

## B-Engrossed Senate Bill 1101

Ordered by the House February 19  
Including Senate Amendments dated February 11 and House Amendments  
dated February 19

Sponsored by Senator KRUSE; Senators FERRIOLI, G GEORGE, L GEORGE, NELSON, STARR, WHITSETT,  
WINTERS (Pre-session filed.)

### SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Limits requirement for withholding funds in real estate transfer involving nonresident transferor to authorized agent. Provides that authorized agent may rely on transferor's written affirmation in determining amount of includable gain. Requires attorney to withhold funds *[if]* **unless** licensed escrow agent *[fails to comply with withholding requirements]* **is providing services in conveyance**. Permits Department of Revenue to recover penalty for noncompliance with withholding requirements. **Provides exception to requirements for licensed escrow agents if attorney also providing services in conveyance.**

Applies to conveyances occurring on or after January 1, 2008. Exempts withholdings made or exemptions accepted prior to effective date of Act if in compliance with law existing before effective date.

Takes effect on 91st day following adjournment sine die.

### A BILL FOR AN ACT

1  
2 Relating to withholding of income tax in real estate transfers; creating new provisions; amending  
3 ORS 314.258 and 696.581; and prescribing an effective date.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 314.258 is amended to read:

6 314.258. (1) As used in this section:

7 (a) "Authorized agent" means an agent who is responsible for closing and settlement services  
8 in a conveyance *[of a real property interest]*.

9 (b) "Closing and settlement services" means services that are provided *[for the benefit of a*  
10 *transferor or a transferee in connection with a conveyance of a real property interest, and the receipt*  
11 *or disbursement of moneys in connection with a sale, lease, encumbrance, mortgage or deed of trust in*  
12 *or related to real property.] by:*

13 **(A) A licensed escrow agent in a real estate closing escrow as provided in ORS 696.505**  
14 **to 696.590; or**

15 **(B) An attorney for the benefit of a transferor or a transferee in a conveyance, if, si-**  
16 **multaneously with the conveyance, the attorney deposits the unpaid purchase price into the**  
17 **attorney's client trust account for disbursement pursuant to the written instructions of, or the**  
18 **agreement between, the transferor and transferee.**

19 **(c) "Consideration" includes the amount of cash paid for a conveyance and the amount**  
20 **of any lien, mortgage, contract, indebtedness or other encumbrance existing against the**  
21 **property conveyed to which the property remains subject or which the purchaser agrees to**  
22 **pay or assume.**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.  
New sections are in **boldfaced** type.

1        [(c)] **(d)** “Conveyance” means [*a sale, lease, encumbrance, mortgage or creation of a secured in-*  
2 *terest in real property.*] **a transfer or a contract to transfer fee title to any real estate located**  
3 **in the State of Oregon.**

4        **(e) “Net proceeds” means the net amount to be disbursed to the transferor, prior to re-**  
5 **duction for withholding, as shown on the transferor’s settlement statement for the**  
6 **conveyance.**

7        [(d)] *“Real property interest” means a United States real property interest, as defined in section*  
8 *897(c) of the Internal Revenue Code, that is located in the State of Oregon.*]

9        **(f) “Transferor” means:**

10        **(A) An individual who is not a resident of this state, as defined in ORS 316.027, on the**  
11 **closing date of the conveyance; or**

12        **(B) A corporation taxed under section 11 of the Internal Revenue Code and subchapter**  
13 **C, chapter 1 of the Internal Revenue Code, that is not domiciled in this state or that is not**  
14 **registered or otherwise qualified to do business in this state on the closing date of the**  
15 **conveyance.**

16        (2)[(a) *If there is a conveyance of a real property interest, the*] **An authorized agent providing**  
17 **closing and settlement services in a conveyance is required to withhold from consideration pay-**  
18 **able to a transferor an amount equal to the least of:**

19        [(A)] **(a)** Four percent of the consideration for the [*real property interest being conveyed*]  
20 **conveyance;**

21        [(B)] **(b)** [*Four percent of*] The net proceeds resulting from the conveyance; or

22        [(C)] **(c)** [*Ten*] **Eight** percent of the gain includable in **the transferor’s Oregon** taxable income.  
23 **In arriving at this amount, the authorized agent may rely upon the transferor’s written af-**  
24 **firmation of the amount of includable gain.**

25        [(b) *For purposes of this subsection, a transferor is:*]

26        [(A) *An individual who is not a resident of this state at the time of both the closing date of the*  
27 *conveyance and the date on which proceeds of the conveyance are disbursed; or*]

28        [(B) *A C corporation that, immediately after the conveyance of the real property interest, is not*  
29 *doing business in this state.*]

30        (3)[(a) *Notwithstanding subsection (2) of this section,*] **An authorized agent is not required to**  
31 **withhold amounts under this section if** [*the authorized agent obtains a written affirmation executed*  
32 *by the transferor on a form prescribed by the Department of Revenue certifying under penalty of per-*  
33 *jury that*]:

34        [(A)] **(a)** The consideration for the conveyance does not exceed \$100,000;

35        [(B) *The transferee is acquiring the real property interest through foreclosure; or*]

36        **(b) The conveyance is pursuant to a judicial foreclosure proceeding, a writ of execution,**  
37 **a nonjudicial foreclosure of a trust deed or a nonjudicial forfeiture of a land sale contract;**

38        **(c) The conveyance is in lieu of foreclosure of a mortgage, trust deed or other security**  
39 **instrument or a land sale contract with no additional monetary consideration;**

40        **(d) The transferor is a personal representative, executor, conservator, bankruptcy trustee**  
41 **or other person acting under judicial review;**

42        **(e) The transferor delivers to the authorized agent a written assurance as provided in**  
43 **section 6045(e) of the Internal Revenue Code that the sale or exchange qualifies for exclusion**  
44 **of gain under section 121 of the Internal Revenue Code;**

45        **(f) The authorized agent obtains a written affirmation that the transferor is unlikely to**

1 **owe Oregon income tax as a result of the conveyance;**

2 **(g) The amount that would be withheld under subsection (2) of this section is less than**  
3 **\$100, or less than a minimum amount established by rule by the Department of Revenue; or**

4 **(h) The authorized agent is an attorney and a licensed escrow agent is providing services**  
5 **in the conveyance.**

6 *[(C) The transferor:]*

7 *[(i) If an individual, is a resident of this state;]*

8 *[(ii) If a corporation, has a permanent place of business in this state; or]*

9 *[(iii) Has professionally competent knowledge or advice that the transferor will not owe tax under*  
10 *ORS chapter 316, 317 or 318 for the tax year because the conveyance is an exchange that qualifies for*  
11 *deferral under section 1031 or 1033 of the Internal Revenue Code or is a nontaxable transaction under*  
12 *Oregon tax law.]*

13 *[(b) If withholding is not retained and remitted to the department pursuant to this section, the au-*  
14 *thorized agent shall retain the written affirmation described in this subsection for six years from the*  
15 *date of the closing of the conveyance transaction and shall present the written affirmation to the de-*  
16 *partment immediately upon request in writing from the department.]*

17 *[(4) For purposes of this section, a corporation is not doing business in this state if:]*

18 *[(a) The corporation has not been issued a certificate of existence or a certificate of authorization*  
19 *by the Secretary of State as described in ORS 60.027; and]*

20 *[(b) The corporation does not maintain a permanent office with a staff of at least one employee in*  
21 *this state or does not own or lease property in this state other than the property that is the subject of*  
22 *the conveyance.]*

23 *[(5)(a)]* **(4)(a) Amounts withheld pursuant to this section are held in trust for the State of Oregon**  
24 **and shall be paid to the department in the time and manner prescribed by the department by rule.**

25 **(b) If an authorized agent fails to remit an amount withheld [or required to be withheld] by the**  
26 **agent under this section by the time remittance is required, the department may [enforce collection**  
27 **in the same manner as the department enforces the collection of amounts withheld by employers under**  
28 **ORS 316.162 to 316.221] recover from the authorized agent the amount withheld with interest**  
29 **at the rate established under ORS 305.220.**

30 **(c) If an authorized agent fails to withhold when withholding is required under this sec-**  
31 **tion, the department may recover a penalty not to exceed the greater of:**

32 **(A) \$500; or**

33 **(B) 10 percent of the amount required to be withheld under this section, but not more**  
34 **than \$2,500.**

35 *[(c)]* **(d) [Notwithstanding paragraph (b) of this subsection,]** The department may not proceed with  
36 collection actions against the authorized agent if the authorized agent:

37 *[(A) Presents the department with the written affirmation described in subsection (3) of this section;*  
38 *and]*

39 **(A) Withholds the required amount in connection with a conveyance and timely remits**  
40 **the funds to the department;**

41 **(B) Is not required to withhold an amount under this section; or**

42 *[(B)]* **(C) Demonstrates to the department that the authorized agent obtained [the] a written af-**  
43 **firmation as described in this section or an assurance as provided in section 6045(e) of the**  
44 **Internal Revenue Code** prior to disbursement of funds due the transferor resulting from the  
45 conveyance.

1 (e) A transferor may claim the amount withheld by an authorized agent on the  
2 transferor's personal income tax return or corporate income tax return or excise tax return.

3 (f) Notwithstanding ORS 696.581 (2), an authorized agent may withhold funds under this  
4 section without written instructions to withhold from the transferor.

5 (g) A written affirmation, as provided under this section, shall be executed by the  
6 transferor or the transferor's tax advisor under penalty of perjury and shall contain the  
7 transferor's taxpayer identification number. The authorized agent shall retain for six years  
8 from the date of the closing of the conveyance any written affirmation obtained by the agent  
9 in connection with the conveyance. The department shall prescribe by rule the form and  
10 content of the written affirmation and procedures for submission to the department of the  
11 information contained in the written affirmation.

12 (h) It shall be a defense to any claim by the department or by a transferor against an  
13 agent that the agent has acted in reasonable reliance upon representations made by the  
14 transferor or the transferor's tax advisor.

15 **SECTION 2.** ORS 696.581 is amended to read:

16 696.581. (1) An escrow agent may not accept funds, property or documents in any escrow  
17 transaction without dated, written escrow instructions from the principals to the transaction or a  
18 dated executed agreement in writing between the principals to the transaction.

19 (2) **Except as provided in ORS 314.258**, an escrow agent may not close an escrow or disburse  
20 any funds or property in an escrow without obtaining dated, separate escrow instructions in writing  
21 from the principals to the transaction adequate to administer and close the transaction or, in the  
22 case of disbursement, to disburse the funds and property.

23 (3) The following statement or its substantial equivalent shall appear on or be attached to all  
24 written escrow instructions prepared by an escrow agent for signature of the principals to a trans-  
25 action. The statement shall be in at least 10-point bold type. The statement shall either appear im-  
26 mediately above the signatures of the principals or be separately initialed by the principals:

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27  
28  
29 It is understood by the parties signing the above or attached instructions that the instructions  
30 are the complete instructions between this firm as an escrow agent and you as a principal to the  
31 escrow transaction. These instructions may not include all the terms of the agreement which is the  
32 subject of this escrow. Read these instructions carefully, and do not sign them unless they are ac-  
33 ceptable to you.

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35  
36 (4) An escrow agent may not solicit or accept any original, amended or supplemental escrow  
37 instructions containing any blank to be filled in after signing. An escrow agent shall not allow any  
38 alteration of original, amended or supplemental escrow instructions, unless the alteration is signed  
39 or initialed by all principals who signed or initialed the instructions before the alteration.

40 (5) An escrow agent may accept client funds, in excess of earnest money required in transaction  
41 documents to be held, as individual funds of the principal who has paid them into escrow. Such  
42 individual funds may be disbursed with only the separate written instructions of the principal who  
43 deposited the funds into escrow.

44 (6) An escrow agent may open a one-sided escrow, as defined by rule by the Real Estate Com-  
45 missioner. Such escrow funds may be disbursed with only the separate written instructions of the

1 principal who deposited the funds into escrow.

2 (7) Except as authorized in ORS 105.475, notwithstanding the requirement for dated, separate  
3 escrow instructions to close an escrow or disburse funds or property in an escrow, an escrow agent:

4 (a) May disburse earnest money deposited based on an agreement of the parties executed after  
5 the initial sales agreement; and

6 (b) May not impose additional requirements on the principals to the transaction, including a  
7 requirement that the principals sign a release of liability in favor of the escrow agent.

8 **SECTION 3. The amendments to ORS 314.258 and 696.581 by sections 1 and 2 of this 2008**  
9 **Act apply to conveyances occurring on or after January 1, 2008. Any withholding made or**  
10 **exemption accepted by an agent in accordance with ORS 314.258 before the effective date of**  
11 **this 2008 Act is deemed to be in compliance with this 2008 Act.**

12 **SECTION 4. This 2008 Act takes effect on the 91st day after the date on which the special**  
13 **session of the Seventy-fourth Legislative Assembly adjourns sine die.**

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