apologies, well, here is a form I have to give you. I need you to sign it and return it to me before we leave. I have made an extra copy for you.

Suzie: I want to read it first.

Christa: Certainly, it is not a contract or anything just a form required by the state or Texas REALTORS® or someone.

Steve: Ok, could we see the house?

Suzie: This form is all about representation. Didn't Steve tell you we do not want anyone to represent us?

Christa: I know you told me you did not want to be represented, however, if I show you this house it will be an intermediary thing and I will have to have this signed for my broker.

Suzie: Inter-what? What are you talking about? We never had had to sign anything to see a house and we are not starting now…

Christa: Oh well, okay, let's go, we can worry about all this paperwork stuff later.

DISCUSSION

1. What are Christa's choices if unrepresented buyers don't want to sign the IABS?
2. How would you have handled this? Could there be additional questions Christa could have asked?

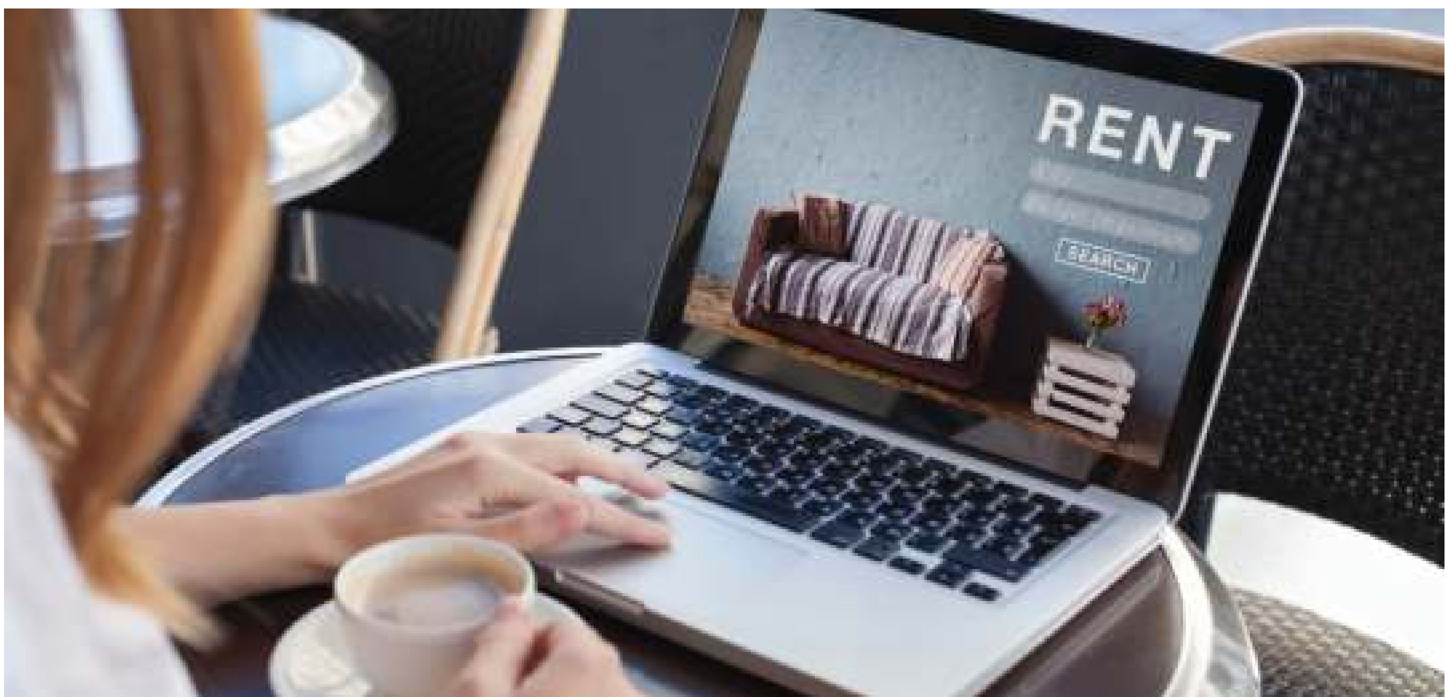
CHAPTER

02 AGENCY

Learning Objectives

After this chapter, you will be able to

- → Explain the intermediary process. Explain the difference between intermediary with appointments and intermediary without appointments.
- → Describe the difference between a rebate and a referral fee and who may receive each.



Residential Rental Locators

A person must be licensed by TREC to locate apartment units for prospective tenants, if they receive compensation for the service, unless they are employees of the apartment owner or otherwise exempt. The apartment locator is subject to the same duties of fidelity, integrity and competency as any other TREC license holder.

Examples of Recent TREC Cases with Violations by Apartment Locators

In four cases originating out of the same apartment locating firm, 9 sales agents, the designated broker and the brokerage were found to have submitted fraudulent rental applications, forging documents and references, including fake jobs, fake pay stubs and fake rental reference. Some of the agents had licenses that expired so unlicensed activity violations were added. (Four Agreed Orders were entered)

Seller Term Requirement Sheets or Seller Offer Guidelines

Have you ever received offer instructions or seen them in the MLS? Offer instructions give pertinent information such as the seller contact, the broker and agent contact, survey availability, possession opportunities, timeframes getting to the seller, and office hours.

While requiring proof of funds and a pre-approval letter IS a best practice, issues can arise when there are staunch requirements for structuring the offer. Issues can arise in the following situations:

* Asking for a percentage amount for earnest money – when Texas does not even legally require it in a contract.
* Requirements for option money amounts and time constraints.
* Limiting the timelines for the buyer approval on credit worthiness in the Third Party Financing Addendum.

The concern comes when agents are dictating what should happen and what the terms should be without instruction from your client. Putting things like *"offers with missing documentation or not correctly filled out will not be presented to seller"* could put you in violation. Did your seller really instruct you to do so and are those instructions in writing. All of us want to protect our clients, but do not overstep your authority making those decisions.

There are some situations such as foreclosure, relocation, or a brokerage owner business model who will structure certain contract requirements. Being the principal does afford the opportunity to generate the rules but remember - it is not the agent's decision.

Keep in mind also that if the term sheet you require for offers in effect makes the only variable the purchase price, you may have inadvertently created an auction situation. That would mean you would have to be licensed as an auctioneer and follow the Auctioneer Laws administered by the Texas Department of Licensing and Regulation.

Intermediary Refresher - Intermediary Means "Enter the Middle"

By law, Texas does not permit dual agency. Instead, the statute sets out a process known as intermediary if a broker is going to represent both parties to a transaction. So as an agent of the broker who is an intermediary, you are stepping into the middle of the transaction and facilitating; and if appointments are properly made, giving advice.

For clarity, what and how does intermediary happen? First, the broker must decide if they are willing to offer intermediary at their firm. The clients must also agree to the intermediary – whether with appointments or no appointments. The consumer is introduced to the concept of intermediary through the Information About Broker Services form. The statutory disclosure and preemptive consent to intermediary is usually contained in the listing agreements and buyer agreements between the clients and the broker. Once the situation presents itself [a seller and buyer who are represented by the same broker want to negotiate on a particular property], there is a secondary notice if appointments are to be made so the parties will know who will represent whom. Note also that if consent to intermediary was not preemptively given previously, written consent to intermediary can also be obtained at the time the intermediary situation presents itself. TEXAS REALTORS® has a form, TXR 1409, Intermediary Relationship Notice, available for members to use or a broker can have an attorney draw up an appropriate notice form.

The broker has final say whether they will appoint or not. There must be at least two agents, not including the broker, in order to appoint. Sole brokers with no or one agent can only be intermediary with NO APPOINTMENTS. If appointments are made, the agents can give advice and opinions to their appointed client. Without appointments, neither the broker nor any agent can give advice or opinions.

The statute specifies four tenets that must be obeyed during intermediary, whether there are appointments or not:

1. the buyer cannot be told the seller would accept a price less than asking price,
2. the seller may not be told the buyer would pay more than the price submitted in a written offer,
3. no confidential information may be shared unless permitted in writing by a party, and
4. all parties must be treated impartially and fairly.

DISCUSSION

1. An agent brings in a listing to the brokerage. Later a call comes in to the brokerage from a prospect and it is passed to the brokerage's buyer agent. The buyer agent--eager to sell the property--makes an appointment to meet the prospect. Who does the buyer agent represent?
2. An agent represents both the buyer and seller in a transaction. The agent says, "Don't worry, I can represent you both and get this deal done. We don't need another agent in the mix. It will go easier if it's just me, after all I know what the seller wants."

Since there are no appointments, there is only one agent who will facilitate the paperwork between the parties. No advice or opinions mean that the agent cannot advise the buyer. The agent says, "You tell me the terms and I will fill in the blanks." The buyer asks, "Should we offer more?'" The agent shrugs his shoulders and shakes his head because he cannot give advice or opinion. The seller asks, "Should we counter this offer?" The agent looks at the seller but can offer NO advice or opinion! What is wrong with this scenario?

Recent TREC Cases - Agency Violations

Case 1

A sales agent scheduled a showing for his client's interested buyers. Prior to the showing, the sales agent arrived and accessed the home. The sales agent was videotaped going through dresser drawers and viewing items in the drawers of bedroom furniture located in the master bedroom. The agent was also on tape going into other parts of the home for a prolonged period of time. No items were taken or damaged, but the sales agent did not have authority to access these areas while showing a home or at any time. (Agreed Order)

Case 2

A buyer's agent left the buyer and an A/C technician (doing an estimate for repairs) in the property alone (the agent did not schedule enough time for the appointment) and gave the key to the buyer and told the buyer to put the key back in the lockbox and lock up when they were done. No damage or harm, just an upset seller because she had not known about or consented to the unescorted buyer and A/C technician on her property. (Agreed Order).

Case 3

A sales agent represented a commercial tenant and entered into a representation agreement that was a custom form (Agreement). The agent was paid a commission on a commercial lease transaction after the commercial lease was finalized but after the Agreement expired and he kept the retainer fee. By the terms of the Agreement, the agent was to either be paid a commission on the lease or keep the $2,000 retainer fee paid upfront-not both. The agent demonstrated bad faith and untrustworthiness when he kept both.

In addition, the agent failed to disclose to his client that the landlords were willing to enter into a 3-to-5 year lease instead of a 10-year lease. The agent continued to push for a 10-year lease when his client told him he was more comfortable with a shorter-term lease, and that his goal was to be the first float center in San Antonio. By continuing to push for a longer lease term and more commission on renewals and expansions, the agent placed his own interests above that of his client's interests to his client's detriment. During the delay for the extended negotiations, another float center opened up in the area first. [Final Order by Commission after the SOAH (State Office of Administrative Hearing) hearing].

Rebates and Referral Fees

What is the difference between a rebate and a referral fee? A **rebate** can be cash or anything of value and is part of a license holder's commission that the license holder gives to a party of the transaction. A **referral fee** is something of value given by a license holder to someone for sending a prospective buyer, seller, landlord or tenant his way.

Who can receive a rebate or referral fee? A **rebate** can only be given to a party of a real estate transaction where the license holder represents one of the parties. A **referral fee** may only be given to a licensed broker or sales agent, unless the value of the gift is less than $50 and is not cash, cash like, (i.e. a gift card) rent bonuses, or discounts. TREC has held that a gift card to one specific merchant (i.e. Starbucks or Macy's) is equivalent to merchandise and not "cash-like." A person not licensed as a real estate broker or sales agent may receive a **referral fee** in very limited circumstances if they are engaged in the business of selling goods or services to the public and other factors are met. This exception is hardly ever used and can be found in 22 TAC §535.20(b).

Some details to consider: If the **rebate** is provided to someone other than the license holder's client, the client and sponsoring broker must first provide written consent. A license holder may not receive a **rebate** from a person other than their client without first disclosing to their client that the license holder intends to receive the payment. The license holder's client must consent prior to receiving the payment. However, this does not include **referral fees** between license holders. A **rebate** to a buyer from a license holder may be subject to restrictions by the buyer's lender. The buyer should notify and obtain the consent of the buyer's lender to address any impact the rebate may have on the determination regarding the buyer's credit worthiness.

DISCUSSION

1. Can our team set up a "VIP" club for people who refer someone to the team more than 3 times a year? It they are in our "VIP" club, we will send them a box of goodies every month.
2. Can a license holder offer to enter an unlicensed person in a drawing to win a cruise for referring a potential lessee or buyer?
3. Is a locator permitted to rebate a portion of the locator's fee to the tenant?

A Business Proposal to Raise Funds for Local Booster Clubs

XYZ Realty, LLC. would like to enter into a verbal or written (if necessary) agreement with your high school band booster club under which XYZ Realty would make a donation to the band booster club each time a booster club member refers someone to XYZ Realty that ends up using XYZ's brokerage services to buy or sell their personal real estate.

All sales, listings, and/or referrals by booster club members that result in a purchase or a sale will generate a donation to the booster non-profit organization of 20% of the commission earned by XYZ Realty in the first year of the agreement. A 15% of the commission in year two, and 10% of the commission in years three and beyond will be donated, until the promotion is terminated by either party.

Example of a Sale for Booster Club Member

XYZ Realty, LLC sells a house for $500,000. The commission paid by the seller is 3% to the buyer's agent and 3% to the listing agent for a 6.0% total commission. The total commission of 6% is $30,000. XYZ's portion of the commission is $15,000. XYZ Realty would make a donation of 20% of the $15,000 commission to the booster club which would be $3,000. The donation from XYZ Realty to the booster club would be paid on the first of each month following the closing. The annual donation target would be $45,000/year.

To avoid conflicts, XYZ Realty, LLC requests that donated funds do not support student scholarships. The booster club may spend the donations any other way they see fit.

The booster club will recognize XYZ Realty at any banquets, football games and all other events when possible to promote the new fundraising concept.

The booster club can terminate this agreement at any time if not satisfied with our services.

Sincerely,

XYZ Realty

DISCUSSION

1. Is this arrangement permissible under TREC Rules? Why or why not?
2. Are there other ways to accomplish what XYZ is trying to do?

Recent TREC Cases - Rebate Violations

Case 1

A buyer banked at a credit union that had an association with a broker. Together they had a lending program that if the buyer met certain criteria (such as obtaining the home loan from that credit union), the broker would rebate 20% of broker's commission to the buyer at closing. The buyer chose to use the broker associated with his credit union. The sales agent told the buyer he was eligible for a rebate but did not write the conditions for the rebate into the buyer representation agreement OR anywhere else.

During the transaction, the buyer decided to change his lender to Wells Fargo, not knowing that he would 'lose' the rebate. Wells Fargo found out about the rebate promise shortly before closing and refused to permit the buyer to receive the rebate. (Agreed Orders for brokerage and agent, Advisory Letter for the designated broker)

Case 2

The buyer agreed to use a broker for the purchase of a new home after the broker told the buyer he would rebate $11,000 of the $13,000 of his commission to the buyer. As closing approached, the buyer asked the broker how he would get the rebate. The broker didn't give the buyer a firm answer.

At closing, the entire commission was listed on the HUD-1 Closing Statement as payable to the broker. After closing, buyer demanded his rebate and after months of evasion, the broker refused to pay stating that the lender was not informed of the rebate and it should have been listed on the Closing Statement. Therefore, it was against federal law for the broker to pay the rebate. (Agreed Order for making a false promise of rebate, failing to disclose conditions of rebate and not making any effort to notify lender or title company of rebate in advance of closing is not outweighed by federal law after the fact.)

CHAPTER

03 ADVERTISING ISSUES

Learning Objectives

After this chapter, you will be able to

→ Identify forms of communication that are considered advertising.
→ Identify the agent/broker information that must be on advertisements to comply with TREC Rules.
→ Give examples of typical copyrighted material an agent may encounter.
→ Explain how to avoid copyright infringement.

§535.155 - Advertisements

(a) Each advertisement must include the following in a readily noticeable location in the advertisement:
  (1) the name of the license holder or team placing the advertisement; and
  (2) the broker's name in at least half the size of the largest contact information for any sales agent, associated broker, or team name contained in the advertisement.

(b) For the purposes of this section:
  (1) "Advertisement" is any form of communication by or on behalf of a license holder designed to attract the public to use real estate brokerage services and includes, but is not limited to, all publications, brochures, radio or television broadcasts, all electronic media including email, text messages, social media, the Internet, business stationery, business cards, displays, signs and billboards. Advertisement does not include:
    (A) a communication from a license holder to the license holder's current client; and
    (B) a directional sign that may also contain only the broker's name or logo.

Additionally,

(4) "Contact Information" means any information that can be used to contact a license holder featured in the advertisement, including a name, phone number, email address, website address, social media handle, scan code or other similar information.

TREC Case Study 3

Susie Sales Agent posted this message on Facebook:

"HELP!!! I am looking for buyers and sellers. If you know someone who is looking, I would appreciate the referral. All friend referrals that close will receive a gift card from me. The more you refer, the more money you can make . . . If you don't know anyone looking, please keep my business in your prayers."

DISCUSSION

1. Is this an advertisement subject to TREC advertisement rules? Is so, what should be included on the Facebook page?
2. Does this arrangement violate TREC referral rules?

Social Media Litmus Test

How do you know if your postings on social media are considered an advertisement? Focus on the intent of the message. Is the message "designed to attract the public to use real estate brokerage services?" If the answer is YES, it is advertising.

Here's a handy litmus test: "If I put this on a postcard and mailed it to a neighborhood would I need to add my brokerage name, etc.?" If the answer is yes, all of the advertising rules apply.

Using Copyrighted Material

As listing content, like photos of a property, becomes more and more publicly accessible, real estate agents and brokers have increased exposure to copyright infringement. Improper use of listing content can create legal problems. Therefore, it is crucial that you know what rights you have, and what you can and cannot do with someone else's listing content.

Copyright Definition

A copyright is a form of legal protection provided to authors of "original works of authorship" (a work that is independently created and possesses at least some minimal degree of creativity).

The work must be fixed in a tangible form of expression, meaning it should be in a sufficiently permanent form such that the work can be perceived, reproduced, or communicated for more than a short time. Things like books, plays, paintings, and photographs can all have copyright protection, but you cannot protect things like ideas, facts, or short phrases or slogans.

Copyright Ownership

Generally, the author who created the work, like the writer, the painter, or the photographer is the owner. However, when a work is made for hire, the author is not the person who actually created the work. Instead, the party that hired the individual is considered the author and the copyright owner of the work. For instance, when the work is created by an employee within the course and scope of his or her employment, the employer is considered the author and owner of the work.

Copyright Ownership Rights

Copyright owners own certain exclusive rights, like the right to reproduce the work, the right to distribute the work, the right to display the work, and the right to create new works from the original work. A work generated from the original work is known as a derivative work.

Sharing Copyright Ownership Rights

A copyright owner can grant or share certain rights with another through an assignment or license agreement.

* <u>Assignment</u>: When a copyright owner transfers ownership of the copyright to another person or entity. This is similar to a sale of a home.
* <u>License</u>: When a copyright owner only transfers some of his or her rights for a limited period of time or a limited purpose. With a license, you transfer your rights in the copyright to another person or entity, but you retain actual ownership of the copyright. This is similar to a lease of a home. Many license agreements will be non-exclusive, meaning the copyright owner can license the work to many different people or entities.

Sometimes, website owners may include a license in their terms of use or through an agreement that comes in the form of a pop-up box that must be clicked to accept.

Copying and Use of Information from the Commission's Website

Information may be copied from the Commission's website and posted on a third-party website, so long as the information is not presented in a misleading way and does not imply that the third-party website is endorsed by the state of Texas or the Commission. If information from the Commission's website is copied and posted on a third-party website, that website must identify the Commission as the source of the information and include the Internet address from which the information was copied and the date the information was copied from the Commission's website.

Copyright Infringement

Copyright infringement is the violation of one or more of the copyright owner's exclusive rights. A copyright infringement case requires proof of: (1) ownership of a valid exclusive copyright right, and (2) defendant's infringement of that right. Basically, copyright infringement is using a work without permission. You can only sue for infringement if you have registered your work with the U.S. Copyright Office.

Fourth Estate Public Benefit Corporation v. Wall-Street.com, 586 U.S. ____, (2019); 139 S. CT. 881

The federal Copyright Act of 1976 prohibits a copyright owner from suing for copyright infringement until "registration of the copyright claim has been made." Prior to the Fourth Estate decision, some courts interpreted this to mean that simply filing a copyright application for a work was enough to file a copyright infringement suit. However, other courts held that actually obtaining a registration at the U.S. Copyright Office was required before suing. The first interpretation was more favorable to copyright plaintiffs because the actual registration can take several months.

In this case, Fourth Estate sued Wall-Street.com for copyright infringement after Wall-Street.com posted Fourth Estate's articles without permission. However, these articles were not registered at the U.S. Copyright Office.

The U.S. Supreme Court held that copyright owners must obtain a copyright registration from the U.S. Copyright Office before suing for copyright infringement, finding that "registration has been made" can only mean one thing: that the Copyright Office's act of granting registration and not filing an application determines whether registration has been made.

This decision may encourage some copyright owners to register their works more promptly and may delay infringement suits.

Protection From Copyright Infringement Claims

Copyright issues will typically impact real estate license holders through their use of photographs when marketing the property. If a license holder uses listing content in a way that is inconsistent with the rights granted to that license holder, then the copyright owner might sue for copyright infringement. Therefore, it is critical that license holders ensure that when, for instance, they upload a photographer's photograph to the MLS or when they post someone else's video on their website, they have the right to do so. Here are some ways license holders can protect themselves:

* Do not use content, like a photograph, unless you have permission.
* Review existing agreements so that you know what rights you have and make sure your use complies.
* Ensure future agreements, like license agreements, have given you the necessary rights.

Copyright Scenario 1

A seller and listing broker enter into a listing agreement for the sale of property. The listing broker enters into a non-exclusive license agreement with a photographer to take photos of the property for marketing purposes.

The listing broker uploads the photos to the MLS. The property never sells and the seller and listing broker agree to terminate their agreement. The seller decides to try again and enters into a new listing agreement with a new listing broker. The new listing broker finds the photographs of the property and decides to reuse them.

DISCUSSION

1. Is it okay for the second listing broker uses the photos?
2. Other than copyright law, what other rules and regulations may you need to consider when using the photos?
3. The photos were posted on the MLS. Can't the second listing broker reuse them for her listing?
4. What should the second listing broker do to make sure they can legally reuse the photos?

Copyright Scenario 2

An agent has decided she wants to create a website. She lives and works in San Antonio so she wants to use photographs of San Antonio landmarks on her website. She searches online and finds the perfect photo of the Alamo, taken by a well-known photographer. She downloads the photo and posts it on her website, making sure to credit the photographer.

DISCUSSION

1. Should the agent have posted the photo?
2. Does the fact that the agent gave credit to the photographer matter?
3. What should the agent do to obtain proper authorization to use the photo?

CHAPTER

04 TITLE ISSUES AND CLOSING

Learning Objectives

After this chapter, you will be able to

- → Discuss the issues associated with closings where the seller of the property is an LLC or Trust.
- → Identify what types of documents and bank accounts should be in place for an LLC or Trust to appropriately obtain their proceeds from a sale.
- → Explain the ramifications of an unnotarized T-47 delivered at closing.
- → Identify the two reasons a listing agent should not switch title companies for the purpose of closing a backup or second contract.
- → Name one FIRPTA best practice an agent/broker should take with a seller.

Closing LLCs

The market has experienced a surge of investors buying residential property to renovate and flip. These investors often take title in the name of a limited liability company ("LLC").

LLCs are a popular entity structure for holding investment property because of the insulation from risk exposure and potential tax benefits, but also because of the perceived ease of administration. Investors can go online to file the Certificate of Formation with the Texas Secretary of State. Unfortunately, that is as far as many go. Many fail to create an operating agreement (also known as a company agreement) to establish the particular authority, or even the exact number, of the manager(s) or member(s). This results in situations where the title company can only rely on the Certificate of Formation's designation of manager(s) or member(s) and a written statement from such persons. Such a statement may be a certificate or affidavit stating that the only member(s) or manager(s) are those listed in the formation documents and that such persons have the authority to sign on behalf of the company for the contemplated transaction. But these affidavits are often self-serving, leaving title companies and the LLCs themselves open to greater risk of fraud or unauthorized persons conducting transactions on the LLC's behalf. In an effort to provide some relief, the legislature passed a bill this session that allows a third party to rely on an Affidavit of Authority to Transfer real property by an LLC or other covered entity (H.B. 1833). The Affidavit must contain all the information required in the statute and is restricted based on

the size of the transaction. Additionally, it is specific as to who can sign the Affidavit. The Affidavit is not in lieu of an operating agreement, but may be relied on by the title company. It is highly preferable for all involved to have an operating agreement in place.

In addition to these challenges, when an LLC sells property, title companies often find that the investors using the LLC structure to hold title to the property have never opened a bank account in the name of the LLC. Instead, the investors request the sales proceeds be paid to the individual member(s) of the LLC.

There are two problems with issuing the sales proceeds to an individual instead of the actual seller, the LLC. The first issue has to do with the fiduciary duty title companies owe to lenders. In Home Loan Corp. v. Texas American Title Co., 191 S.W.3d 728 (Tex. App.–Houston [14th Dist.] 2006, pet. denied), the court ruled that a title company owes a fiduciary duty to the lender to close according to the lender's closing instructions. Since that ruling, most lenders have inserted language in their closing instructions to the effect that the title company is not authorized to close the transaction if the title company is not prepared to complete and deliver the transaction as shown on the settlement statement. If the title company pays sales proceeds to an individual or entity who is not the "seller" reflected on the settlement statement, it violates its fiduciary duty to the lender.

However, even if the settlement statement were specifically to reflect a line item payment of seller's proceeds to an individual other than the LLC, a second issue remains regarding the purpose and protection of the LLC structure. An LLC can shield an individual from personal liability and set up a structure for writing off expenses for income tax purposes. However, the payment of the LLC's proceeds to an individual could support a potential claim that the LLC is a sham or a mere "alter ego" of the individual, thereby potentially subjecting the individual to liability and tax issues that the LLC was formed to protect against.

This is because Texas courts have held that an LLC member may be held individually liable for debts of an LLC if the LLC is a mere alter ego of the member. An alter ego may be found when the LLC and individual are so unified that holding only the LLC liable would work an injustice. One of the factors used by courts in determining whether such unity exists is the degree to which individual property has been kept separately and has not been commingled with LLC property. See, e.g., Watkins v. Basurto, 2011 WL 1414135 (Tex.App.–Houston [14th Dist.] Apr. 14, 2011, no pet.); Doyle v. Kontemporary Builders, Inc., 370 S.W.3d 448 (Tex.App.–Dallas 2012, pet. denied); and In re Arnette (Ward Family Foundation v.Arnette), 2011 WL 2292314 (Bankr. N.D. Tex. June 7, 2011).

Therefore, the failure to maintain a bank account for the LLC and commingling its real estate proceeds with individual funds can bolster the position of creditors and other organizations wishing to "pierce the corporate veil" to reach beyond the LLC to the individual's assets. It is in the best interest of the title company, the LLC, and its members that the LLC's proceeds be disbursed into an account in the name of the LLC.

Closing Trusts

Many homeowners have placed their homes in trust to avoid probate. However, similar to the LLC issues discussed above, because the home is often the only asset in the trust, the homeowners never set up a bank account for the trust. Upon closing, the trustee of the trust asks the title agent to pay the proceeds directly to the individuals (trustees and/or beneficiaries of the trust). For the same reasons as above, paying an individual that is not the official seller in the transaction is problematic and can subject the title company to liability.

When listing a property held in the name of a trust or LLC, real estate agents can do a great service to their clients by encouraging them to set up a bank account in the name of the LLC or trust as soon as possible, if one has not already been established. This allows them time to provide the necessary paperwork required by the bank and avoids closing delays occasioned when sellers must wait for the activation of a new bank account to receive proceeds.

Commission Disbursement Authorizations and Instructions

Many real estate brokers ask the title agent to split the commissions up between the broker and agents. This is done by written authorization from the broker, which is commonly referred to as a Commission Disbursement Authorization ("CDA"). Under the Real Estate License Act (Chapter 1101 of the Texas Occupations Code), which governs brokers and sales agents, brokers may only pay commission to license holders.

Specifically, Texas Occupations Code Section 1101.651 states:

> "A licensed broker may not pay a commission to or otherwise compensate a person directly or indirectly for performing an act of a broker unless the person is:
> (1) A license holder; or
> (2) A real estate broker licensed in another state who does not conduct in this state any of the negotiations for which the commission or other compensation is paid . . . ."

A common challenge comes when a license holder has been advised to set up an LLC through which to run his or her real estate activity for tax purposes. The title company receives a CDA from the broker directing a specific portion of the commission to be paid to the license holder. The license holder then asks the title company to pay such commission portion to his/her LLC. But, unless the LLC itself is licensed, the commission cannot be paid to the LLC. Paying the LLC in this situation would:

i) cause the title company to violate the instructions provided in the broker's CDA;
ii) subject the broker to penalties and fines imposed by the Texas Real Estate Commission ("TREC") for paying commission to a non-licensed person or entity [a violation of TREC Rule §535.147]; and
iii) potentially create an IRS audit issue because the 1099 issued by the broker to the license holder would not match the license holder's tax return.

Unless the license holder gets his or her LLC formally licensed with TREC, the license holder should not ask the title company to pay the license holder's commission to the LLC.

T-47 Misconceptions

Some real estate agents pay little attention to the importance of having the T-47 notarized and executed by all sellers listed on the contract within the timeframe specified in the contract.

Paragraph 6(c)(1) of the TREC One to Four Family Residential Contract (Resale) (the "Contract") states, "Within ___ days after the Effective Date of this contract, Seller shall furnish to Buyer and Title Company Seller's existing survey of the Property and a Residential Real Property Affidavit (T-47 Affidavit). If Seller fails to furnish the existing survey <u>or affidavit</u> within the time prescribed, Buyer shall obtain a new survey at <u>Seller's expense</u> . . . ." (emphasis added).

Listing agents often assume that their clients can comply with the above paragraph by delivering an unnotarized T-47, which could then just be resigned and formally notarized at closing. However, the Contract specifically requires that Seller deliver an "affidavit." By definition, an affidavit is a sworn statement. A statement that is not sworn cannot be an affidavit and, therefore, if the T-47 does not contain the sworn notarization contemplated by the promulgated form within the time specified, the Seller has not "furnished" the affidavit in accordance with the Contract. The ramifications of this failure, as stated in the Contract, are that the Buyer can then obtain a new survey at Seller's expense.

Additionally, a title company can rely on a T-47 affidavit signed by only one of two or more individuals named as the "Seller" in order to approve the survey. However, if the T-47 affidavit is not signed by all individuals who are listed as "Seller" in the Contract, then the "Seller," as that term is defined, arguably did not provide the required affidavit. Again, under the consequences outlined in Para. 6(c)(1) of the Contract, Buyer would be able to obtain a new survey at Seller's expense.

Back-Up and Second Contracts

After a contract "falls through" or otherwise appears as if it will not close, sellers often jump to sign a new contract with a new buyer, even though the first contract has not been formally released by all parties. Often, the new buyer signs a contract, delivers the option fee and earnest money, and incurs other expenses before learning that the seller cannot close because the first contract was not properly terminated and remains in dispute. It is thus prudent for buyer's agent to ask for evidence that all parties have been fully released from their obligations under the first contract before entering into a contract with seller.

If the first contract has not been fully released, the second buyer may be better off entering into a back-up contract with seller. The TREC Addendum for Back-up Contract still requires that the option fee and earnest money be delivered in accordance with the contract, but it defers the time for performance of all other obligations under the contract until the first contract is terminated and the backup becomes "primary." If the option fee is properly paid, buyer's unrestricted right to terminate begins immediately and, after becoming primary, extends for the number of days stated in Paragraph 5 of the contract (assuming use of a standard TREC contract). This gives the buyer the option to wait until becoming primary to spend any money on inspections, and it keeps seller from being in default if the first contract is not terminated by a specific time.

Listing agents, knowing that the title company cannot and will not close a second contract on the property until the first one has been fully released, may switch the title company for the closing of the second contact.

This is a mistake for two reasons:

i) if the second buyer knows that the first contract has not been fully terminated and released, and the first buyer later makes a claim under the first contract, the second buyer has no protection under the title insurance policy. This is because the owner's title policy excludes coverage for matters that are known to the insured, but not the title company, on the date of the

policy, unless such matters appear in the public records; and

ii) if the second buyer does NOT know about the first contract, the second buyer may have protection under the title policy; however, as with any insurance contract, the title company (insurer) is subrogated to the rights of the buyer (the insured) to go after the party at fault. At closing, the seller signs a "warranty deed" to the buyer. The warranty deed "warrants" that title is free and clear of encumbrances (except as otherwise stated therein). When the seller does not disclose the pre-existing first contract, the title company can step into the shoes of the buyer and pursue the seller under the warranty deed. Thus, a real estate agent that encourages opening the second contract with a second title company for the sole purpose of closing without regard to the unreleased first contract is not only doing a disservice to his or her clients, but could be found by TREC to be acting negligently or in bad faith.

Escrow Requests to Avoid

There are several requests title company escrow officers receive from real estate agents that should be avoided. Below are some common examples.

1. Real estate agents should not ask the escrow officer to select or order the buyer's residential service contract.

   The buyer, and not the escrow officer, should handle the process of ordering a residential service contract ("RSC"), also known as a "home warranty." The buyer can send the invoice to the escrow officer to be collected and paid at closing. The escrow officer has limited or no familiarity with the structure, features, or size of the home subject to the RSC, and the escrow officer is unaware of the particular coverages the buyer may want included in the RSC's coverage. Real estate agents do a disservice to their clients if they do not encourage them to be involved in this process. Title companies and real estate agents can end up in conflict with the buyer after closing if the buyer is not involved in selecting the RSC coverages, and then buyer ends up having to pay for repairs for which RSC coverage was available but not selected.

2. Real estate agents should not ask the escrow officer to pass checks between buyer and seller at closing.

   Sometimes real estate agents ask that the title company deliver a check from buyer to seller, or vice versa, at closing for funds that are not shown on the settlement statement (often referred to as the "Closing Disclosure"). However, in any transaction where the buyer has a lender, any monies that need to be transferred between Seller and Buyer at closing must be reflected on the Closing Disclosure. The title company has a fiduciary relationship with the lender, which requires the title company to close as instructed on lender's written closing instructions. Typical lender closing instructions contain language similar to the following:

   "The escrow agent shall close the transaction and disburse funds only in accordance with the Closing Disclosure. If any party to the transaction requests that his/her funds be disbursed in any manner different from the Closing Disclosure, the escrow agent shall advise us of the request and obtain prior approval from us before any funds are disbursed in a manner different from the Closing Disclosure."

   This means that payments for matters connected with the sale of the property, such as leasebacks, non-realty items, or credits from Seller to Buyer, must be reflected on the Closing Disclosure. To ask the escrow officer to aid them in circumventing the Closing Disclosure via "side payments" not reflected thereon is to ask the title company to violate its fiduciary duty to the lender. In addition, "side deals" not reflected on the Closing Disclosure could also subject those involved to liability for mortgage fraud.

3. Real estate agents should not ask the escrow officer to delay closing due to a dispute between the listing agent and the buyer's agent as to the commission split.

   Technically all of the commission belongs to the listing broker. In the event of a dispute, the law would require the title company to pay the listing broker all of the commission, and the buyer's broker would have to pursue the listing broker for their split owed to them. To try to hold up a closing based on such a dispute is a violation of the agent's fiduciary duty to act in the best interest of the client.

4. Real estate agents should not ask the escrow officer to notarize pre-signed documents.

   With the exception of Online Notaries (who are subject to a separate set of stringent regulations), a Texas notary cannot notarize the signatures of persons that do not sign or acknowledge a document in the notary's physical presence. Texas notaries must also review sufficient identification that meets the standards required by state notary

regulations. Asking a notary to notarize documents of a client who is not present is asking the notary to break the law.

5. Real estate agents should not ask the escrow officer to pay an entity (LLC's) or trust seller's proceeds directly to an individual client.

   See the above section on Closing LLCs.

6. Real estate agents should not ask escrow officers to pay their individual agent commissions to their own unlicensed LLCs.

   See the above section on Closing LLCs.

FIRPTA Best Practices

The day of closing is NOT a good day to learn that the seller is a foreign person.

This is not something to ignore and assume title or someone else is going to take care of FIRPTA.

A commonly used listing agreement under "other notices" has a paragraph regarding "foreign status". On every listing appointment, there is an action that each seller should take to answer the question regarding their foreign status or not foreign status. A prudent broker will have a list of CPAs or attorneys who are familiar with FIRPTA to provide to a seller with a foreign status. The CPA or attorney can guide the seller and advise them regarding their tax obligations under this law. A license holder should NOT take it upon themselves to determine whether or not the seller has a tax obligation under FIRPTA. However, it will be important for the buyer of any property of a foreign status seller to know this has been taken care of in advance of the closing date, since the law requires the buyer to withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the IRS.

It is not the title company's job to take care of these issues for the seller or the buyer.

TREC Promulgated Contracts

20. FEDERAL TAX REQUIREMENTS: If Seller is a "foreign person," as defined by Internal Revenue Code and its regulations, or if Seller fails to deliver an affidavit or a certificate of non-foreign status to Buyer that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax forms. Internal Revenue Service regulations require filing written reports if currency in excess of specified amounts is received in the transaction.

CHAPTER

05 RESPA COMPLIANCE

Learning Objectives

After this chapter, you will be able to

- → Identify what is allowable and not allowable to be paid by title companies for a broker or agent under the Texas Dept. of Insurance's Rule P-53.
- → Discuss the issues surrounding Marketing Service Agreements between title companies and brokers that have led to increased scrutiny from the CFPB.
- → Be familiar with TREC Rule §535.148 that addresses consumer protection issues involving settlement service providers.

RESPA – Real Estate Settlement Procedures Act . . . and related rules affecting relationships with title companies and title agents.

The Real Estate Settlement Procedures Act (12 U.S.C. 2601 et seq.) was enacted by Congress in 1974. Regulation X (12 C.F.R. Part 1024), which implements the act (the act and Regulation X collectively referred to herein as "RESPA"), states: "No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. A company may not pay another company or employees of the other company for the referral of settlement service business."

Settlement services are generally those services provided in connection with purchasing property, such as title insurance and settlement, real estate brokerage, mortgage lending, appraisals, home inspections, surveys, casualty insurance and home warranties.

Rule P-53

Because RESPA's prohibition on providing a "thing of value" in exchange for referral of business is somewhat vague, the Texas Department of Insurance promulgated Procedural Rule P-53 ("P-53") to help define "thing of value" for the Texas title industry. Under that rule, title companies are prohibited from paying, contributing or sharing in the cost of any part of the business expenses of a real estate broker or agent. The rule defines "business expenses" to mean any cost to operate or promote

the business of the broker or agent, and specifically prohibits a title company from contributing or paying any part of the costs of: open houses held by brokers or agents; providing prizes, food, beverages, gifts, decorations, entertainment or professional services given at open houses; and parties or receptions which promote an agent or broker, amongst other examples of real estate broker and agent "business expenses."

P-53 does, however, specifically allow a title company to pay for advertising and promotional opportunities, as long as the payment is at market rates for the advertising and not conditioned on the referral of business. That means a title company can pay to advertise or promote itself at an event of an agent or broker, as long as the payment is at market rate and the title company does in fact promote itself at the event. If the payment is above market rate or the title company does not show up to promote itself, it is more likely that the payment would be viewed as pretense for providing "thing of value" exchange for referral of business.

However, the specific prohibition against paying or contributing anything towards an open house or other event just promoting the properties and activities of the real estate broker or agent controls, irrespective of the advertising opportunity. P-53 requires that a title company or title agent keep auditable records supporting compliance with the rule. Failing to comply with the rule can subject the violators to steep civil penalties, in addition to the civil and criminal penalties that may be imposed by RESPA.

RESPA itself also emphasizes the need for payments for a "thing of value" to reflect market value, stating, "If payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of [RESPA]." (12 C.F.R. §1024.14(g)(2)).

Marketing Service Agreements

Marketing service agreements ("MSAs") between real estate brokers and title companies have commonly been used to establish and define the terms under which the title company may promote and advertise itself through the broker. However, in recent years, MSAs have come under increasing scrutiny from the Consumer Financial Protection Bureau ("CFPB"), the federal agency responsible for enforcing RESPA. The reasons are numerous, including but not limited to:

1) the fee amounts vary widely and are not usually directly related to the amount of advertising or promotional benefit to be received by the title company, making it hard to prove market value;
2) fees paid are above and beyond what would reasonably be required for a title company to participate in a particular event to promote itself; and
3) unless the title company or title agent can provide evidence that its marketing materials are continuously displayed, and that it promotes itself at each event, it is not in compliance with the rule.

Under CFPB Consent Order 2014-CFPB-0015, Lighthouse Title Inc. was ordered to pay a $200,000.00 civil penalty for violation of RESPA's anti-kickback provisions. CFPB found that, among other things, Lighthouse did not determine a fair market value for the services it allegedly received under numerous MSAs; it did not diligently monitor its brokers to ensure that it received the services for which it contracted; it believed that if it did not enter the MSAs that the brokers would refer their business to other companies; and the brokers referred significantly more transactions to Lighthouse when they had an MSA as compared to when they didn't. The latter is what was intended, since the purpose of "advertising" and "marketing" a business is to get more business, and yet the CFPB cited this as evidence of a violation!

MSAs may cause additional issues when the service provider, e.g. an inspector, is "ranked" on a real estate broker's website or other advertising materials based on amount paid for the advertising. That ranking may mislead the public into believing the ranking is based on quality of service provided by the service provider. For example, if a broker's website ranks service providers as platinum, gold or silver simply based on the amount paid for the MSA, such may imply that the ranking is based on quality or relative value to the consumer. The Texas Real Estate Act prohibits misleading or deceiving advertisements (Texas Occupations Code §1101.652(b)), and under Texas Real Estate Commission ("TREC") Rule §535.155(d)(19), an advertisement may be misleading if it contains a claim to a special or relative quality standard unless it includes a disclosure of the objective criteria upon which the claim is based. Ranking solely based on amount of payment may be misleading advertising.

RESPA does allow the splitting of charges made or received for rendering a settlement service involving a federally related mortgage provided it is for services actually rendered, and the fee is paid whether the transaction is completed or not. The services rendered must be actual, necessary and distinct from services already provided. If the payment to the real estate agent or broker exceeds market value for such services, the excess is considered a kickback violating RESPA. Nominal services or services which must be duplicated by the service provider are not actual, necessary or distinct.

TREC recently revised Rule §535.148 to provide clarity about consumer protection issues when paying or receiving funds to/from other settlement service providers, to detail who is considered a settlement service provider that mostly parallels the definition in RESPA, and what activity is not prohibited.

See Appendix A for TREC Rule §535.148 (d)(e) and (h)

In addition to RESPA compliance issues, it is important to remember that if a real estate broker or agent receives a payment from a service provider for actual, necessary and distinct services rendered, the broker or agent must disclose to and obtain the consent of the party to whom the service is rendered (see TREC Rule §535.148(b)). Additionally, the client of the broker or agent receiving the compensation must consent to the payment, whether or not the client is the recipient of the service (see TREC Rule §535.148(a)).

See Appendix B for the article "RESPA Do's and Don'ts for Co-Marketing, Social Media, & Other Web-Based Marketing Tools" from the National Association of Realtors.

Case Summary

Investor Class Action Lawsuit Against Zillow Gains Traction in Amended Complaint

Investors claim that Zillow's "co-marketing program" was designed to allow participating real estate agents to refer mortgage business to participating lenders in violation of RESPA.

The lawsuit, which had previously been dismissed for lack of specificity, gained legs, when a judge declared that the amended complaint contains enough particularized facts to support a claim that Zillow maintained an arrangement, in which lenders paid for a portion of agents' advertising costs in return for mortgage referrals that violated RESPA. The case is still in the early stages—this ruling simply means that the case will likely be heard on its merits after Zillow's motion to dismiss was denied.

Based on facts alleged in the suit, "the Court can draw a reasonable inference that Zillow designed the co-marketing program to allow agents to provide referrals to lenders in violation of RESPA, and that such referrals were occurring." The allegations claim that there was "an understanding between Zillow and the co-marketing participants, that in exchange for lenders paying a portion of agents' advertising costs, lenders would receive mortgage referrals from their partnering agents." That arrangement was not documented, but "evidenced by participating agents allegedly providing, and Zillow allegedly tracking, referrals to participating lenders."

In Zillow's co-marketing scheme, vendors pay a portion of a real estate agent's advertising costs on Zillow in exchange for appearing on an agent's online listings. These lenders appear on the agent's listings as "preferred lenders," and are sent the lead when Zillow users provide an agent with their contact information. While the judge originally declared these costs to be protected under RESPA's safe harbor provision, the additional information provided in the amended complaint made a difference. These preferred lenders were paying, according to the complaint, "more than fair market value for the advertising they received and therefore fell outside RESPA's safe harbor provision."

Discussion Scenarios

Break into three groups with each group assigned a different scenario. Each group will answer the discussion questions below and report back to the class.

Scenario A

A brokerage has established a tiered Vendor Sponsorship program. The more a vendor pays for sponsorship, the more face-to-face access time will be given to the sales agents for that office. Sponsorship would be limited to only three of each type of vendors (this includes home inspectors, title companies and lenders). Sponsorship benefits are advertised by the brokerage as a limited number of your vendor type to compete against for agent referrals. Sponsoring vendors would appear on the brokerage's preferred vendor list and promoted throughout the office; only sponsoring vendors may leave marketing materials for distribution to agents; permitted to sponsor a team meeting by providing breakfast or lunch; almost exclusive interaction with agents at that office. Sponsorship fees can range from $1100.00 - $2500.00 per month. The more you pay, the higher your tier and the more personal access time you will be given to the brokerage agents.

Scenario B

A brokerage has a program where three home inspectors pay a monthly fee to contribute to the cost of marketing software purchased by the broker for the benefit of the broker and sponsored agents. Only three inspectors will be used to help cover the cost and will appear on a preferred inspectors list that will be provided to all agents at that office. The preferred inspectors would also appear on the marketing software portal. The only qualifications for selecting which home inspectors would participate is based upon which ones are willing to put up the funds.

Scenario C

A brokerage rents office space within the real estate office to a mortgage broker.

DISCUSSION

1. Does this program violate RESPA? What about TREC Rule §535.148 or TREC Advertising Rule §535.155?
2. What factors may be important in determining whether it violates RESPA or TREC Rules?
3. Is this program in the best interest of the broker's client (read fiduciary duty here)?

CHAPTER

06 INSPECTOR AND LENDER RELATIONSHIPS AND DUTIES IN THE REAL ESTATE TRANSACTION

Learning Objectives

After this chapter, you will be able to

→ Describe the standard to which an inspector conducts business.
→ Identify which party to the transaction receives the inspection report.
→ Identify who should be allowed on the premises or to accompany an inspector on an inspection.
→ Define the basic duty of a mortgage loan officer.
→ Describe the license holder's responsibilities to the buyer concerning lenders and mortgage loan originators.

Inspectors are individuals licensed by TREC to perform inspections of real property when it is part of a real estate transaction. Inspectors provide information on the performance of certain systems in the property. For residential properties, they are required to use the TREC standard report form and are guided by rules known as "Standards of Practice" to ensure consistency throughout the home inspection process. A home inspection is a limited visual survey and basic performance evaluation of the systems and components of the house. It does not require the use of specialized equipment and is not a comprehensive investigative or exploratory probe to determine the cause or effect of deficiencies noted by the inspector. TREC does not require inspectors to inspect to any of the various building codes. However, an inspector is free to inspect to a higher standard (such as to various codes or recognized safety hazards), as long as they do so competently.

An inspector cannot:

* Perform a hydrostatic test unless they are also licensed as a plumber;
* Perform a mold assessment unless they are also licensed by the Texas Department of Licensing and Regulation;
* Test for the presence of wood-destroying insects unless they are also licensed by the Texas Department of Agriculture;
* Accept employment to repair, replace, maintain or upgrade systems or components of property covered by the Standards of Practice within 12 months of the date the inspector performed an inspection on the property;

* Disclose inspection results or client information without prior approval from the client;
* Pay or receive a fee or other valuable consideration to or from any other settlement service provider (newsflash – brokers and sales agents are considered settlement service providers).

Inspector FAQ's

Should a buyer's or seller's agent ask the inspector for a copy of the inspection report prepared for the buyer?

To answer this question, you need to remember who the inspector's client is and which party you represent. Who is the inspector's client? The person who contracts with the inspector and pays for the inspection services (usually this is the buyer). See the article below.

Where Does That Inspection Report Go?

After an inspection is performed, often times the inspector will go over the findings with the potential buyer to let them know about all of the deficiencies that the inspector observed during the course of the inspection. By rule, the inspector must have the report sent to the client no later than 48 hours after the inspection is paid for, unless otherwise agreed to in writing. In most cases, the agent or broker that represents the buyer would like a copy of the inspection report sent to them as well. The inspector is only allowed to send the report to the inspector's client, as they are the ones that own the report. If the buyer's agent would like a copy of the report, the buyer must give their permission to the inspector in order for the inspector to do so. If an agent is unable to attend the inspection with the buyer, then it would be a good idea to inform the buyer to ask the inspector to send them a copy of the inspection report at the time of the inspection. This will help ensure that the inspector obtains the permission from the buyer to do so, and it makes sure that the agent gets the report at the same time the buyer does. In most situations, it is a good idea for the buyer to allow the inspector to send the agent the report. However, there are some situations where that may not be a good idea. One situation in particular is when there is an intermediary situation. In that situation, the inspector may choose to not send the report to the agent directly. It would be best, in that scenario, for the buyer to send the report to the agent themselves if they choose to do so. The issue here is that if a broker represents a buyer and a seller and has not appointed separate agents to each party, neither the broker nor the broker's agents may give advice to either party in the transaction. Further, if the broker or an agent gets a copy of the report, they are now aware of material defects in the property. Being that they also represent the seller, that information must be conveyed to the seller as well. If the seller is aware of the material defects to a property, then they should modify the Seller's Disclosure Notice to reflect the known issues.

Contributed by Lee Warren, Chair of the Texas Real Estate Inspector Committee. Mr. Warren is a licensed Professional Inspector and a Broker.

Can an inspector allow the buyers to accompany him/her during the inspection if the buyer's agent and the sellers are not present?

Presumably, the buyer has a signed contract where the seller has already given consent to allow access the property "at reasonable times." Section 7 of the One to Four Family Residential Contract states that the "Seller shall permit Buyer and Buyer's agents access to the Property at reasonable times. Buyer may have the Property inspected by inspectors selected by Buyer and licensed by TREC or otherwise permitted by law to make inspections." So, as long as the seller is notified and agrees to the time of the inspection, both the buyer and the inspector have the seller's permission to be there, with or without the buyer's agent.

Is it a violation for the inspector to provide access to the home since the inspector is not a broker or agent?

The inspector has not committed a TREC violation simply by allowing access to the property. Remember, licensed inspectors, like real estate license holders, go through a criminal background check and this distinguishes them from an unlicensed assistant. Whether or not an inspector can access the lockbox to enter a home depends on whether the MLS rules in their area allows them to have access, and whether the rules allow access for just the inspector, or the inspector and the buyer. If the MLS rules do not, the seller, seller's agent or the buyer's agent will have to be present to provide access to the buyer for the inspection.

Is the inspector or the buyer's agent liable if the buyer damages or removes something from the home during the inspection?

The question of liability is a civil matter. The answer

would turn on the particular facts of the case, including local MLS access rules, the terms of the listing agreement and contract, any directions given by the seller regarding the need for an agent to be present and whether the inspector or agent knew or should have known what the buyer was doing.

Lender Relationships and Duties

The basic duty of a mortgage loan officer is to provide the best information possible about the mortgage loan process and give the consumer the choices that are available to them to make the best choice about a mortgage loan AND to assist the consumer in meeting the contract deadlines the consumer has agreed to meet.

Mortgage loan originators are licensed through the Nationwide Multistate Licensing System (NMLS).

Education requirements for licensure of mortgage loan originators (MLOs) includes annual continuing education. The SAFE Act requires state-licensed MLOs to complete:

a. Three hours of federal law and regulations;
b. Two hours of ethics that shall include instruction on fraud, consumer protection, and fair lending issues;
c. Two hours of training related to lending standards for the nontraditional mortgage product market; and
d. One hour of undefined instruction on mortgage origination.

Consumers and real estate license holders should consult with a mortgage loan originator before determining the timeframes put in the Third Party Financing Addendum to ensure the timeframes are realistic. Connecting a buyer with a mortgage loan originator early in the process of a home search is the prudent action to take. And assisting the consumer in understanding it not just a "suggestion" that the consumer's financial documents be sent to the lender, it is the ONLY way the lender can make an informed decision about approving this consumer for a mortgage loan.

As a real estate license holder, one of your responsibilities is to offer choices to the buyer consumer about mortgage lending and to help the consumer understand a contract is an obligation with real deadlines to meet and consequences for not meeting those deadlines. Furthermore, in the current environment with many choices for lending, some lenders are not competent to handle a mortgage loan that does not fit into a strict criteria. Be aware, some lenders have no interest in your particular consumer - it is just another application in a long line of applications. Another of the real estate license holder's responsibilities is to make certain the mortgage lender and title company have all the amendments to the contract as soon as they are executed.

What a lender doesn't want to hear:

"We lowered the price last week, why can't you close it tomorrow?"

"The seller is giving the buyer cash in lieu of repairs"

"We don't have to tell anyone the buyer has to sell the home they have in order to buy this one, do we?"

"Couldn't you just create a pre-qualification letter and talk to the buyer later?"

"The buyer is not working now, couldn't we just use the job they used to have?"

APPENDIX

RULE §535.148, RECEIVING AN UNDISCLOSED COMMISSION OR REBATE

Proposed rule expected to be approved at august 2019 commission meeting.

AGENDA ITEM 22
ADOPTED RULE ACTION FROM THE AUGUST 12, 2019, MEETING OF THE COMMISSION
CHAPTER 535 GENERAL PROVISIONS
Subchapter N. Suspension and Revocation of Licensure
§535.148. Receiving an Undisclosed Commission or Rebate

§535.148. Receiving an Undisclosed Commission or Rebate.

(a)A license holder may not receive a commission, rebate, or fee in a transaction from a person other than the person the license holder represents without first disclosing to the license holder's client that the license holder intends to receive the commission, rebate or fee, and obtaining the consent of the license holder's client. [~~This subsection does not apply to referral fees paid by one licensed real estate broker or sales agent to another active licensed broker or sales agent.~~]

(b) - (c)(No change.)

(d)A license holder may not pay or receive a fee or other valuable consideration to or from any other settlement service provider for, but not limited to, the following: [~~A license holder may not accept a fee or payment for services provided for or on behalf of a service provider to a real estate transaction the payment of which is contingent upon a party to the real estate transaction purchasing a contract or services from the service provider~~].

(1)the referral of inspections, lenders, mortgage brokers, or title companies;

(2)inclusion on a list of inspectors, preferred settlement providers, or similar arrangements; or

(3)inclusion on lists of inspectors or other settlement providers contingent on other financial agreements.

(e)In this section, "settlement service" means a service provided in connection with a prospective or actual settlement, and "settlement service provider" includes, but is not limited to, any one or more of the following:

(1)a federally related mortgage loan originator;

(2)a mortgage broker;

(3)a lender or other person who provides any service related to the origination, processing or funding of a real estate loan;

(4)a title service provider;

(5)an attorney;

(6)a person who prepares documents, including notarization, delivery, and recordation;

(7)a person who provides credit report services;

(8)an appraiser;

(9)an inspector;

(10)a settlement agent;

(11)a person who provides mortgage insurance services;

(12)a person who provides services involving hazard, flood, or other casualty insurance, homeowner's warranties or residential service contracts;

(13)a real estate agent or broker; and

(14)a person who provides any other services for which a settlement service provider requires a borrower or seller to pay.

(f)[~~(e)~~] A license holder must use TREC No. RSC-2, Disclosure of Relationship with Residential Service Company, to disclose to a party to a real estate transaction in which the license holder represents one or both of the parties any payments received for services provided for or on behalf of a residential service company licensed under Texas Occupations Code Chapter 1303.

(g)[~~(f)~~] The Texas Real Estate Commission adopts by reference TREC No. RSC-2, Disclosure of Relationship with Residential Service Company,

Page **1** of **2**

approved by the Commission for use by license holders to disclose payments received from a residential service company. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

(h)This section does not prohibit:

(1)normal promotional or educational activity that is not conditioned on the referral of business and that does not involve the defraying of expenses that otherwise would be incurred;

(2)a payment at market rates to any person for goods actually furnished or for services actually performed; or

(3)a payment pursuant to a cooperative brokerage or referral arrangement or agreement between active licensed real estate agents and real estate brokers.

APPENDIX

RESPA DO'S AND DONT'S FOR CO-MARKETING, SOCIAL MEDIA, & OTHER WEB-BASED MARKETING TOOLS

RESPA DO'S AND DON'TS FOR CO-MARKETING, SOCIAL MEDIA, & OTHER WEB-BASED MARKETING TOOLS

Real estate brokers and agents are subject to the Real Estate Settlement Procedures Act (RESPA) when engaging in transactions involving federally related mortgage loans. RESPA generally prohibits any person from giving or receiving any "thing of value" in exchange for the referral of settlement service business. Liabilities for RESPA violations may be severe, ranging from significant fines to imprisonment. Below are some guidelines for real estate professionals when engaging in co-marketing activities via social media and other web-based marketing tools:

DO

- Do ensure that each co-marketing party pays its proper share of the advertisement.
    - Each party's share should be based on the proportionate split of the fair market value for any and all services in connection with the advertisement (e.g., creation, design, distribution, etc.); and
    - Each party's share should be equal to each advertised settlement service provider's prominence in the advertising.
- Do ensure that the agreed upon marketing is actually performed and that any payment made in connection with such services is the fair market value for the services performed.
    - Remember—just because a social media platform is "free" for users to join or post in, it does not mean that all uses of the platform are offered at no cost or that there are no costs associated with the development of the advertisement.
    - Be aware of what may constitute a thing of value, and remember it does not require a transfer of money. Any benefit or concession (a "quid pro quo") may be a "thing of value."
- Do include the word "Advertisement" in a prominent location on each party's information included on the co-marketing materials.
- Do document procedures to calculate co-marketing charges and/or create a standardized rate sheet for the fair market value of such marketing.
- Do consider maintaining written agreements of the co-marketing arrangement to demonstrate compliance with RESPA Section 8 as well as federal and state laws and regulations governing your co-marketing efforts, including those regarding advertising, privacy, and licensing requirements, as applicable.
- Do ensure that the advertisements are distributed to the general public, such as publicly-facing, broadly-reaching websites, and cannot be viewed as "targeting" specific consumers.
- Do ongoing oversight of the co-marketing arrangement that may be required by either or both co-marketing participants.

DO NOT

- DO NOT enter into the arrangement with a co-marketing party without getting the necessary corporate authorization for such arrangement for yourself or for your co-marketing party.
- DO NOT directly or indirectly defray expenses that would otherwise be incurred by anyone in a position to refer settlement services or business to you, by use of a co-marketing arrangement.
    - Payments by settlement services providers to third party real estate listing aggregator sites that reduce your advertising costs can create a direct RESPA violation.
- DO NOT exchange any "thing of value" with anyone for a referral, no matter how small the "thing of value" is. RESPA does NOT have an exception for minimal "kickback" amounts and even a small amount (i.e., $5 coffee giftcard) is considered a "thing of value" under the law.
- DO NOT require or allow your co-marketing party to endorse you, exclusively or otherwise, or vice versa, e.g.:
    - Do not allow either co-marketing party to refer to the other as a "preferred" service provider, or a "partner," or some other similar designation.
    - Beware of any perceived endorsements, such as "likes," follows, re-postings, tagged pictures with one another, and other favorable commentary on referral sources' pages, whether such activity is conducted from your personal or your business accounts. Remember that promotion of business activities generally should be conducted from business accounts/pages, not personal ones.
- DO NOT enter into co-marketing arrangements before considering the implications of any other concurrent relationship with the co-marketing party (e.g., lead sales, desk rentals, etc.).
- DO NOT direct any of the co-marketing efforts to specific consumers with whom either co-marketing party has a relationship or over whom either party has the ability to influence the selection of a settlement service provider (as compared to marketing of general distribution).
- DO NOT evaluate or adjust the compensation paid under an arrangement based on "capture rate," which is the percentage of referrals that convert to actual clients or customers.
- DO NOT allow one party to act as a "gatekeeper" when dealing with a third-party marketing company. Both parties should have a separate agreement with third-party marketing firms.
- DO NOT perform services for the other co-marketing party that are outside the terms of the agreement. For example, if a real estate agent and a lender are co-marketing, the lender should not "incubate" or cull leads on behalf of the real estate agent as that is outside the terms of the co-marketing agreement and is not a compensable service.
- DO NOT share the cost of leads generated through websites or arrangements. Each party must pay the fair market value of the leads they purchase.

Disclaimer: This document is provided for informational/instructional purposes only and does not constitute the giving of legal advice by NAR. Consult with a RESPA attorney to make sure you understand and properly comply with any and all applicable laws. As a reminder, some state and local laws prohibit or otherwise restrict activities that may be permissible under RESPA.

https://www.nar.realtor/washington-report/nar-publishes-co-marketing-dos-and-donts
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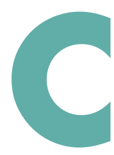
APPENDIX



HELPFUL LINKS

TREC Rules

https://www.trec.texas.gov/rules-and-laws

TREC News and Articles

https://www.trec.texas.gov/news-articles

Commission & Committee Meeting Schedules

https://www.trec.texas.gov/apps/meetings/

Consumer Financial Protection Bureau (CFPB) Final Rules (Topic “RESPA”):

https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/?topics=real-estate-settlement-procedures-act

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