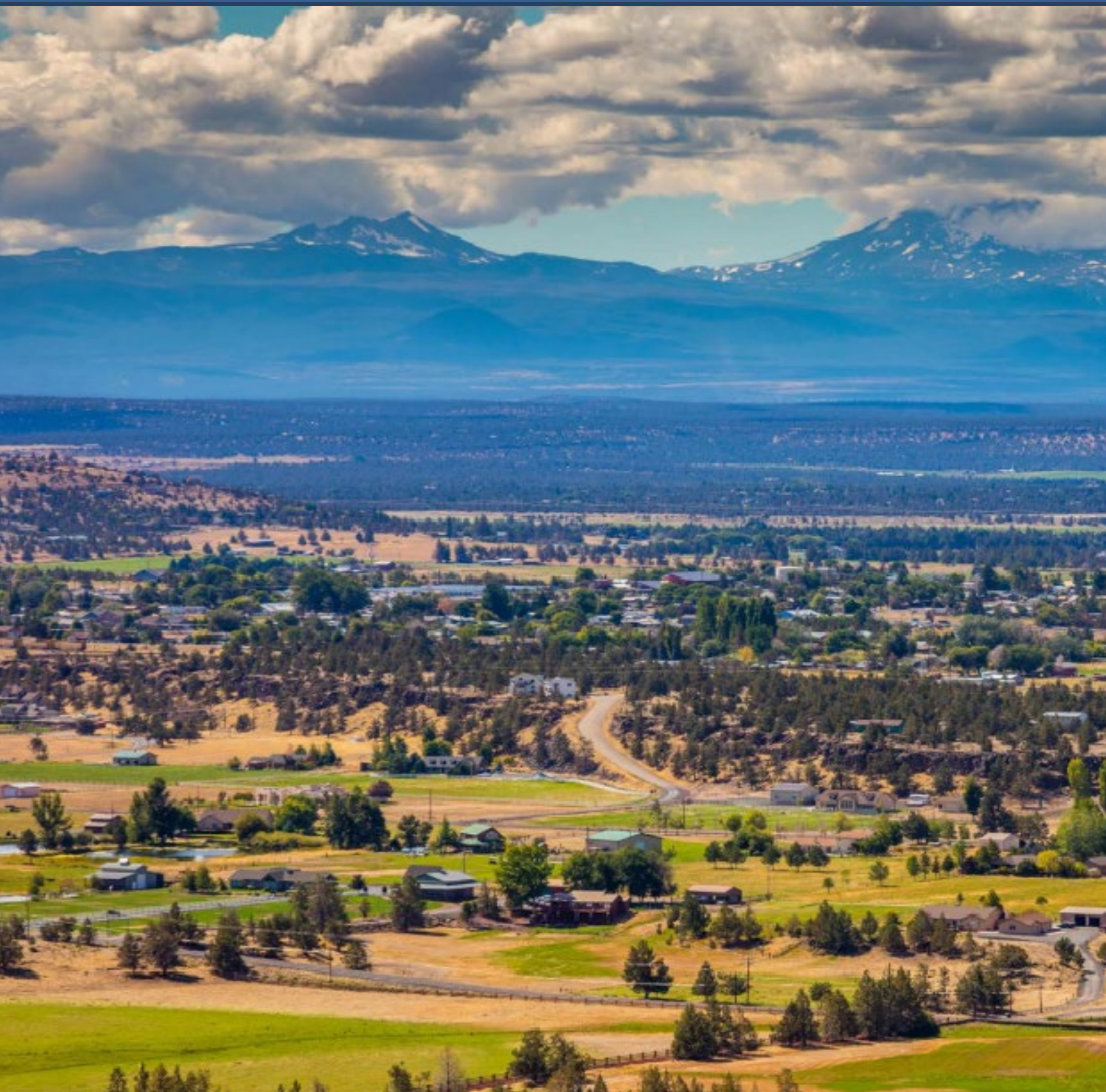
Oregon Real Estate Agency

Regulatory Trends Update

Spring, 2022



ACKNOWLEDGEMENTS

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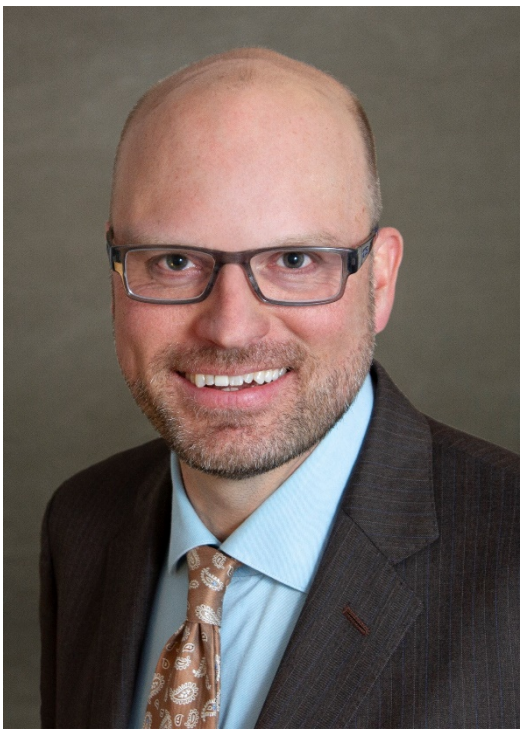

Since joining the Oregon Real Estate Agency in February 2019, I have endeavored to engage with stakeholders as much as possible. While the COVID-19 pandemic halted face-to-face contact for almost two years, virtual engagement continued – mostly through Zoom meetings, phone calls, and emails. More recently, in-person meetings have resumed and the industry remains optimistic about the future of Oregon – and their role in a critical part of the state's economy.

Through this engagement, stakeholders identify issues that are important to them and provide this feedback to Agency staff and me. Some of these issues relate to Agency operations, while others relate to suggested statute or rule changes. In order to provide stakeholders additional insight, we are providing this Regulatory Trends document to provide a response and additional context to questions that have been presented to us.

Please keep in mind that the topics covered here are not advocating any particular statute or rule change. Moreover, where we refer to legislation from other jurisdictions, they are samples only – and by no means the only viable path forward. We hope that stakeholders find the information useful to help determine their future legislative or rulemaking priorities.

Sincerely,

DESCRIPTION OF THE OREGON REAL ESTATE AGENCY

Agency Mission

The mission of the Oregon Real Estate Agency (OREA) is to provide quality protection for Oregon consumers of real estate, escrow, and land development services, balanced with a professional environment conducive to a healthy market atmosphere.

Who We Are

The OREA is a stand-alone Executive Branch Agency of the State of Oregon comprised of 29-full-time employees. It is charged with administering professional real estate licensing and regulating Oregon real estate license law under Oregon Revised Statute (ORS) Chapter 696. The Real Estate Commissioner, who is appointed by the Governor and is an employee of the state, directs the Agency. The Commissioner oversees the administration of the Agency and is responsible for assessing sanctions for license law violations.

The Commissioner must have industry experience but does not hold an active Oregon real estate license while serving in this role. Additionally, Agency staff do not hold active licenses while employed by OREA. Per ORS 696.232, "The license status of a real estate licensee employed by the Real Estate Agency shall be placed on hold at the time that the real estate licensee commences employment with the agency." This restriction is unlike many real estate commissions nationwide where the director of a Commission may also be an active market participant. Oregon's model is intended to ensure better regulatory independence between OREA staff and the regulated community. Instead of a "Commission" of active market participants who also make regulatory decisions, Oregon has a "Commissioner" whose actions are not affecting their own real estate business. It is the Commissioner's responsibility to remain engaged and up-to-date on industry practices and regulatory trends statewide and nationwide.

The Oregon Real Estate Board is a nine-member advisory board with authority to waive license experience requirements for principal broker applicants, approve qualifications for continuing education provider applicants, and advise the Governor, Commissioner and Agency on law, rule, and policy. The Board also has statutory authority for approving the Law and Rule Required Course (LARRC) outline each biennium.

Our Regulatory Guiding Principles

Our guiding principles are those of regulatory effectiveness, appropriateness, and adaptability to change. We regulate from a perspective of consumer and licensee impact. We are dedicated to adaptability as the practice evolves. In collaboration with our stakeholders, we continually evaluate our governing regulatory framework, within the context of the current market atmosphere.

COMMISSION SHARING / REBATES

Oregon is one of nine states that ban licensees from paying part of their commission in the form of a rebate to consumers. The other states are Alabama, Alaska, Iowa, Kansas, Mississippi, Missouri, and Oklahoma. A number of brokerage models have developed nationwide which promise a portion of the buyer's agent commission to be paid to the buyer at closing.

CURRENT STATUTE

ORS 696.290 states that an Oregon licensee "may not offer, promise, allow, give, pay or rebate, directly or indirectly, any part or share of the licensee's compensation arising or accruing from any real estate transaction or pay a finder's fee to any person who is not a real estate licensee…"

REGULATORY CONSIDERATIONS

OREA's position is that a buyer's agent may set their own fees as long as the buyer's agent follows the "notice of compensation" provisions outlined in ORS 696.582. A buyer's agent may negotiate a commission that is different from the "offer of compensation" made on a Multiple Listing Service (MLS), and MLS compensation policies fall outside of the Agency's regulatory authority.

The Agency does not have the authority to regulate what commission or fee a seller's agent charges a seller or what a buyer's agent may request the seller to pay from that commission in a co-broke transaction.

Rather than offering a rebate to a buyer at close of escrow as done in other jurisdictions, a buyer's agent in Oregon is free to negotiate a reduced commission and reduce the sales price a corresponding amount – thus affording the seller to realize the same net proceeds. This lower price can benefit the consumer too, such as lowering the principal amount if the purchase is being financed, and other title, escrow, and transfer fees tied to purchase price.

An inherent problem with this scenario is the historical lack of transparency with respect to buyer's agent commissions. It is not required, nor is it a common practice, for brokers in Oregon to use Buyer Representation Agreements. In such agreements, it is clear to a buyer what a buyer's agent is charging for their services. Also historically, the offer of compensation from seller to buyer's agent was not shared publicly with consumers. Because of business practices, and despite the potential higher long-term costs of rebates versus reduced commissions coupled with sales prices, allowing rebates could be perceived as a consumer-friendly solution.

Note: OREA listed commission sharing and rebates as policy consideration in its budget narrative in the Fall 2020. Later that year, a lawsuit was filed challenging ORS 696.290 (*REX v. Brown et al*). Since this topic was identified prior to the lawsuit, we are still including it in our Regulatory Trends update for stakeholders' discussion. We will not be able to comment on the specifics of pending litigation, however.

POSSIBLE STATUTE / RULE CHANGE

ORS 696.290 could be amended to allow paying rebates. An appropriate limitation would be allowing such rebates to be paid to principals in the transaction only.

WHOLESALING

The practice of wholesaling occurs when an individual or entity enters into a real estate purchase contract with a seller and subsequently markets and sells the assignment of that contract to a third party. The originator of the contract does not intend to hold title to the property but instead realize a profit for their role in finding an assignee who will purchase the contract.

CURRENT STATUTE

None

REGULATORY CONSIDERATIONS

There is concern that the practice of wholesaling can create consumer harm for the most vulnerable. Individuals who engage in wholesaling are generally engaged in this as a real estate investing tool but are exempt from the duties and responsibilities required of real estate licensees. By comparison, real estate licensees are required to disclose when they are principals in a transaction since there is understanding that they have an above-average level of real estate knowledge about market conditions.

OREA recognizes wholesaling as a business model. It provides a service for homeowners who may desire an easy exit from their property. However, in our experience, we know that consumer confusion exists about this unregulated activity. For example, the Agency receives complaints from home sellers who enter into contracts and then see their properties listed on Craigslist for a higher price. They feel that they were not fully informed and that they are losing money.

POSSIBLE STATUTE / RULE CHANGE

Using another jurisdiction as an example, Oklahoma amended their statutes to address wholesaling. A recent article from the Association of Real Estate License Law Officials (ARELLO, of which OREA is a member) shared the details:

- Anyone marketing an equitable interest in a contract for real property must obtain a real estate license.
- The licensure of these individuals assures there is a minimum level of competency and that practitioners have passed a background check.
- With the activity under the state's regulatory authority, consumers have a cost-free avenue to file complaints.

Oregon could expand the definition of professional real estate activity to cover wholesaling, too.

LICENSE RECIPROCITY AND PORTABILITY

Individuals licensed in other jurisdictions who seek to obtain Oregon real estate licenses must generally take all the same pre-licensing education and successfully pass the same pre-license examination as someone who has never been licensed. A few exceptions exist as permitted by longstanding statute and recent legislation.

Statute has long permitted the Commissioner to enter into reciprocity agreements with individual jurisdictions. For over twenty years, Oregon has had reciprocity agreements with Alabama, Nebraska, South Dakota, Georgia, and Alberta. In 2019, House Bill 3030 was passed, requiring all licensing boards and agencies issue temporary licenses to spouses of active military personnel who hold an occupational license in another jurisdiction and who relocate to Oregon.

CURRENT STATUTE

ORS 696.265 grants the Commissioner the authority to prescribe by rule the terms and conditions for license recognition of a nonresident real estate brokers and enter into reciprocity agreements with other states and countries. The corresponding rules are found in Oregon Administrative Rule (OAR) 863-014-0080.

REGULATORY CONSIDERATIONS

OREA has researched the variety of models existing nationwide and in Canada and found there is no single best practice. ARELLO has written extensively on the topics of license recognition and reciprocity, with a position paper first drafted in 2009 and amended at least four times subsequently.

Removing barriers to licensure is part of a larger regulatory trend across all occupational licensing categories. Such efforts will need to be tailored to the occupation based on potential risk to consumers. Organizations such as the Council for State Governments, and federal agencies such as the Federal Trade Commission, have written on the topic and convened work groups with names such as “The Economic Liberty Force.” The FTC task force, for example, wrote, “(L)icense portability restrictions often prevent otherwise qualified people from marketing their services across state lines or when they move to a new state.”

Arizona is often cited as among the most generous in offering full reciprocity. An Arizona resident who holds an out-of-state license active for more than one year, in good standing (no disciplinary action or active investigations), may simply apply for an Arizona real estate license.

Real estate statutes, rules, and marketplace conditions vary widely from state to state. Of those states which offer some sort of license recognition, many take a partial reciprocity approach. For example, jurisdictions have a state and national portion of pre-license education along with two examinations – the “National” test and “State” test. To facilitate licensure and streamline the process, some states recognize an applicant’s successful completion of the national portion; an applicant only needs to complete state-specific coursework and pass the state exam.

POSSIBLE STATUTE / RULE CHANGE

ORS chapter 696 could be amended to address license recognition from across all jurisdictions. Alternatively, a rulemaking group could be convened to update OAR 863-014-0080 related to state-by-state reciprocity agreements.

INITIAL AGENCY DISCLOSURE PAMPHLET – BROKER AND PRINCIPAL BROKER

Real estate brokers and principal brokers must provide an initial agency disclosure pamphlet at first contact with each party to a real estate transaction. First contact includes in person, telephone, internet, and email.

CURRENT STATUTE

ORS 696.820 provides the regulatory authority for the Commissioner to prescribe by rule the format and content of the initial agency disclosure pamphlet. It shall be information only and not be evidence of the intent to create an agency relationship. Agent obligations for buyer's agent, seller's agent, and disclosed limited agent are outlined in ORS 696.805-696.815.

REGULATORY CONSIDERATIONS

Consumer advocacy groups such as Consumer Federation of America have written extensively on the need to better educate consumers about an agent's duties and responsibilities in a transaction. Jurisdictions vary widely on how these duties and responsibilities are conveyed to consumers.

OAR 863-015-0215 outlines the requirement for the Initial Agency Disclosure Pamphlet. Based on review of other jurisdictions' forms and practices, as well as consumer advocacy publications, OREA has identified some areas that could be more perceived as offering better consumer protection. For example:

- Identify consumer's name, broker's name (if applicable), and principal broker's name to ensure proper record-keeping and offer a resource to consumers if issues arise that need to be escalated to principal broker.
- Identify on the pamphlet the date in which it was given to consumer – in print or electronically – to better safeguard against the concern that forms are often first being delivered at the same time a contract is drafted.
- Remove or correct ambiguous language, such as "an agent need not provide a copy of the initial agency disclosure pamphlet to a party who has, or may be reasonably assumed to have, received a copy of the pamphlet from another agent." This current language allows one licensee to rely on the assumption that another licensee has properly explained the pamphlet at some unknown time in the past. It creates no obligation for a licensee to verify.
- Update language to more user-friendly "plain English," as well as translate to other language(s) such as Spanish.
- Offer additional consumer resource information about the Oregon Real Estate Agency and how to check a licensee's current status and prior administrative actions, if any.

POSSIBLE STATUTE / RULE CHANGES

Most of the requirements related to the disclosure pamphlet are defined in rule, so adopting best practices such as those identified above could be accomplished through a rulemaking work group.

PROPERTY MANAGER SURETY BONDS

Real estate licensees routinely handle large sums of clients' funds. Misappropriation of funds by licensees, while infrequent, cause considerable consumer harm. OREA has the regulatory authority to sanction a licensee as well as seek a court receivership for more serious violations. While escrow agents and real estate marketing organizations (REMO)are currently subject to bonding requirements or deposits in lieu of bonds, such requirements do not exist for real estate licensees engaged in property management.

CURRENT STATUTE

ORS 696.525 outlines the requirements for escrow agents to deposit with the Real Estate Commissioner a corporate surety bond running to the State of Oregon. The amount is based on total annual receipts for clients' trust funds, with bond amounts ranging from a minimum of $50,000 to a maximum of $500,000. ORS 696.527 allows escrow agents to make deposits in lieu of funds with the State Treasurer.

ORS 696.606 outlines similar requirements for REMOs, requiring that each REMO obtains a surety bond of $35,000 or deposit the same with the Commissioner to be held in trust.

REGULATORY CONSIDERATIONS

Property managers hold considerable sums of clients' cash in trust accounts. During clients' trust account reviews, and during investigations prompted by consumer complaints, OREA has identified examples of significant theft by property managers.

In a recent example in which OREA had to seek a court-appointed receiver, the receiver estimates that the property manager misappropriated over $200,000 in client funds. Aside from revoking the property manager's license, OREA's only other options are to turn over the investigation to law enforcement and recommend that the consumers seek legal advice for possible civil action.

A statutory change to require surety bonds would offer additional consumer protection. OREA has not investigated the cost impact on small business or how it would affect an individual's ability to obtain licensure. Depending on one's regulatory philosophy, it could be perceived as either an excessive burden or an effective additional safeguard to property owners and consumers.

POSSIBLE STATUE / RULE CHANGE

ORS 696 could be amended to require all licensees who engage in property management to obtain surety bonds, deposit the equivalent into an account with the State Treasurer, or deposit the equivalent with the Commissioner to be held in trust.

The amount of the bond could be a sliding scale, similar to the formula used by escrow agents, or flat amount as in the REMO model.

TEAM REGULATION

Real estate teams operate as a business-within-a-business. In a team environment, a licensee or multiple licensees, with support staff, operate under the umbrella of a registered business name (RBN). From a regulatory standpoint, OREA is most concerned about proper supervision and transparency. By operating as a distinct group within a brokerage, clear direction about supervision must exist for all members of the team. Additionally, consumers must readily know who to turn to for help should they need to escalate an issue during the transaction.

CURRENT STATUTE

If two or more principal real estate brokers are associated with the same RBN, ORS 696.310 requires the principal real estate brokers to execute written supervisory agreements. These agreements are intended to clarify for brokers within that RBN which principal brokers have supervisory control over an individual or group of brokers.

Currently, no broker within a team is required to hold a principal broker license. OREA has left the decision up to principal brokers to decide by company policy if they retain supervisory authority for teams within their RBN or require each "team leader" (a term not currently defined in statute or rule) obtain a principal broker license. Historically, OREA has not regulated business practice to that level of specificity. But since the topic resurfaces frequently in broker forums, committee meetings, and OREA presentations, we are including it in this update.

REGULATORY CONSIDERATIONS

The topic of team regulations is common across jurisdictions. Several years ago, ARELLO published a "Law & Regulation Subcommittee Report on Teams." On the whole, Oregon's approach shares similarities with many other jurisdictions.

A couple takeaways from the report may offer ideas or guidance to Oregon stakeholders considering change. First is one that Oregon already addresses in rule; the registered business name must feature conspicuously in all advertising, and licensees may also use their team name. However, two states (Maryland and Nebraska) have a proximity requirement that could provide additional clarity - the team name must be adjacent to, and only used in conjunction with, the registered business name. Next, Oregon stakeholders have been suggesting that the "team leader" must also hold a principal broker license since the leader may assume some supervisory authority in carrying out day-to-day functions. From the ARELLO report, "(E)ven in those jurisdictions where teams are expressly organized…teams remain subject to the direct supervision of the employing broker." With Oregon's existing requirement for written supervisory agreements among multiple principal brokers, a clear path for statutory change may already exist that could enable Oregon to adopt a different but effective solution.

POSSIBLE STATUTE / RULE CHANGE

Team and team leader could be defined in statute. A team leader who leads other licensees within an RBN could be required to obtain a principal broker license.

INITIAL AGENCY DISCLOSURE PAMPHLET – PROPERTY MANAGERS

As discussed earlier, real estate brokers and principal brokers must provide an initial agency disclosure pamphlet at first contact with each party to a real estate transaction. First contact includes in person, telephone, internet, and email. This requirement does not apply to property managers.

CURRENT STATUTE

ORS 696.820 provides the regulatory authority for the Commissioner to prescribe by rule the format and content of the initial agency disclosure pamphlet to be given to buyers and sellers; there is no corresponding equivalent for property managers to provide such a pamphlet to property owners.

REGULATORY CONSIDERATIONS

Property managers are required to have written and unexpired property management agreements (PMA) with owners. OAR 863-025-0020 outlines what must be contained in the PMA.

While the key obligations of a property manager to owner are required to be in a PMA, current statute and rule do not ensure they are communicated in a consumer-friendly format.

In OREA's experience, property owners can be unsure of what their property manager's obligations are to them.

POSSIBLE STATUTE / RULE CHANGE

Statue and/or rule could be amended to require an Initial Agency Disclosure Pamphlet be provided to property owners, following the current requirements for brokers to sellers and buyers.