REO Transactions

Member Legal Services
Tel 213.739.8282
Fax 213.480.7724
May 20, 2008 (revised)

Copyright© 2008, CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.) Permission is granted to C.A.R. members only to reprint and use this material for non-commercial purposes provided credit is given to the C.A.R. Legal Department. Other reproduction or use is strictly prohibited without the express written permission of the C.A.R. Legal Department. All rights reserved.

TABLE OF CONTENTS

I. GENERAL OVERVIEW

There comes a time in a real estate market cycle when REO transactions take center stage. When this happens, it raises many legal and practical concerns for REALTORS®. Are REO transactions a viable business opportunity? Are there special disclosure requirements? Are there common pitfalls to watch out for? This legal article aims to address these and other general concerns to help REALTORS® and their clients navigate their way through REO transactions.

Q 1. *What is an REO?*

A An "REO" is a commonly-used acronym for "real estate owned" by banks. Instead of an individual person or persons owning the property as in a typical resale transaction, a bank owns the property instead. The bank typically acquires title to its REO properties through the foreclosure process. However, REO properties may also be acquired through other means, such as a deed-in-lieu of foreclosure, tax sale, or corporate housing.

Q 2. *Is an REO sale the same thing as a foreclosure sale?*

A No. A foreclosure sale is the sale of real property, usually at an auction, generally triggered by a homeowner's inability to pay a mortgage loan. An REO

sale, on the other hand, is the sale of property owned by a bank. Let's say, for example, Harry Homeowner has a mortgage loan secured by his home. If Harry defaults on his mortgage loan, his lender may initiate the foreclosure process and eventually acquire the property at a foreclosure sale. Upon the lender's acquisition, the property becomes part of the lender's REO portfolio. The subsequent sale of that lender-owned property is commonly called an REO sale. For a more detailed explanation, see the answer to Question 3 below.

Q 3. ***Why are there so many REO properties lately?***

A The high volume of REO sales is a result of the high volume of foreclosure sales in recent years, as well as the nature of foreclosure sales. When a property is foreclosed upon, the mortgage lender often acquires title to the property at the foreclosure sale, although it's possible that someone else acquires title. More specifically, when an owner fails to make mortgage payments, the lender may commence the foreclosure process to sell the property to satisfy the defaulting borrower's debt secured by that property.

In California, foreclosure is commonly handled through a trustee's sale (not court action) where the property is sold to the highest bidder at an auction open to the public. At the trustee's sale, the foreclosing lender may make a credit bid in the amount of its unpaid debt plus foreclosure costs, but the trustee typically requires any other accepted bid to be paid in the form of cash or cash equivalent. Because of the onus of paying cash, rarely does anyone outbid the foreclosing lender at the trustee's sale. Once the foreclosing lender acquires title to the property by trustee's deed, the property becomes part of that lender's REO portfolio.

Q 4. ***Why would someone wait to buy a property from an REO lender, rather than acquire it as the highest bidder at the trustee's sale?***

A Acquiring property as the highest bidder at a trustee's sale is likely to have a higher potential for return than buying the same property from the REO lender after foreclosure. However, many people are not in a position to pay all cash for real property as is often required for trustees' sales, but not for REO sales. Furthermore, buying from an REO lender may be less risky, because a foreclosure sale purchaser often has no opportunity to inspect the interior of the property before buying it, despite the possibility that the property may be distressed (see Question 7) or occupied by tenants or previous owners (see Questions 18 to 20). Acquiring title to an REO property may also be less risky because an REO lender is likely to take care of certain title issues, such as unpaid property taxes. Indeed, it can be very difficult for a buyer to obtain title insurance when acquiring property at a trustee's sale, but not an REO sale.

Q 5. *What are the general characteristics of an REO transaction?*

A Providing the general characteristics of an REO transaction may be a disservice to REALTORS® because there are always exceptions to the rule. However, providing a general understanding of REO transactions may help REALTORS® manage their expectations. Some of the major distinguishing characteristics of an REO transaction are as follows:

• Lower Price: First and foremost, an REO property tends to sell for a lower price than other comparable properties, depending on local market conditions. That's precisely what generates so much public interest in REO properties. Some experts, however, consider the discounts to be limited, especially given the possible distressed nature of REO properties (see Question 7).

• Bank Representatives: The seller in an REO transaction, the bank, acts through its employees and representatives. An REO lender may outsource the management and disposition of its REO properties to asset management companies (see Question 6). Unlike other sellers, the REO employees and representatives have not occupied the properties, and have no emotional attachment to the properties they are selling. The REO properties may be generally characterized as unwanted assets, although the banks want to demonstrate to their investors that they sold these assets for the highest prices possible. Indeed, because REO lenders and their asset management companies have a lot of inventory to sell, they possess certain leverage when negotiating listing and sales agreements.

• Timing: An REO transaction is generally more cumbersome and takes a longer time to process compared to other resale transactions, from negotiating an accepted offer to closing escrow. Whereas other resale sellers may be able to answer questions instantaneously, a question posed to an REO lender may have to go through the asset management company and several levels of approval at the bank. And they don't work evenings or weekends.

• Transactional Features: An REO listing or sale has many transactional features that differ from other resales. For example, an REO lender may want to use its own forms, such as its own status reports or sales agreements (see Questions 40 and 43). An REO sale has its own set of disclosure requirements (see Question 30). An REO lender may offer attractive loan terms to help its buyers finance their purchase transactions.

Q 6. *What are asset management companies?*

A Asset management companies are companies that REO lenders may hire to oversee the sale of their REO properties. Some asset managers work in house

for a department or division of the bank itself, whereas others work for a separate legal entity altogether. For more information about asset management companies, see Questions 26 to 28.

Q 7. *Why are REO properties sometimes characterized as distressed properties?*

A Some REO properties are no different than other properties for sale. However, REO properties may be distressed as a result of simple neglect, intentional vandalism, or both. As for neglect, before an REO lender even takes over a property, the previous homeowner was likely to be experiencing financial difficulties, and thus also likely to have foregone ordinary maintenance and repair of the property. As for intentional vandalism, when some homeowners lose their properties through foreclosure, they have been known to take their anger and frustration out on the property. They may strip a property of its fixtures, cabinets, appliances, and even copper plumbing, as well as damage the property by smashing out the walls, breaking window panes, pouring cement down the toilet, or flooding the property by leaving the faucets on.

Things may not improve when the bank takes over the property. An REO property may sit vacant for many months with the utilities shut off, which makes it susceptible to further neglect and vandalism. Even absent any neglect or vandalism, there is the possibility that a piece of property posed such serious issues for the previous homeowner (e.g., significant structural defects or neighborhood problems) that, coupled with market conditions, the previous homeowner purposely decided to get rid of the property through the foreclosure process.

Q 8. *What is the upside of working with REOs?*

A Whether REO transactions are viable business opportunities for a REALTOR® is highly dependent on who that REALTOR® is. Some of the advantages of working REO transactions are as follows:

• Make Money: Although there may be a bit of a learning curve at first, agents can potentially carve out a new niche for themselves by working REOs. If there's a slow-down in the market, working REOs may be a way for agents to generate new business and income. Getting just one REO listing may open the door to many more from that particular REO lender or asset management company.

• Service to Clients: When REO properties are prevalent in the marketplace, prospective homebuyers and investors will persistently ask real estate agents about bank-owned properties for sale at bargain prices. Knowing about REO properties in the neighborhood enables agents to service these clients.

• Get Your Name Out: Listing agents who advertise their REO listings, such as on For-Sale signs, the MLS, and flyers, can establish a prominent name for themselves in their farming areas, and enhance their ability to attract new leads, prospects and clients. Buyers' agents can also get their names out by advertising, for instance, "Ask Me about REOs," and showing prospective buyers REO properties compiled from the MLS, lists provided by REO lenders, REO websites, and other sources.

• Help Your Community: REO properties that sit vacant, unkempt, and in disrepair are eyesores that may potentially bring down the neighborhood, including home values. A study in Philadelphia showed that for every foreclosure, the value of other homes within one block fell by one percent in one year. Agents who facilitate REO sales are also helping their community get through this transitional period.

II. LISTING AND PROPERTY MANAGEMENT ISSUES

Q 9. *What can I expect as a listing agent for REO properties?*

A The business practices of real estate agents working REO properties vary widely. Some agents conduct themselves very much like traditional listing agents, whereas others focus on a particular aspect of the REO business, such as doing broker price opinions (see Question 13). Some REO agents take REO listings primarily to accommodate their investor clients who want to buy REO properties to rehab and resell. After all, REO specialists generally tend to handle a high volume of REO listings, but earn a smaller commission for each transaction as compared to other types of listings.

The types of services that an REO listing agent may provide can be loosely categorized as follows:

- Valuation Services (see Questions 12 to 14);
- Property Management Services (see Questions 15 to 24); and
- Listing and Marketing Services (see Questions 25 to 29).

Q 10. *How do I become an REO listing agent?*

A REALTORS® join the REO business in many different ways. Some agents are REO specialists who have made significant capital investments and do hundreds of REO sales per year, whereas other agents just handle one or two REO listings, here and there. Some agents pick up REO business because they know someone at the bank or asset management company. Other agents solicit

REO business by cold calling, mass mailing, or networking. There are several trade associations and other organizations for REO professionals.

Q 11. ***What types of marketing tools do agents use to solicit REO listings?***

A REALTORS® have a wide arsenal of effective and creative marketing tools for successfully negotiating REO listings. An agent may provide REO lenders with a business portfolio, containing, among other things, his or her professional qualifications, the types of services offered, the breadth of advertising and marketing strategies, sample copies of the agent's status reports, before and after pictures of REO properties, and business references. Agents today may invest in new technology, such as new websites and blogs for advertising REOs to the general public. Other technological investments include digital cameras, color printers, and computer programs for tracking listings or generating status reports in either electronic or hard copy format, depending on what the REO lender wants.

Valuation Services

Q 12. ***What types of valuation services do REO lenders require?***

A Each REO lender has its own valuation requirements, such as drive-bys, comparative market analyses (CMAs), broker price opinions (BPOs) (see Question 13), and full appraisals. An REO lender may require different valuations at different stages of the foreclosure process, e.g. a BPO before filing a notice of default, but a CMA every three months thereafter.

Q 13. ***What is a BPO?***

A BPO is an acronym for a broker price opinion. Like a comparative market analysis (CMA), a BPO is an in depth analysis of a home's current market value, but it's usually prepared for a bank or asset management company. The bank or asset management company typically sets certain parameters for what it want in its BPOs, such as photographs, comps, interior inspections, repair estimates, or the completion of the bank's own forms. REO lenders generally pay less for BPOs than for appraisals. They may agree to pay brokers about $50 to $200 for each BPO, which brokers should get in writing. Some brokers are willing to provide BPOs free of charge in hopes of obtaining future listings from the REO lenders or asset management companies. These brokers, however, should be careful of the out of pocket costs that they and their agents may incur to prepare

BPOs, including printing costs, photographs, overnight delivery, mileage, and the time investment.

Q 14. ***When does an agent get paid for a BPO?***

A It depends. Some banks and asset management companies pay promptly within 30 days after the brokers render the BPOs, whereas others may take longer. Some agents complain about getting only partial payments or not getting paid at all. To be fair, some REO lenders and asset management companies complain that the BPOs are untimely, incomplete, or of poor quality.

Property Management Services

Q 15. ***What property management services do REO lenders ask real estate agents to do?***

A Real estate agents are often characterized as the "eyes and ears" of REO lenders. They may be called upon to see if a property is occupied, if the lawn needs watering, or if repairs are needed to improve salability. The types of property management services that REO lenders may ask agents to do or to hire someone to do include, but are not limited to, the following:

- Inspecting the property, such as to ascertain whether it's occupied, to assess damage if any, or to check whether appliances and electrical, plumbing, heating, and other systems are working;

- Negotiating cash-for-keys agreements or lease agreements with existing tenants or occupants (see Question 17);

- Evicting existing tenants or occupants (see Questions 18 to 20);

- Arranging for the disposition of personal property left behind (see Question 21);

- Rekeying vacant properties or getting the locks changed;

- Boarding up properties for safety or winterization;

- Obtaining repair estimates from contractors and others;

- Repairing and rehabbing property to improve marketability;

- Arranging for trash removal;

- Having the property professionally cleaned;

- Attending to regular maintenance and upkeep of the property;

- Turning utilities on or off;

- Caring for the landscaping, lawn, and grounds;

- Staging the property for resale; and

- Providing periodic status reports and CMAs.

These types of property management services may take considerable time, money, and effort. Some agents pay out of pocket for these property management services, but get reimbursed by the REO lender or asset manager. Other brokers and agents may take a gamble and perform these services free of charge, or without an agreement for reimbursement, in hopes they will obtain listings from the REO lender or asset manager. See Question 23 for further discussion of the risks an agent takes on by paying for the costs of utilities, maintenance, and repairs.

Q 16. ***What form should a real estate agent use for performing property management services for an REO lender or asset management company?***

A Real estate agents may use C.A.R.'s standard form Property Management Agreement (Form PMA) to carefully delineate in writing the scope of their agency relationships. The PMA authorizes a property manager to operate and manage certain real property. Other provisions in the PMA include, but are not limited to, the following:

- Compensate broker for property management, other services, and expenses;

- Require REO lender to carry insurance, including worker's compensation insurance; and

- Indemnify broker and agents from any liability arising from injury upon, or damage to, the real property.

Instead of the C.A.R. standard form, an REO lender may require the use of its own property management agreement. Some lender-prepared documents may contain terms and conditions that are unfavorable to the property manager. Some real estate practitioners believe that REO lenders will not deviate from the boilerplate terms in their documents, but that is not true in every circumstance. Ultimately, it is up to the broker and agent to decide whether to accept the REO lender's terms, reject them, or attempt to change them. At a minimum, brokers and manager should consider establishing office policy prohibiting their agents

from entering into lender-prepared documents without the broker's prior written consent.

Q 17. ***What is a cash-for-keys agreement?***

A In a cash-for-keys agreement, an agent of the REO lender offers to pay a certain sum of money to the occupants of a foreclosed-upon property if the occupants voluntarily vacate the premises in a certain number of days and turn over the keys. For instance, an occupant may be offered $2,500 to vacate within 15 days and release in writing the REO lender and agent from any and all further claims regarding possession of the property.

As background, when a lender acquires property through a trustee's sale, the property may be occupied by the previous owners or tenants of the previous owners, who must be evicted, if at all, through the legal process of an unlawful detainer action. A cash-for-keys agreement avoids what could be a costly, cumbersome, and time-consuming eviction proceeding.

Q 18. ***If someone is occupying the property after the REO lender acquires title through a trustee's sale, can the REO lender or agent resort to self help measures to recover possession of the property?***

A No, that's not a good idea. An REO lender who resorts to self-help measures, such as changing the locks or physically removing the occupants or their belongings from the property, may be held liable under landlord-tenant law for monetary damages under a claim of forcible entry and detainer, and even for return of possession of the premises under a claim of restitution. The REO lender is better off hiring an unlawful detainer attorney or eviction service to regain possession through the legal process. For more information about landlord-tenant laws, and the eviction process, see the C.A.R. legal articles, **Landlord/Tenant Guide for REALTORS®**, and **Unlawful Detainer: the Eviction Process in California**.

Q 19. ***Upon acquiring a property at a trustee's sale, can an REO lender or agent evict the previous owner or the previous owner's tenants?***

A In most cases, yes. Upon acquiring a property at a trustee's sale, an REO lender can commence eviction of the previous owner by serving a three-day notice to quit (Cal. Code of Civ. Proc. § 1161a(b)). As for the previous owner's tenants, the REO lender may commence eviction by serving a 30-day notice to quit (Cal. Code of Civ. Proc. § 1161a(c)) if the lender's deed of trust was recorded before the tenancy was created, as is often the case.

Local rent control ordinances may alter the REO lender's right to evict. REALTORS® are well-advised to refer REO lenders to unlawful detainer attorneys or eviction services to handle any eviction matters. For more general information, members may refer to C.A.R.'s legal article, **Foreclosing on Rental Property**.

Q 20. ***What should an REO lender or agent do if, while an REO property sat vacant, someone apparently gained entry and has taken up residence?***

A The REO lender or agent should first attempt to get the police or sheriff's department to remove the trespasser from the property. However, the law enforcement authorities often deem this to be a "civil matter." In that case, the REO lender and agent are advised not to resort to self help measures (see Question 18), but to seek the help of an unlawful detainer attorney or eviction service instead. The law is unsettled as to whether a notice of termination is required before commencement of an unlawful detainer action against an unauthorized intruder.

Q 21. ***What should an REO lender or agent do if the previous occupants are gone, but they left personal property behind?***

A The REO lender and agent are well advised to take inventory and pictures of the personal property, as well as follow legal procedures for disposing of the personal property left behind. That legal procedure involves, among other things, the service of a Notice of Right to Reclaim Abandoned Property and the eventual sale at a public auction of any property valued at $300 or more. Otherwise, to dispose of someone else's personal property, without that person's consent, exposes the REO lender to unnecessary liability.

As an example, let's say an REO lender does not follow the legal procedures for disposing of personal property left behind. When the REO lender gains possession of a piece of property after foreclosure, the REO lender discovers the previous homeowner left behind a faded and worn-out sofa that appears worthless and abandoned. The REO lender, acting without the previous homeowner's consent, throws out that sofa. That previous homeowner may now sue to recover thousands of dollars from the REO lender under a claim for conversion, by alleging the sofa was an antique or that gold coins were sewn inside the sofa cushions. If instead, the REO lender followed the legal procedures for handling personal property left behind, the REO lender would be shielded from liability with respect to the personal property, as set forth in section 1989 of the California Civil Code. For more information, C.A.R. has a legal article, **Abandoned Personal Property: Disposition of Items Left Behind After Termination of a Tenancy**. This C.A.R. article contains the statutory language for the Notice of Right to Reclaim Abandoned Property.

Q22. ***What should an REO lender and agent do if they discover neglected or "green" swimming pools?***

A Because "green" swimming pools give rise to West Nile Virus concerns, the REO lender and agent should immediately contact their local mosquito control agency to determine their best course of action. Swimming pools that are not maintained may turn "green" over time from the growth of algae and bacteria, which become an ideal breeding ground for mosquitoes. Infected mosquitoes can transmit the West Nile Virus. For more information about the West Nile Virus, including the location of mosquito control agencies, go to **www.westnile.ca.gov**.

Q 23. ***What should a real estate agent do if an REO lender wants the agent to turn on the utility services of a vacant REO property and put them in the agent's name, as well as pay for other costs of maintenance and repair of the REO property?***

A It's up to the broker and agent to decide whether to take on the risk of putting the utility services in the agent's name, as well as paying for other things, such as maintenance and repair costs, taxes, and homeowners' association dues for an REO property. Although the client is a bank, an agent paying for these expenditures runs the risk of not getting reimbursed in full or in a timely manner, if at all. Another risk is the agent may ultimately not get the listing from the REO lender or asset manager. Yet, these expenditures can add up very quickly – locksmiths, gardeners, inspectors, contractors, construction materials, cleaning and staging services. Agents may reduce their risk by getting the REO lender to agree in writing to reimburse the agent within a certain time of receiving an invoice or bill. Furthermore, an agent may require a written listing agreement before taking on the responsibility of paying for these expenditures.

Q 24. ***What should employing brokers do if their agents are willing to pay out of pocket for REO expenses?***

A Brokers should carefully set forth their own position to their agents who work REO properties and are willing to pay out of pocket for the REO lender's expenditures. Brokers should be aware that some agents are inclined to put these invoices and utility bills in the brokerage's name, not the agent's name. Employing brokers may or may not be willing to take on that risk. One suggestion is for the employing broker to issue in writing a new office policy specifically prohibiting agents from placing any invoices or utility bills in the broker's name without the broker's prior written consent.

Q 25. ***What form should a real estate agent use to list an REO property?***

A Real estate agents may use C.A.R.'s standard form Residential Listing Agreement (Form RLA) or, depending on the type of listing or property, one of our other standard form listing agreements. Listing agents are strongly encouraged to require an REO lender to sign a listing agreement. Under the Statute of Frauds, an agreement for a seller to compensate a listing agent must be in writing and signed by the party against whom enforcement is sought (Cal. Civ. Code § 1624(a)(4)). Although the RLA is preferred, a written memorandum that satisfies the Statute of Frauds need not be a formal listing agreement. It may take another form, such as a letter, memo, e-mail, or a combination thereof, containing the essential terms of the listing agreement (Cal. Civ. Code § 1624(b)(3)).

When entering into a listing agreement, an REO lender may require the listing agent to use listing agreements, supplements or other documents that the REO lender drafted and prepared. Some lender-prepared documents may contain terms and conditions that are unfavorable to the listing agent. Some real estate practitioners believe that REO lenders will not deviate from the boilerplate terms in their documents, but that is not true in every circumstance. Ultimately, it is up to the listing agent and broker to decide whether to accept the REO lender's terms, reject them, or attempt to change them. At a minimum, brokers and manager should consider establishing office policy prohibiting their agents from entering into lender-prepared listing agreements or other documents without the broker's prior written consent.

Q 26. ***Can a listing agent for an REO property compensate an asset management company?***

A It depends on the activities and legal organization of the asset management company. A listing agent may agree to compensate an asset management company for performing clerical or administrative services. However, the listing agent cannot compensate an asset manager if the asset manager performs real estate licensed activities without a license, and the asset management company and REO lender are separate legal entities. Real estate licensed activity includes, but is not limited to, selling or negotiating the sale of real property on behalf of another, for compensation or the expectation of compensation (Cal. Bus. & Prof. Code § 10131).

Stated another way, if an asset management company is a separate legal entity from the REO lender, the asset management company cannot, in expectation of compensation, negotiate the sale of real property on behalf of the REO lender, unless the asset management company has a real estate license. It would be a

misdemeanor punishable by a $100 fine for anyone, including an agent or escrow holder, to compensate an asset management company for performing licensed activity that is not known to be or presents evidence of a real estate broker's license (Cal. Bus. & Prof. Code § 10138). A violation of this law by a real estate licensee is also grounds for disciplinary action by the Department of Real Estate (DRE), including license suspension or revocation (Cal. Bus. & Prof. Code § 10138). To look up DRE licensees, go to **http://www2.dre.ca.gov/PublicASP/pplinfo.asp**.

If the asset manager is an employee of the REO lender, an exemption to the licensing laws is available for a regular corporate officer handling real property owned by the corporation, if the acts are not performed by the officer in expectation of special compensation (Cal. Bus. & Prof. Code § 10133(a)(1)). This exemption, however, does not apply to a person using or attempting to use the exemption for the purpose of evading licensing laws (Cal. Bus. & Prof. Code § 10133(b)).

For the payment of a referral fee to an asset management company, see Question 28.

Q 27. *Isn't there an exemption to the licensing laws for banks and their agents?*

A Yes, but not for selling real property on behalf of another. Banks are exempt from the licensing requirements for negotiating loans, but not for negotiating the sale of real property (Cal. Bus. & Prof. Code § 10133.1).

Q 28. *Can a listing agent for an REO property pay a referral fee to an unlicensed asset management company?*

A No, for transactions falling within the Real Estate Settlement Procedures Act (RESPA). RESPA pertains to transactions involving one-to-four residential units with a federally- related mortgage loan, as is often the case. RESPA prohibits a listing agent from, among other things, giving anything of value to an unlicensed person in exchange for the referral of real estate business (12 U.S.C. § 2607(a)). Hence, if a broker or agent has a listing agreement with an REO lender, and the subsequent sales transaction falls within the scope of RESPA, the broker or agent cannot pay a referral fee to a third-party asset management company. The listing agent can, however, make a bona fide payment to an asset management company for actual services rendered (24 C.F.R. § 3500.14(g)(1)), subject to California licensing requirements as discussed in the answer to Question 26. For more information about referral fees, C.A.R. offers members the legal article, **Referral Arrangements**.

Q 29. ***I am the listing agent for an REO property. The seller wants to pay a commission based on the net selling price (i.e., the contract sales price minus seller concessions). How do I put a commission based on the net selling price into the Multiple Listing Service (MLS)?***

A You cannot. The **California Model MLS Rules** require an offer of compensation to MLS participants to be stated in one or a combination of the following forms: (1) a percentage of the gross selling price or (2) a definite dollar amount (Rule 7.12). Although a seller may enter into an agreement to compensate a listing broker based on a net selling price, the listing broker cannot offer compensation in the MLS based on a net selling price. The purpose of this rule is to allow cooperating brokers to determine their compensation with reasonable certainty before finding a ready, willing, and able purchaser for the listed property.

One possible alternative for a listing broker is to anticipate what the seller concessions will be and adjust the offer of compensation in the MLS accordingly. Let's say, for example, a listing agent has a $500,000 listing she wants to place in the MLS at 3% of the net selling price. Assuming that the listing agent estimates the seller concessions to be $10,000 and the sales price to be $500,000, she should enter an offer of compensation in the MLS of 2.94% of the gross selling price (i.e. (($500,000 - $10,000) x 0.03)) ÷ $500,000). Keep in mind that the difference between 3% of a $500,000 gross selling price and a $490,000 net selling price is only $300. Alternatively, the listing broker could offer compensation in the form of a set percentage of the gross selling price minus a set dollar amount. Under the scenario set forth above, the listing broker would offer 3% of the gross selling price minus $300. Either method complies with MLS Rules.

Of course, the gross sales price can be changed during escrow. If the parties to an agreement wish to restate the purchase contract so that the final sales price is a reduced amount to reflect any seller concessions, and the seller and buyer modify the purchase contract to that effect in writing prior to close of escrow, then the commission will be based on the final contractually agreed-upon sales price at the close of escrow. To avoid any potential uncertainty regarding this anticipated scenario up front, it would be permissible for the listing broker to state in the MLS remarks or other appropriate section, "Commission is based on the final contractually agreed-upon sales price at the close of escrow."

III. DISCLOSURE ISSUES

Q 30. ***What are the disclosure requirements for REO sales?***

A An REO lender is subject to certain legally mandated disclosure requirements and is well advised to provide other disclosures. Note, however, if the bank acquires the property by means other than a foreclosure, deed-in-lieu of foreclosure, or a tax sale, then the required disclosures are the same as for the resale of any property by any seller (*See* Cal. Civ. Code § 1102.2(c) and (i)). Please refer to the C.A.R. legal article, **Sales Disclosure Chart for REALTORS®.**

The following is a list of recommended disclosures for a typical REO sale in California--that is the lender acquired the property by foreclosure, deed-in-lieu of foreclosure or a tax sale. An explanation of this recommended list and the C.A.R. forms to use are provided in the answer to Question 33.

- Natural Hazard Disclosure Statement;
- Seller's Affidavit of Nonforeign Status and California Withholding Exemption;
- Megan's Law Disclosure;
- Lead Based Paint Hazards Disclosure;
- C.A.R.'s Combined Hazards Booklet;
- Water Heater and Smoke Detector Statement of Compliance;
- Methamphetamine Laboratory Activity Order;
- Condominium or Other Common Interest Development documents (if applicable);
- Seller Property Questionnaire;
- Statewide Buyer and Seller Advisory;
- Agency Disclosure Statement (applies to agents); and
- Agent's Visual Inspection Disclosure (applies to agents).

In addition to the above disclosures, certain transactions may have additional requirements, including, but not limited to, government inspection or point of sale requirements imposed by local authorities, or special requirements for manufactured homes or government housing.

For a list of legally-mandated disclosures and specific exemptions for REO sales, see Questions 31 and 32.

Q 31. ***What are the legally-mandated disclosures for REO sales?***

A The following is a list of legally-mandated federal and state disclosure requirements for a typical REO sale in California (but see Question 30 for a list of recommended disclosures):

- Natural Hazard Zones;
- Megan's Law Disclosure;
- Lead-Based Paint Hazards Disclosures;
- Smoke Detector Statement of Compliance;
- Water Heater Bracing Statement of Compliance;
- Methamphetamine Laboratory Activity Order;
- Condominium or Other Common Interest Development documents (if applicable); and
- Agency Disclosure Statement (applies to agents).

For more information, C.A.R. provides members with a **Foreclosure and REO Sales Disclosure Chart**. C.A.R. also offers a side-by-side comparison of disclosure requirements for residential sales and REO sales in our **Sales Disclosure Chart for REALTORS®**.

Q 32. ***What are the disclosure requirements from which REO sales are specifically exempt?***

A Most notably, an REO lender is exempt from the linchpin of California disclosure requirements – the Transfer Disclosure Statement (TDS). However, exemption from one requirement, such as the TDS, does not automatically exempt REO transactions from all other disclosure requirements. Nor are REO lenders exempt from any disclosure requirement for other reasons often espoused, such as they have not occupied the property, they are transitional owners, they are out of state lenders, they are self insured, they are relocation companies, or the buyer signed an "as is" clause.

Note, however, if the bank acquires the property by means other than a foreclosure, deed-in-lieu of foreclosure, or a tax sale, then the required disclosures are the same as for the resale of any property by any seller. That

means the bank is not exempt from giving the TDS nor the other exemptions listed below.

The following is a list of disclosure requirements from which REO sales are specifically exempt (but see Question 30 for a list of recommended disclosures):

- Transfer Disclosure Statement (Cal. Civ. Code § 1102.2(c));

- Natural Hazard Disclosure Statement (Cal. Civ. Code § 1103.1(a)(2));

- Mello-Roos Tax and 1915 Bond Act Assessment Notice (Cal. Civ. Code § 1102.6b);

- Supplemental Property Tax Notice (Cal. Civ. Code § 1102.6c);

- Homeowner's Guide to Earthquake Safety (and Residential Earthquake Hazards Report) (Cal. Gov't Code § 8897.1(c)(3));

- Military Ordnance Locations (Cal. Civ. Code § 1102.15);

- Industrial Use Zoning (Cal. Civ. Code § 1102.17); and

- Private Transfer Fee Notice (Cal. Civ. Code § 1102.6e).

Regardless of the above exemptions, an REO lender must nevertheless disclose any actual knowledge of material facts that affect the value or desirability of the property (C.A.R. Form SPQ). The often-quoted legal maxim, "caveat emptor" or "let the buyer beware," does not apply to real estate transactions under California law.

Q 33. *Can you explain the items on your recommended list of disclosures for REO sales?*

A Yes. Here are explanations for the recommended list of disclosure requirements for REO sales, as set forth in Question 30, and what C.A.R. forms to use:

For REO Lenders

- Natural Hazard Disclosure (NHD) Statement (C.A.R. Form NHD): The law on natural hazard zones is confusing. An REO lender is specifically exempt from providing the NHD Statement (Cal. Civ. Code § 1103.1(a)(2)), such as C.A.R.'s standard form NHD. However, an REO lender is not exempt from other provisions of California law requiring sellers to disclose the fact that a property is located in a natural hazard zone. The six natural hazard zones and

corresponding laws requiring disclosure are as follows: Special Flood Hazard Area (Cal. Gov't Code § 8589.3); Area of Potential Flooding (Cal. Gov't Code § 8589.4); Very High Fire Hazard Severity Zone (Cal. Gov't Code § 51183.5); Wildland or State Fire Responsibility Area (Cal. Pub. Res. Code § 4136); Earthquake Fault Zone (Cal. Pub. Res. Code § 2621.9); and Seismic Hazard Zone (Cal. Pub. Res. Code § 2694).

If the law exempts an REO lender from providing the NHD Statement, but not from disclosing natural hazard zones, it makes sense to simply use the NHD Statement anyway to document the required disclosure of natural hazard zones. Moreover, the listing agent is also strongly encouraged to provide the buyer with the NHD Statement, because the law specifically places a duty of disclosing four of the six natural hazard zones on the seller's agent if any (Special Flood Hazard Area, Area of Potential Flooding, Earthquake Fault Zone, and Seismic Hazard Zone). For more information, C.A.R. offers its members the legal article, **Natural Hazard Disclosure Statement**.

• Seller's Affidavit of Nonforeign Status and California Withholding Exemption (C.A.R. Form AS): An REO lender may gain exemption from the federal and state withholding requirements by completing C.A.R.'s Form AS if applicable. Under federal law, a buyer must withhold 10 percent of the sales price from the seller's proceeds, and send that amount to the Internal Revenue Service (IRS), unless an exemption applies (26 U.S.C. § 1445). An exemption is available if, for example, an REO lender provides a written certification using C.A.R.'s Form AS that it is a nonforeign corporation or LLC. For more information, members may refer to C.A.R.'s legal article, **Federal Withholding: The Foreign Investment in Real Property Tax Act (FIRPTA)**.

Similarly, under state law, a buyer must generally withhold 3 1/3 percent of the sales price, and send that amount to the Franchise Tax Board (FTB) unless an exemption applies. An exemption is available if, for example, an REO lender provides a written certification using C.A.R.'s Form AS that it is a corporation or LLC that is either qualified through the California Secretary of State or has a permanent place of business in California (Cal. Rev. & Tax Code § 18662(e)(3)(D)(v)). A corporation has no permanent place of business in California if all of the following apply: (1) It is not organized and existing under the laws of California; (2) It does not qualify with the Secretary of State to transact business in California; and (3) It does not maintain and staff a permanent office in California (Cal. Rev. & Tax Code § 18622(e)(1)(B)). For more information, C.A.R. members may refer to C.A.R.'s legal article, **California Withholding Tax on the Sale of Real Property**.

• Megan's Law Disclosure (C.A.R. Form RPA-CA): An REO sale is not exempt from a seller's duty to disclose the availability of a database of registered sex offenders in at least 8 point type font (Cal. Civ. Code § 2079.10a). The legally required notice is set forth in C.A.R.'s RPA-CA and other purchase agreements.

If, however, an REO lender opts to use its own sales contract, the Megan's Law disclosure may not be included, but is still required. For more information, C.A.R. offers its members the legal article, **Megan's Law: Disclosure of Registered Sex Offenders**.

• Lead-Based Paint Hazards Disclosures (C.A.R. Forms RPA-CA and FLD): An REO sale is not exempt from federal law requiring disclosure of lead-based paint hazards when selling residential properties built before 1978. Briefly, the four lead-based paint requirements are as follows: (1) Provide the buyer with an EPA approved lead hazard pamphlet (such as "Protect Your Family From Lead in Your Home" contained in C.A.R.'s Combined Hazards Book (discussed below)); (2) Provide the buyer with a 10-day opportunity to inspect for lead-based paint hazards, unless otherwise agreed in writing (such as C.A.R.'s standard form California Residential Purchase Agreement (RPA-CA)); (3) Provide a lead-based paint disclosure statement to the buyer (such as C.A.R.'s standard form Lead-Based Paint and Lead-Based Paint Hazards Disclosure (FLD)); and (4) Disclose the presence of any known lead-based paint or lead-based paint hazard in the property (C.A.R. Form FLD) (42 U.S.C. 4852d and 40 C.F.R. § 745.107). For more information, C.A.R. members may refer to the legal article, **Federal Lead Based Paint Hazard Disclosures**.

• C.A.R.'s Combined Hazards Booklet: REO lenders and agents are encouraged to provide C.A.R.'s Combined Hazards booklet to prospective buyers. This Combined Hazards Booklet is a three-part booklet. Part One is the Residential Environmental Hazards booklet, Part Two is "Protect Your Family From Lead in Your Home," and Part Three is the Homeowner's Guide to Earthquake Safety. Part One is not required for any transaction, and REO lenders are specifically exempt from Part Three. However, delivery of the Combined Hazards Book is highly recommended because it provides a valuable shield from liability. By law, delivery of the Combined Hazards Book will be deemed adequate for the seller and broker to inform the buyer about common environmental hazards (Part One) (Cal. Civ. Code § 2079.7(a)) and geologic and seismic hazards in general (Part Three) (Cal. Civ. Code § 2079.8(a)). Part Two of C.A.R.'s Combined Hazards Book, "Protect Your Family From Lead in Your Home," is required for most residential properties built before 1978, including REO transactions.

• Water Heater and Smoke Detector Statement of Compliance (C.A.R. Form WHSD): An REO sale is not exempt from the water heater bracing or smoke detector requirements. With respect to water heater bracing, the seller of any real property containing a water heater must certify in writing to the buyer that an existing residential water heater is properly braced, anchored, or strapped (Cal. Health & Safety Code § 19211). There are no exceptions to this requirement. As for smoke detectors, with certain exemptions not applicable here, the seller of a single-family dwelling or factory-built housing must have an operable smoke detector (Cal. Health & Safety Code § 13113.8(a)). Additionally, the seller must

deliver to the buyer a written statement of compliance with the smoke detector law (Cal. Health & Safety Code § 13113.8(b)). For more information, C.A.R. offers its members two legal articles, **Water Heater Bracing and Disclosure Requirements**, and **Smoke Detector Requirements**.

• Methamphetamine Laboratory Activity Order (C.A.R. Form SPQ): An REO sale is not exempt from the requirement to disclose a meth lab activity order. Under that law, a seller must disclose in writing to a buyer a pending order issued by a local health officer prohibiting the use or occupancy of a property contaminated by meth lab activity. The seller must also give a copy of the pending order to the buyer to acknowledge receipt in writing. (Cal. Health & Safety Code § 25400.28.)

• Condominium or Other Common Interest Development Documents (C.A.R. Form HOA): The seller of a condominium or other separate interest in a common interest development must provide the governing documents and other items to the prospective buyer (Cal. Civ. Code § 1368(a)). There is no exemption from this requirement for REO lenders. The law also requires the homeowners' association to provide these documents to the owner upon written request (Cal. Civ. Code § 1368(b)). For more information, members may refer to C.A.R.'s legal article, **Condominium or Other Common Interest Development Disclosures**.

• Seller Property Questionnaire (C.A.R. Form SPQ): C.A.R.'s standard form SPQ is not a legally required form, but it is recommended for all real estate transactions, including REO sales, because sellers are required to disclose any actual knowledge of material facts that affect the value or desirability of the property (see also Question 35). The often-quoted legal maxim, "caveat emptor" or "let the buyer beware," does not apply to real estate transactions in California. For more information, C.A.R. members may access the legal article, **Seller Property Questionnaire**.

• Statewide Buyer and Seller Advisory (C.A.R. Form SBSA): The SBSA is not a legally required form, but it is recommended for the seller to provide this document to the buyer for any real estate transaction, including an REO sale, for review and acknowledgement of receipt. Agents are also encouraged to provide the SBSA to both the seller and buyer of any real estate transaction. The SBSA advises both the seller and buyer of various factors that may affect a sales transaction. For more information about the SBSA, see Question 35.

For Agents

• Agency Disclosure Statement (C.A.R. Form AD): A real estate agent must provide Agency Disclosure Statements for transactions involving one-to-four residential units, except certain subdivision sales (Cal. Civ. Code § 2079.14). There is no exemption for an REO sale. However, if the seller or buyer refuses to sign an acknowledgement of receipt, the agent shall set forth, sign, and date a

written declaration of the facts of the refusal (Cal. Civ. Code § 2079.15). For more information, C.A.R. has the legal article, **Agency Disclosure and Confirmation**.

• Agent's Visual Inspection Disclosure (C.A.R. Form AVID): A real estate agent in an REO sale is not exempt from his or her duty to conduct a reasonably competent and diligent visual inspection of the property, and to disclose to the buyer all facts materially affecting the value or desirability of the property that an investigation would reveal (Cal. Civ. Code § 2079). Generally, real estate agents use the "Agent's Inspection Disclosure" section on page 3 of the Transfer Disclosure Statement (TDS) to document their visual inspection. However, because REO sales are exempt from the TDS requirement, agents may use the AVID instead to document their visual inspections. For more information, C.A.R. offers members the legal article, **Real Estate Licensee's Duty to Inspect Residential Property**.

Q 34. *What should a listing agent do if an REO lender does not comply with the recommended list of disclosures?*

A If an REO lender or asset manager does not provide one or more of the items set forth in the recommended list of disclosures in Question 30, a prudent listing broker and agent should consider protecting themselves by taking the following steps before close of escrow:

• Write a letter to the REO lender or asset manager requesting the relevant disclosures. The listing agent may attach to that letter C.A.R.'s **Foreclosure and REO Sales Disclosure Chart**.

• Write a second request for disclosures to the REO lender or asset manager.

• Write a letter of confirmation that the REO lender and asset manager have not provided the requested disclosures. Indicate in the letter that it's against the agent's advice not to provide these disclosures. Also indicate that closing escrow without these disclosures may pose serious legal consequences for the REO lender and asset manager. Also indicate that the listing agent strongly recommends for the REO lender and asset manager to seek the advice of an attorney regarding those legal consequences, and instruct the listing broker how to proceed.

• Obtain an acknowledgement of receipt of any correspondence sent to the REO lender or asset manager, or a second best alternative is to retain records demonstrating that the correspondence has been sent (e.g., e-mail receipt, fax transmittal, post office's return receipt, messenger's delivery slip).

• Retain in broker's file all documentation regarding disclosures, and also use conversation logs to document any verbal communications.

Q 35. ***If it is not customary for REO lenders to complete or sign the Seller Property Questionnaire (SPQ), Statewide Buyer and Seller Advisory (SBSA), and other forms, why are they recommended?***

A Regardless of what is customary, it is a good practice for an REO lender to complete and sign the SPQ, because an REO lender has a legal obligation to disclose any known material facts affecting the value or desirability of the property. Although REO lenders may claim to have limited knowledge of the condition of a property, that claim may be contradicted in certain circumstances by inspection reports, status reports, repair estimates, and other documentation that the REO lender has regarding the property. It is also good practice for an REO lender to provide a buyer with the SBSA, because it informs the buyer of various factors that may affect a sales transaction. Finally, it is an excellent practice for a listing agent to have written evidence showing that he or she requested the REO lender to complete and sign certain documents, such as the SPQ and SBSA, but the REO lender has refused, against the agent's advice (see Question 34).

Q 36. ***If an REO lender provides no disclosures whatsoever, what disclosures do you recommend that a listing agent of an REO sale give to a buyer anyway?***

A Given the nominal cost of providing certain disclosures, as well as an agent's duty to disclose certain items, the following is a list of recommended disclosures for a listing broker and agent to provide to a buyer, in the event the REO lender or asset manager does not do so:

• Natural Hazard Disclosure Statement (C.A.R. Form NHD), or NHD report prepared by a third- party disclosure company;

• Megan's Law Disclosure (C.A.R. Form RPA-CA);

• Lead-Based Paint Hazards Disclosure (Agent's Section) (C.A.R. Form FLD);

• Combined Hazards Book published by C.A.R.;

• Agent's Visual Inspection Disclosure (C.A.R. Form AVID); and

• Statewide Buyer and Seller Advisory (C.A.R. Form SBSA).

For an explanation of the items in the above list, see the answer to Question 33. Real estate brokers may, of course, exercise their own business judgment in deciding which disclosures, if any, to provide to a buyer in the event the REO lender does not do so.

Q 37. ***What should a buyer's agent do if an REO lender does not provide any disclosures?***

A If an REO lender or asset manager does not provide the recommended list of disclosures in Question 30, a prudent buyer's broker and agent should consider protecting themselves by taking the following steps before close of escrow:

- Write a letter to the listing agent requesting the relevant disclosures. The buyer's agent may attach to that letter C.A.R.'s **Foreclosure and REO Sales Disclosure Chart**.

- Write a second request for disclosures to the listing agent.

- Write a letter of confirmation to the listing agent that the REO lender and asset manager have not provided the requested disclosures.

- Write a letter to the buyer, attaching the correspondence with the listing broker, indicating that despite his or her best efforts, the buyer's agent has been unable to obtain the relevant disclosures. Indicate that it's against the agent's advice for the buyer to close escrow without these disclosures. Also indicate that closing escrow without these disclosures may pose serious legal consequences for the buyer. Also indicate that the buyer's agent strongly recommends for the buyer to seek the advice of an attorney regarding those legal consequences and instruct the buyer's agent how to proceed.

- Obtain an acknowledgement of receipt for any correspondence sent to the listing agent or buyer, or a second best alternative is to retain records demonstrating that the correspondence has been sent (e.g., email receipt, fax transmittal, post office's return receipt, messenger's delivery slip).

- Retain in broker's file all documentation regarding disclosures, and also use conversation logs to document any verbal communications.

Q 38. ***If an REO lender and listing agent provide no disclosures whatsoever, what disclosures do you recommend that a buyer's agent in an REO sale give to a buyer anyway?***

A Given the nominal cost of providing certain disclosures, as well as a duty to disclose certain items, the following is a list of recommended disclosures for a

buyer's broker and agent to provide to a buyer, in the event the REO lender or listing agent does not do so:

- Megan's Law Disclosure (C.A.R. Form RPA-CA);
- Lead-Based Paint Hazards Disclosure (Agent's Section) (C.A.R. Form FLD);
- Combined Hazards Book published by C.A.R.;
- Agency Disclosure Statement (C.A.R. Form AD);
- Agent's Visual Inspection Disclosure (C.A.R. Form AVID);
- Statewide Buyer and Seller Advisory (C.A.R. Form SBSA); and
- Market Conditions Advisory (C.A.R. Form MCA) (see Question 41).

For an explanation of the items in the above list, see the answer to Question 33. Real estate brokers may, of course, exercise their own business judgment in deciding which disclosures, if any, to provide to a buyer in the event the REO lender does not do so.

IV. BUYERS' AGENTS AND CONTRACT ISSUES

Q 39. *How should a buyer and buyer's agent generally approach an REO transaction?*

A Investigation, investigation, investigation. Because of potential difficulties in consummating an REO sales transaction, buyers and buyers' agents are well advised to do as many budget-conscious research and investigations as possible upfront, before writing an offer. Those investigations may include conducting property inspections, getting cost estimates, searching title and other public records, and getting pre approval for the buyer's mortgage loan. For example, knowing how much the REO lender acquired the property for, at the foreclosure sale, helps to determine how likely a buyer's offer will be accepted. As another example, deciding not to write an offer on an REO property because research revealed that the previous foreclosed-upon homeowner has filed a lis pendens against the property, may be a better option than waiting around, unaware of this title issue, for the REO lender to respond to the buyer's offer.

Q 40. *What form should I use to write an offer for an REO listing?*

A Contact the listing agent for instructions on what form to use, or use C.A.R.'s standard form California Residential Purchase Agreement (RPA-CA) or other

C.A.R. purchase agreement depending on the type of property involved. Different REO lenders have different practices. Some use their own forms, whereas others use the RPA CA, but require the buyer to agree to an addendum drafted by the bank's attorneys.

Q 41. ***What can a buyer's agent do as protection from liability if a buyer is an investor who wants to buy an REO property to rehab and resell?***

A A buyer's agent may want to provide the buyer with C.A.R.'s standard forms Statewide Buyer and Seller Advisory (SBSA) and Market Conditions Advisory (MCA). The SBSA advises the buyer of various risks and concerns when buying property. The MCA advises the buyer that, among other things, it is impossible to predict future market conditions and that it's against the broker's advice to write a non-contingent offer.

Q 42. ***What should I, as the buyer's agent, do if we submitted an offer for an REO property over a week ago, but the listing agent says he has not received any response from the REO lender?***

A You should follow up with the listing agent. Compared to other sellers, REO lenders tend to take a longer time to respond to communications (see Question 5). However, keep in mind that sellers are not legally required to respond to buyers' offers.

Q 43. ***In acting as a buyer's agent, I submitted an offer to an REO lender on C.A.R.'s California Residential Purchase Agreement (RPA-CA). In response, the REO lender gave us a 10-page addendum, but the REO lender didn't sign anything. Some of the provisions in the 10- page addendum appear to contradict the RPA CA, whereas other provisions seem to be unfavorable to the buyer. What should I do?***

A You should advise the buyer in writing of these provisions and strongly encourage the buyer to consult with an attorney. The REO lender's terms and conditions are matters of negotiation for a seller and buyer entering into a purchase agreement. It is the buyer's choice to accept these terms, reject these terms, or attempt to change them. Some real estate practitioners believe that REO lenders will not deviate from the boilerplate terms in their agreements, but that's not true in every circumstance. See Question 45 for examples of potentially unfavorable terms.

As for the absence of the REO lender's signature, that sales contract is unlikely to be binding upon the REO lender at this point in time. But see the discussion in

Question 44 for exceptions to the signature requirement for real property sales contracts.

As for contradictory terms between the RPA-CA and REO lender's addendum, the parties are well advised to clarify these items before entering into a purchase agreement. If not, ambiguous terms will ultimately be interpreted, if necessary, through the legal process by a judge, jury, or arbitrator.

Q 44. *When is a contract formed in an REO transaction?*

A Under the C.A.R. California Residential Purchase Agreement (Form RPA-CA) or other purchase agreements, a contract to sell an REO property is formed in the same manner as other contracts. According to the RPA-CA, contract formation occurs when the buyer (or buyer's agent) personally receives the seller's written acceptance of the buyer's signed offer.

Alternatively, if the seller issues C.A.R.'s standard form Counter Offer (Form CO), contract formation occurs when the seller (or seller's agent) personally receives the buyer's written acceptance of the seller's signed counter offer.

In practice, however, REO lenders may not sign sales contracts. In that situation, it is up to the buyer to seek the advice of an attorney and decide whether or not to take the risk of proceeding as if there's a signed contract.

That a contract for the sale of real property must generally be in writing and signed by the party against whom enforcement is sought is a requirement of the Statute of Frauds (Cal. Civ. Code § 1624(a)(3)). Under certain circumstances, however, a buyer may enforce a sales contract even if an REO lender does not sign on the dotted line of the RPA-CA. For example, a written memorandum that satisfies the Statute of Frauds may take another form, such as a letter, memo, e-mail, or a combination thereof, containing the essential terms of a sales agreement (Cal. Civ. Code § 1624(b)(3)). As another example, an oral agreement to sell real property may be taken out of the Statute of Frauds if the parties subsequently perform on the contract (Cal. Code of Civ. Proc. § 1972). Exactly what constitutes sufficient performance to take an oral agreement out of the Statute of Frauds depends on the specific facts and circumstances of that case.

Q 45. *What are some examples of potentially unfavorable terms for buyers that REO lenders may insert into a sales contract?*

A REO lenders, as well as other sellers, may insert terms into a purchase agreement that are potentially unfavorable and onerous to the buyer, although it

is up to the buyer to weigh any unfavorable terms against favorable terms. Some examples of these unfavorable terms are as follows:

- Requiring a substantial amount for good faith deposit;

- Requiring a buyer to prequalify with the REO lender;

- Requiring an "as is" clause (see Question 46);

- Disallowing buyer contingencies, especially a contingency for sale of buyer's property (see Question 47);

- Allowing contingencies, but deeming them passively waived through the passage of time;

- Refusing to do repairs (although an REO may be more willing to give credit in lieu of repairs) (see Question 47);

- Refusing to pay closing costs;

- Refusing to provide a home warranty plan;

- Refusing to provide disclosures;

- Charging a per diem or daily charge for any delays in closing escrow;

- Requiring hold-harmless agreements; and

- Requiring a buyer to waive other rights.

Q 46. *What should I, as a buyer's agent, do if the REO lender requires the buyer to sign an "as is" clause?*

A The answer here is the same as the first paragraph of the answer to Question 43, which essentially is to allow the buyer to decide whether to accept, reject, or try to renegotiate this term. Sellers often use the words "as is" in an attempt to require the buyer to accept the condition of the property at close of escrow.

However, the legal effect of the two words – "as is" – is questionable. That a buyer agrees that a property is sold "as is" is unlikely, for example, to act as a waiver of the seller's duty to disclose any known material facts affecting the value or desirability of the property, or as a waiver of the seller's duty to comply with the state-mandated water heater bracing and smoke detector retrofit requirements. That a buyer agrees to the words "as is" is also unlikely to prohibit the buyer from subsequently requesting the seller to conduct repairs, although

the seller may refuse to do such repairs under C.A.R.'s California Residential Purchase Agreement (RPA-CA). Finally, that a buyer agrees to the words "as is" in the seller's counter offer makes it unclear as to whether the seller still has a duty to pay for Section One work for wood-destroying pests, as requested in the buyer's offer.

Putting aside the difficulties raised by just adding the two little words, the entire "as is" clause typically required by an REO lender contains additional language that attempts to undercut or waive the buyer's rights. For more information, C.A.R. has a legal article on this subject, **Use of An "As Is" Clause**.

Q 47. *If the REO lender disallows an inspection contingency or refuses to do any repairs, should a buyer have an REO property inspected by a professional home inspector anyway?*

A Yes. Although a home inspection is not legally required, it is an excellent idea for the buyer in an REO transaction to have the property thoroughly inspected by a qualified professional. In a typical resale transaction, the seller occupies the property, personally oversees maintenance and repairs of the property, and provides a prospective buyer with a Transfer Disclosure Statement (TDS) disclosing the defects of the property. In contrast, the typical REO lender does not occupy the property and may not be aware of the condition of the property. An REO lender is not required to provide a TDS, and yet the REO property may be in disrepair (see Question 7).

A professional inspector can assist the prospective buyer in ascertaining the condition of the property, and in certain circumstances, a buyer may also want to call in contractors and other professionals to provide cost estimates for any repairs or renovations. In the event that a buyer elects not to conduct a home inspection, the listing and buyer's agents are strongly encouraged to require the buyer to review and sign C.A.R.'s standard form Buyer's Inspection Waiver (Form BIW).

Q 48. *What should I, as a buyer's agent, do if after close of escrow, we are informed that the REO lender has no keys or garage door openers?*

A It depends on the buyer's contractual rights. Under paragraph 3E of the C.A.R. California Residential Purchase Agreement (Form RPA-CA), the REO lender must provide keys and garage door openers at close of escrow, unless otherwise agreed in writing. If the REO lender has failed to perform accordingly, the buyer as an individual person may seek to recover the reasonable cost of replacing the keys and garage door openers in small claims court up to $7,500. For more information, the California Department of Consumer Affairs has a publication titled **The Small Claims Court: A Guide to Its Practical Use**.

V. ADDITIONAL INFORMATION

Q 49. *Where can I obtain more information?*

A This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit *C.A.R. Online* at **www.car.org**.

Readers who require specific advice should consult an attorney. C.A.R. members requiring legal assistance may contact C.A.R.'s Member Legal Hotline at 213.739.8282, Monday through Friday, 9:00 A.M. to 6:00 P.M. C.A.R. members who are broker-owners, office managers, or Designated REALTORS® may contact the Member Legal Hotline at 213.739.8350 to receive expedited service. Members may also fax or e-mail inquiries to the Member Legal Hotline at 213.480.7724 or **legal_hotline@car.org**. Written correspondence should be addressed to:

CALIFORNIA ASSOCIATION OF REALTORS®
Member Legal Services
525 South Virgil Avenue
Los Angeles, California 90020

The information contained herein is believed accurate as of May 20, 2008. It is intended to provide general answers to general questions and is not intended as a substitute for individual legal advice. Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney.