



The Duty to Disclose

California

Harlow T. Spaan, N. Jeffrey Sorg

California Bureau of Real Estate Disclaimer: This course is approved for continuing education credit by the California Bureau of Real Estate. However, this approval does not constitute an endorsement of the views or opinions that are expressed by the course sponsor, instructor, authors or lecturers.

OnlineEd Disclaimer: The California Bureau of Real Estate does not approve nor endorse any of the forms used in this course with the exception of those prescribed by State and Federal Law. While this publication is designed to be accurate information about the subject matter it covers, it is sold with the understanding that the distributor, author, and publisher are not engaged in rendering legal, accounting or other professional advice. If such advice or other expert assistance is required, the services of a competent professional should be sought. The recipient is cautioned to check with their managing supervisor before acting on any suggestion or recommendation, or before using any sample form contained herein.

©2007-2016 by Sorg and Spaan, LLC, ALL RIGHTS RESERVED. Duplication or transmission is not permitted. United States of America and foreign copyright laws protect this publication. The text of this publication, or any part thereof, may not be reproduced in any manner whatsoever without written permission from the copyright holders. Permission is granted to print the material on this page for personal use only.

VERSION 2016-02-09

CONTENTS

Chapter 1: The Disclosure of Material Facts - Historical and Legal Background	1
Introduction	1
What is a Material Fact?	2
History of the Duty to Disclose	2
Easton v. Strassburger	3
Visual Inspections and Red Flags	4
California Civil Code Section 2079.12	5
Impact of the Easton Case and Code Section 2079	6
The Concept of Material Facts	7
Agency and Broker Disclosure Obligations	10
<i>Fraud</i>	11
<i>Negligence</i>	12
Buyer's Obligations Regarding Agent Representations	13
Chapter 2: Transfer Disclosure Statements	14
Introduction	14
The TDS and Seller Disclosure	16
The TDS and Agent Disclosure	18
Statutory TDS Delivery Requirements	19
Discussion of the Required Information on the TDS	20
The TDS Introduction	21
Section 1	21
Section 2 Introduction	23
Section 2 (A)	24
Section 2 (B)	26
Section 2 (C)	26
Section 3	28
Section 4	29
Section 5	30
Local Option Real Estate Transfer Disclosure Statement	31
Chapter 3: Natural Hazards Disclosure	33
Introduction	33
When Natural Hazard Area Disclosures Must Be Made	34
The Six Natural Hazards Required to be Disclosed	35
<i>Zone A or Zone V (Special Flood Hazard Areas)</i>	35
<i>Dam Failure Inundation Areas</i>	35
<i>Designated Very High Fire Hazard Severity Zones</i>	36
<i>Designated Wild Land Areas ("State Responsibility Areas")</i>	36
<i>Earthquake Fault Zones</i>	37
<i>Seismic Hazard Zones</i>	37
Natural Hazard Disclosure Procedures	37
Failure to Disclose and Erroneous Disclosures	41
Chapter 4: Miscellaneous Property Transfer Disclosure Requirements	42
Introduction	42
Agent Visual Inspection Disclosure (AVID)	42

Window Security Bars	47
Smoke Detector Statement of Compliance	47
Water Heater Bracing and Disclosure Requirements	48
Lead-Based Paint Hazards Disclosure	49
Earthquake Guides	52
Environmental Hazards Pamphlet	53
Structural Pest Control Inspections and Certification Reports	54
Energy Conservation Retrofit and Thermal Insulation Disclosures	55
Right to a Home Inspection Disclosure	55
Ordinance Location	57
Mello-Roos Bonds and Taxes	57
Foreign Investment in Real Property Tax Act	57
State Tax Withholding on Disposition of California Real Property	59
Advisability of Title Insurance	60
Locations of Registered Sex Offenders	60
Disclosures for Manner/Occurrence of Death and Occupants with AIDS	61
Chapter 5: California Agency Disclosure Law and Disclosure of Negotiability of Real Estate Commissions	62
Introduction	62
Section 2079 Disclosure Provisions	63
<i>Types of Transactions Where DISCLOSURE FORM is Required</i>	63
<i>Delivery of Form</i>	64
<i>Seller or Buyer Acknowledgment of Receipt</i>	64
<i>The DISCLOSURE FORM</i>	65
Initial Oral Disclosure and Written Confirmation of Agency	67
<i>Oral Disclosures as required by California Civil Code Section 2079.17.</i>	67
<i>Written Confirmation of the Agency Relationship</i>	67
Typical Sequence of Events Regarding Agency Disclosure	68
Negotiability of Real Estate Commissions	69
Chapter 6: RESPA - Real Estate Settlement Procedures Act	71
Introduction	71
When RESPA Rules Apply	72
RESPA Disclosures at the Time of the Loan Application	73
<i>Special Information Booklet</i>	74
<i>Loan Estimate</i>	74
<i>Mortgage Servicing Disclosure Statement</i>	75
RESPA Disclosures Before Settlement (Closing) Occurs	75
RESPA Disclosures at Settlement	76
RESPA Disclosures After Settlement	76
Prohibited Settlement Practices - Kickbacks, Fee-Splitting, Unearned Fees	77
RESPA Section 9 - Seller Required Title Insurance	78
Chapter 7: Disclosures Relative to Subdivisions	79
Introduction	79
The Subdivision Public Report	80
Blanket Encumbrance Disclosure	82
Disclosure of the Right to Rescind	83
Annual Association Disclosures to Common Interest Owners	83

Statement of Defects Disclosure for a Common Interest Development Conversion	85
Special Case of Existing Building Conversions	86
Chapter 8: Real Property Financing Disclosures	88
Introduction	88
Seller Carry-Back Financing Disclosures	89
<i>The Disclosure Statement</i>	90
Adjustable-Rate Loan Disclosure	91
Regulation Z - Truth in Lending	91
<i>Regulation Z Disclosures</i>	92
<i>Disclosure Requirements for ARM Loans</i>	93
<i>Rescission Rights</i>	94
<i>High-rate or High-Fee Loan Transactions</i>	95
<i>Loans Subject to RESPA</i>	95
Regulation B - Equal Credit Opportunity Act	96
<i>Notice and Disclosures of Adverse Loan Action</i>	96
<i>Appraisal Notification</i>	96
<i>Notice of Information for Monitoring Purposes</i>	97
Holden Act Disclosure Requirements	97
<i>Holden Act Notification</i>	98
Conclusion	99
Checklist of Disclosures Required Under California Law	100
Disclosures required of the Seller and/or Real Estate Licensee:	100
Disclosures Required of Real Estate Licensees in Transfer of Residential Real Estate	101
Disclosures Relative to Subdivisions	101
Property Financing Disclosures (Usually made by lender)	101
Appendix 1: California Civil Code Section 1102-1102.14	102
Appendix 2: California Civil Code Section 2079 - 2079.24	111

Chapter 1: The Disclosure of Material Facts - Historical and Legal Background

At the conclusion of this chapter you will be able to:

1. Explain what "duty to disclose" means and how *Easton v. Strassburger* contributed to its enforcement.
2. Outline the history behind the formation of the duty to disclose.
3. Describe the importance of California Civil Code Section 2079.12.
4. Define fraud and negligence as it pertains to disclosure.
5. Summarize an agent's disclosure obligations.

Introduction

It was not too many years ago that the Latin term "caveat emptor" or "buyer beware" was the rule in the practice of real estate. Issues relating to the condition of property, its potential environmental hazards, and a host of other considerations were solely the responsibility of the buyer. During the last third of the 20th Century, legislatures, courts, and pressure from the public have totally transformed the real estate brokerage business. Past exclusive seller-representation by all agents involved in a transaction has been replaced by seller and buyer representation. In California, the 1984 case of *Easton v. Strassburger*, has become the basis for agent disclosure. In addition to the disclosure principles set forth in the *Easton* case, all California licensees must comply with additional federal and state disclosure requirements relating to environmental hazards, agency representation issues, seismic and flood zone disclosures, sexual predator notifications, and other issues.



Even without laws requiring disclosure, it would be almost impossible to have a real estate transaction take place with a complete absence of disclosure. **Disclosure will take place in every real estate transaction to some degree.** The disclosure issues in every real estate transaction will relate to the following questions:

- **What** disclosures will be made?
- **How** will the disclosures be made?

Chapter 1: The Disclosure of Material Facts - Historical and Legal Background

- **When** must disclosures be made?
- **Who** will make the disclosures?

What is a Material Fact?

All real estate licensees and all sellers have the duty to disclose all facts that are material. Whether facts are material may depend on the transaction details and each individual buyer. However, in general, it can be concluded that **a fact is material if a buyer would not have entered a contract with a seller if the fact was known.**

Unfortunately, **the determination of what are material facts is not always simple.** Which agent has the burden to disclose and to whom disclosure should be made is often unclear. As in many areas of the law, **many questions do not have concrete answers.**

This course will explore the licensee's obligation to disclose material facts to the appropriate party in a real estate transaction. It will be demonstrated that the obligation by all parties in a transaction to disclose has *increased* in recent years. In order to minimize legal risks, utmost attention must be paid to disclosures. Included in this course are detailed discussions of the disclosures required in every real estate transaction.

First, we need to understand the history of licensee disclosure obligations and the legal foundation upon which disclosure law is currently based.

History of the Duty to Disclose

For years, real estate licensees had a very limited duty to disclose to a buyer of real estate. Quite simply, the law favored the approach of *caveat emptor*. This approach, which was the industry standard for years, meant that the buyer was to "beware" or "take care." It was the rule that a buyer must examine, judge, and test for himself or herself the condition or other factors relating to the property. This approach was the standard for years because:

- The law in general did not favor the consumer.
- The real estate industry represented only sellers. Buyer's were not represented and were treated as customers.

With the rise of consumerism in the 1960s, the courts began to pick away at the doctrine of caveat emptor. The first requirement by the courts was that licensees, when asked, should not lie about the condition of the property or other related facts. This meant that if the buyer asked a real estate licensee if a roof leaked, and if the licensee knew that it *did* leak, that licensee could not say that it did *not* leak. **This approach was also "buyer beware" because no response was required if no question was asked!**

Next, the courts began to require licensees to disclose known facts about the property. This required licensees to disclose facts about the condition of property or other factors relating to property that were actually known by that licensee. There was an affirmative duty to disclose that "which was known."

Many licensees, during the period of time when this approach to disclosure was favored by the courts, often tried to get around this duty by instructing sellers to not tell them about property defects or material facts. **If the licensee had no knowledge, there was nothing to disclose.**

Easton v. Strassburger

In 1984, a landmark California court case, *Easton v. Strassburger*, (152 Cal. App. 3d 90), turned the industry on its head. The case held that not only did a licensee have the duty to disclose that which was actually known, but that the licensee also had an affirmative duty to disclose facts which could have been known in the exercise of reasonable diligence. Due to the importance of the case, it will be summarized and discussed below.

In 1976, **Easton** purchased a 3,000 square foot home from Strassburger. It was located on a one-acre parcel of property and contained a swimming pool and a detached guest house. Shortly after purchasing the property, there was massive earth movement. In 1977 and 1978, portions of the driveway were destroyed due to even further earth movement. That movement also affected the foundation of the house, which resulted in damage to the primary structure. It was determined by expert testimony that the earth upon which the structure sat was largely fill-dirt that had not been properly engineered and compacted. At trial, evidence was submitted that suggested the value of the damaged property was as low as \$20,000, although the property would have been worth \$170,000 if no damage had occurred. Evidence was also submitted that estimated the cost to repair the slide damage and to prevent further slides to be as high as \$213,000.



In 1973, when **Strassburger** had owned the property, there was a minor landslide. A larger landslide occurred in 1976, dropping a 50 to 60-foot circular section of property approximately 8-to-10 feet. Strassburger took corrective action to mitigate the damage. **When Strassburger listed the property for sale, the history of earth movement was not disclosed** to any real estate agent, nor was the extent of the corrective actions that had been taken. At the time of purchase, Easton knew nothing of the prior earth movement activity or any corrective actions taken.

The real estate agents involved in the transaction, both listing and selling, had visited the property numerous times. At trial, it was revealed that one of the listing agents had known that the property was built on fill. Another agent had seen the corrective netting laid over the slope, which was the measure used to repair one of the landslides caused by the earth movement. Yet another agent revealed that he had observed that the guest house floor was not level, suggesting unusual settlement. **Although the agents had observed those facts, they did not disclose them to Easton.** In addition, they did not suggest

to Easton that a soil stability study should be performed on and or about the property.

Easton sued Strassburger, the builder, all of the real estate agents, and others and won. The final judgment for \$197,000 in total damages was allocated among those sued. Based upon the theory of negligence, both the listing brokerage and the selling brokerage were assessed five percent of the total damages. Specifically, with respect to the brokerages, the trial judge gave the following instruction to the jury:

Chapter 1: The Disclosure of Material Facts - Historical and Legal Background

"A real estate broker is a licensed person or entity who holds himself out to the public as having particular skills and knowledge in the real estate field. He is under a duty to disclose facts materially affecting the value or desirability of the property that are known to him or which through reasonable diligence should be known to him."

The listing brokerage appealed the decision, arguing that a broker's responsibility to disclose was limited to those facts that were known facts about a property, not facts that could have been known by the exercise of reasonable diligence. The California Court of Appeals disagreed, stating that its conclusions is based upon the theory that a broker is liable for the intentional tort of fraudulent concealment or negative fraud if the broker fails to disclose material facts about the property that are not known to, nor within the reach of the diligent observations of the prospective buyer. The following language of the court explains this theory of liability in detail:

"If a broker were required to disclose only known defects, but not those that are reasonably discoverable, he would be shielded by his ignorance of that which he holds himself out to know. The rule thus narrowly construed would have results harmful to the policy upon which it is based. Such a construction would not only reward the unskilled broker or salesperson or his/her incompetence, but might provide the unscrupulous broker the unilateral ability to protect himself at the expense of the inexperienced and unwary who rely upon him. In any case, if given legal force, the theory that a seller's broker cannot be held liable for undisclosed defects would inevitably produce a disincentive for a seller's broker to make a diligent inspection. Such a disincentive would be most unfortunate, since in residential sales transactions, the seller's broker is most frequently the best situated to obtain and provide the most reliable information about the property and is ordinarily counted on to do so."

The implications of this case are clear. **A broker representing either the seller or the buyer has a duty to disclose to a buyer those facts that could have been known about a property if reasonable due diligence had been exercised.** Any time a broker observes anything which would raise a red flag regarding a property, further investigation should not only be recommended to the buyer, but also *encouraged*.

Visual Inspections and Red Flags

Some examples of "red flags" are:

- Steep slopes
- Floors that appear unlevel
- Cracks in the foundation, walls, or ceilings
- Doors and door casings which are not square to each other
- Water stains on walls or ceilings
- Smell of dampness in structure
- Apparent additions or structure modifications (Were additions or modifications done under a valid building permit?)



Chapter 1: The Disclosure of Material Facts - Historical and Legal Background

- Presence of an oil heating system or evidence of a prior oil heating system
- Soft floors in an area such as a bathroom
- Evidence of poor caulking in tub/shower surround areas
- Use of manufactured siding
- Gas or oil furnaces that show yellow flames
- Evidence of water stains on crawl space piers, footings, or walls
- Evidence of crumbling concrete foundation walls (Older homes may be built with sand that contained a great deal of organic material. This material over time breaks down and simply leaves the foundation concrete in a deteriorated state)
- Evidence of standing water on a property

The preceding red flags are only some of the items that brokers and licensees must observe. This should not be viewed as an all-inclusive list. Consequently, all licensees would be well advised to recognize the most common red flags that may indicate a potential problem with a property. Furthermore, based upon the Easton doctrine, it is clear that **real estate agents must make a reasonable inspection of the property and disclose any observations to the buyer which could indicate a problem.** This affirmative duty requires action on the part of the agent.

Even a clause in the earnest money agreement which indicates that the property is "sold as is" does not relieve an agent in the transaction or the seller of a duty to disclose to the buyer known material facts or facts which *should* have been known.

Perhaps it is more than coincidental that **the home inspection industry grew substantially after the Easton case.** Prior to the *Easton* case (1985), home inspections by professionals were rarely a part of a real estate transaction. After the *Easton* case, home inspections became a part of almost *all* real estate transactions. An agent recommending to a purchaser the hiring of a professional inspector shifts a great part of the legal duty to observe onto a professional. An inspector can be used as a risk management tool with respect to the potential liability imposed by the Easton doctrine.

California Civil Code Section 2079.12

The principles of the Easton case are codified in California Civil Code Section 2079.12. The code section requires a real estate licensee to "*conduct a reasonably competent and diligent visual inspection of the property offered for sale*" and to disclose the facts that such an investigation would reveal. To not conduct a reasonably competent and diligent visual inspection of the property being offered for sale would be negligence.

Code Section 2079.12:

(a) [The Legislature hereby finds and declares all of the following:](#)

Chapter 1: The Disclosure of Material Facts - Historical and Legal Background

1. That the imprecision of terms in the opinion rendered in *Easton v. Strassburger*, 152 Cal. App. 3d 90, and the absence of a comprehensive declaration of duties, standards, and exceptions, has caused insurers to modify professional liability coverage of real estate licensees and has caused confusion among real estate licensees to the manner of performing the duty ascribed to them by the court.
 2. That it is necessary to resolve and make precise these issues in an expeditious manner.
 3. That it is desirable to facilitate the issuance of professional liability insurance as a resource for aggrieved members of the public. That Sections 2079 to 2079.6, inclusive, of this article should be construed as a definition of the duty of care found to exist by the holding of *Easton v. Strassburger*, 152 Cal. App. 3d 90, and the manner of its discharge, and is declarative of the common law regarding this duty. However, nothing in this section is intended to affect the court's ability to interpret Sections 2079 to 2079.6, inclusive.
- (b) It is the intent of the Legislature to codify and make precise the holding of *Easton v. Strassburger*, 152 Cal. App. 3d 90. It is not the intent of the Legislature to modify or restrict existing duties owed by real estate licensees.

Impact of the Easton Case and Code Section 2079

The Easton case and California Civil Code Section 2079 require a real estate licensee to conduct a "visual" inspection of the property. Code Section 2079 applies to one-to-four residential units. The visual inspection does *not* include areas that are "reasonably and normally inaccessible to such an inspection." The standard of care owed by a licensee under section 2079 is "the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination required to obtain a license..." Neither *Easton* nor Code Section 2079 requires a licensee to conduct tests to discover the specific structural problems due to environmental hazards if a potential environmental hazard has been visually identified.



Based upon the interaction of the *Easton* case and Code Section 2079, it can probably be stated that a licensee has an affirmative duty in residential transactions of one-to-four units to conduct a "visual" inspection of the property to determine if there are any "red flags" relating to potential environmental hazards. **If any "red flag" is visually identified, the licensee has a duty to disclose that knowledge to the buyer.** In addition, although code Section 2079 appears to limit the licensee's standard of care to "knowledge ...required to obtain a license" the courts will undoubtedly expand the standard to a higher level of knowledge that the public would expect from a real estate licensee. Licensees relying upon the knowledge that is required to obtain a license (which does not include education on environmental hazards) will most likely find that courts will expand under a theory of negligence to the knowledge which the licensee *should have* due to continued education, experience, and expectations of the public.

The Concept of Material Facts

Just as a complete absence of disclosure is not practical or possible under a licensee's disclosure obligations, neither is total disclosure. Total disclosure would mean telling the buyer *everything* about a property, even down to a listing of the materials used in construction and details of how the property was built. **Obviously, "total" disclosure would be nearly impossible. Therefore, "material" items are what must be disclosed.** In addition, **the buyer has an absolute right to know what they are buying.** The seller and the real estate agents have the duty to disclose information to the buyer; no secrets may be kept from them. If the seller or agents lie, they may be guilty of intentional fraud. If the seller or agents know a fact about the property and fail to disclose it, they may be guilty of intentional concealment or intentional fraud. **It is the duty of a real estate agent to disclose material facts** that affect the value or desirability of a property that the agent knows or could have known if reasonable due diligence would have been exercised. To do less than attempt to uncover material facts could leave the seller or agents liable for gross negligence, at best.



In order for sellers and agents to comply with the disclosure laws, an understanding of what facts must be disclosed is necessary. All material facts must be disclosed. However, not all facts are material. In fact, as with many legal concepts, no absolute standard for determining if a fact is material to a particular property transaction is possible to define. **All of the facts and circumstances relating to the transaction must be evaluated to determine whether a particular fact is material.**

Chapter 1: The Disclosure of Material Facts - Historical and Legal Background

An Example of Determining Material Facts:

A property was listed for sale as "needing cosmetic fixing." Buyer A, a first time investor, decided he liked the property and felt that he could repaint, carpet, replace the kitchen cabinets, and then resell it for a profit. After purchasing the property, he learned that the entire foundation needed to be replaced because impure sand was used in the original concrete mixture. Was the condition of the foundation a material fact to Buyer A? Would he have purchased the property had he known the condition of the foundation?

Alternatively, Buyer B, a developer, offers to purchase the same property. Due to its location on the lake in a popular lake-front community, he decides to tear down the house and build a new one. Was the condition of the foundation material to Buyer B? Would he have purchased the property had he known the condition of the foundation?

Although the condition of the foundation was such that it needed total replacement, **whether the fact was material or not would be different in each situation.** Buyer A, whose intent was to fix up the property and resell it at a profit, would most likely have considered the foundation problem as material. The expense of replacing the foundation would likely have eaten up most or all of his potential profit. Therefore, having known the true condition of the foundation, Buyer A would probably not have purchased the property. At the very least, he would not have purchased it at the price he originally offered. Buyer B, on the other hand, would not have considered the condition of the foundation material since his objective was to tear down the entire structure and replace it with a new one. The facts of these two transactions would lead to a different conclusion as to whether the condition of the foundation was material.

Material facts may also be evaluated in terms of **objective** or **subjective** standards.

- An **objective** standard would require that the fact affect the value or desirability of the property.
- A **subjective** standard would affect the value or desirability of a particular property where it may be important to a specific buyer, as in the case of the foundation in our example.

Example: Buyer A desires to purchase a property located in a wooded setting that was once a toxic waste dump and toxic material continues to be released from the ground. Obviously, under an objective standard of evaluation, the fact that toxic waste is a problem affects the value and desirability of using the site for its intended residential purpose and would be material for most buyers.

Chapter 1: The Disclosure of Material Facts - Historical and Legal Background

Example: Buyer B and Buyer A both desire to purchase a property near a school. Buyer B has two small children who would attend the nearby school. Buyer A is a single person who works the graveyard shift and is a light day sleeper. Under an objective standard, the location of the property near a school is probably not material, as it probably does not affect the value or desirability of the property one way or the other. However, when the location of the property is evaluated under the subjective desirability standard of Buyer A and Buyer B, the fact of the nearby school may be material for different reasons. For Buyer A, the proximity of the school is material because the noise may create a daytime sleeping problem. For Buyer B, the location of the school may be material in that proximity to a school was important for easy school accessibility. The subjective test is much more difficult to use as a basis to determine materiality, since the subjective standard may be different for each buyer.

The line between subjective and objective standards may sometimes be hard to draw:

Example: For example, if a gruesome murder had taken place in a house 15 years ago and that fact was not disclosed to the buyer, could the buyer rescind the contract to purchase? Although the condition of the property is not at issue in this type of case, the courts generally will try to apply the objective standard analysis to this and similar fact situations. Most courts in this type of case will reason that if a fact will have a quantifiable effect on the market value of a property, then the seller must disclose that fact under the objective standard of materiality. Note that in this type of fact situation, Buyer A might be sensitive to the fact that a murder had been committed in the house, but Buyer B might not care at all about the murder. Nevertheless, even insensitive Buyer B, because he would upon resale of the property have to disclose the murder, would necessarily then be affected economically by the prior murder. Thus, most courts, by tying their decisions in these types of cases to a potential loss in market value, have kept their standard objective, in order to protect the stability of contracts by not allowing irrational objections as a basis for rescinding contracts.

A fact is *material* if a party would not have entered into a contract had he or she known the facts. Material facts may be evaluated in terms of **objective** or **subjective** standards.

"MATERIAL FACTS" THAT MAY NOT BE DISCLOSED:

Certain facts, which under a subjective test may be "material" to certain buyers, may not be disclosed unless the buyer specifically asks for the information. For example, if an agent knows that a buyer will not likely buy a property if a member of a certain racial minority had lived in the property, the agent cannot volunteer information on the race of prior property occupants. However, if the buyer asked the agent if a member of a certain race had lived in the property, the agent would have to answer the question honestly, if the agent knew the answer.

In recent years, the number of persons afflicted with the Acquired Immune Deficiency Syndrome (AIDS) has increased at an alarming rate. Consequently, many buyers, fearing the disease may want to know if the seller of a property or any occupants of that property has AIDS. In California, the law requires that if any occupant of a residence died in that residence in the past three years, that fact must be disclosed to any potential buyer. In the case of AIDS related deaths, California public policy prohibits a licensee from disclosing to a prospective tenant or buyer that the prior occupant was afflicted with AIDS or died from AIDS. **Persons with AIDS are considered "disabled" under the Federal Fair Housing law and are protected from discrimination.** Therefore, if an inquiry relating to death on the property relates to AIDS, the licensee or landlord's agent may simply refuse to answer the question about AIDS. This information, even if known, is considered confidential and private.

Agency and Broker Disclosure Obligations

The following propositions would seem logical:

- The listing broker should, in representing the seller, have a limited duty to disclose to the buyer since that broker owes all of his fiduciary duties to the seller.
- The selling broker should, in representing the buyer, have a broad duty to disclose and assist in the obtaining information for the buyer, since that broker owes all of his fiduciary duties to the buyer.

Courts have struggled long and hard with relationship issues between the listing agent and the buyer. Logically, since no agency relationship exists between the listing agent and the buyer, the duty to disclose should be limited, if it is to occur at all. However, courts have addressed the disclosure issue between the listing broker and the buyer using two theories:

- First, the courts have concluded that there are some fiduciary duties between a listing broker and a buyer.
- Second, as a matter of public policy and regardless of fiduciary duties, courts have reasoned that a listing broker has a duty to the public to act fairly. This would open the need for disclosure on the part of the listing agent to the buyer.

Based upon the desire of the courts to protect the public, court cases in the area of broker disclosure or nondisclosure often hang upon the theories of **fraud** and **negligence**.

Fraud

Lawsuits against sellers and real estate agents based on fraud are based upon the premise that liability should result from either intentional misrepresentation or from not disclosing facts.

The California Civil Code defines **actual fraud**:

1572. Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it; or, 5. Any other act fitted to deceive.

The California Civil Code defines **constructive fraud**:

1573. Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Any lawsuit based upon a fraud theory must contain the following elements:

- Nondisclosure by a broker of facts that materially affect the value or desirability of the property
- The broker had knowledge of the material fact and the fact was beyond the reach of the buyer
- The broker's intent was to induce action by the buyer
- Inducement of the buyer to act by reason of the nondisclosure
- Resulting damages to buyer

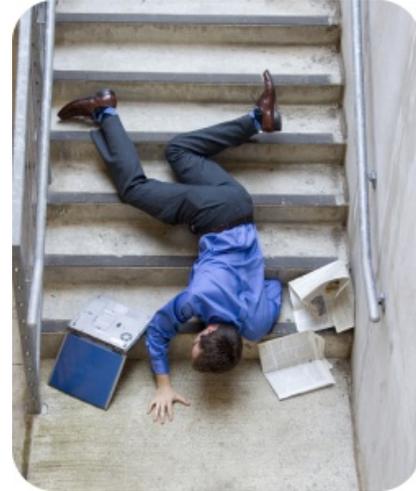
Fraud can be committed by either intentional lying or by withholding material facts.

Negligence

Lawsuits brought against real estate licensees under a negligence theory are based upon the concept that **a licensee can be held liable for not exercising ordinary care and skill** in the conduct of their real estate practice, which in turn leads to their client being damaged economically. The California Civil Code Section 1714 statutorily defines negligence:

Section 1714: Responsibility for willful acts and negligence; contributory negligence

Every one is responsible, not only for the result of his willful acts, but also for injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief



The previously cited Easton case was based upon a theory of negligence. The trial court concluded that a reasonably competent and diligent inspection of the property would have uncovered the past landslide problems. This information should have then been disclosed to the buyer for further investigation. As noted, the California Court of Appeals clearly held that the real estate agents were negligent in not disclosing a material fact to the buyer that the agents "should have known" if "reasonable due diligence would have been exercised."

OFFERING OF OPINIONS: Often, a licensee will correctly identify a red flag that demands further investigation. Subsequently, the licensee may comment to a buyer that although there may be a problem, the situation can be solved "easily." This situation is very common, as the licensee knows that a red flag has to be disclosed to the buyer. However, in order to minimize the problem and keep the sale together, the broker will try offering an opinion which may construe the problem as "easily solvable." In giving the opinion, the licensee exposes himself to a great deal of liability. If the licensee lacks the expertise, his/her opinion is nothing more than a guess. In offering an opinion, if the buyer should suffer a loss due to that offered opinion, a court may hold the licensee to the standard of the expertise represented by the offered opinion.

EXAMPLE: A licensee points out to a buyer a red flag regarding a crack in the foundation. The licensee then gives his *opinion* that the crack is not a problem since cracks of this size are normal for the age of the property. The buyer subsequently purchases the property. One year later, the crack has enlarged to twice that of the original size. The buyer hires an engineer who determines that the crack is being caused by recent construction activity on the adjoining property and was exacerbated by heavy winter rains. Expensive foundation work will be required to correct the problem. The buyer sues the broker based upon the opinion the licensee gave. Undoubtedly, the court would find liability on the part of the licensee, thereby holding him to the standard of the foundation expert he purported to be.

Buyer's Obligations Regarding Agent Representations

The buyer has obligations with respect to his/her own actions, or lack thereof, in the research and investigation of property being purchased. As was discussed, the law, historically, favored the seller and placed virtually the entire burden of property investigation on the buyer under the theory of "buyer beware." Today, the law has moved toward favoring the buyer. The seller now clearly has disclosure obligations to the buyer. As will be discussed in the next course section, the Sellers Transfer Disclosure Statement (TDS) must be delivered to the buyer. The TDS requires the disclosure of known material facts to the buyer. The agents involved in the transaction even have to make reasonable efforts to investigate conditions that can be reasonably discovered and disclose those discovered conditions to the buyer.



Regardless of the disclosures made by the seller or the agents in the transaction, **the courts will also impose upon the buyer an obligation to conduct a complete investigation of the property.** The generally relied upon standard of the courts is that of exercising reasonable ordinary care and diligence in the investigation process. Likewise, a buyer cannot deny knowledge of a fact that would have or could have been known to them if the buyer was not negligent.

In the context of today's real estate market, most buyers will hire a home inspector to investigate the property. Additional professionals may also be hired to investigate issues relating to soil stability, underground oil tanks, radon, lead, asbestos, or other environmental contaminants. During this investigation process, the buyer and experts must have complete access to the property and must not be hindered in the investigative process or be persuaded to discontinue the investigation. **Once the buyer receives, reviews, and approves of the results, then the buyer will be deemed to have acted upon his own judgment.**

Although the seller and the agents involved in the transaction are required to make disclosures, the buyer does have an obligation to do more than rely only upon those disclosures. **The buyer has an affirmative obligation to use reasonable due diligence to investigate the property being purchased.** However, the obligation of the buyer to investigate in no way diminishes the buyer's right to rely upon the representations of the seller and the real estate agents as to technical matters or as to facts not ascertainable by the exercise of reasonable due diligence in the investigation of the property.

Chapter 2: Transfer Disclosure Statements

At the conclusion of this chapter you will be able to:

1. Explain the purpose and main parts of the Transfer Disclosure Statement (TDS).
2. Understand when a TDS is required and when it is not.
3. Explain the purpose and function of the Local Option Real Estate Transfer Disclosure Statement (LORETDS).

Introduction

California Civil Code, Sections 1102 - 1102.14, provides that a buyer ("transferee") is entitled to receive a statement from the seller ("transferor") that provides information on the condition of the property the buyer is intending to purchase. This required seller disclosure form is known as the *Real Estate Transfer Disclosure Statement* or TDS. (See Appendix 1 at the end of this course for the text of Civil Code, Section 1102-1102.14.)

The statutory disclosure form is specifically provided for in Civil Code Section 1102.6. The form requires the seller to address the following:

- Identify the presence of and operational condition of appliances, specific fixtures, improvements, and other features of the property
- Identify and disclose any defects or malfunctions of the physical property improvements
- Identify and disclose any of the following:
 - Common features shared with adjoining property owners
 - Encroachments
 - Easements
 - Additions, alterations, or modifications made without permits or items which are not in compliance with building codes

Chapter 2: Transfer Disclosure Statements

- Any fill on the property and whether there have been any flooding or other soil problems on the property
- Any major damage to the property
- Neighborhood noise problems or nuisances
- Zoning violations
- Any common-area facilities
- Notices of lawsuits or abatement actions affecting the property
- CC&Rs, deed restrictions, or homeowners associations affecting the property

The code applies to the sale, transfer, lease, or exchange of residential property of one-to-four units. **The TDS is required even if the property is being sold "as is" or without covenant or warranty.** The purpose of the TDS is informational. The TDS is not to be viewed as a warranty of the information provided by the seller. It is to be used as a source of information, provided by the seller, which the buyer may rely upon in deciding to purchase. This is the case even if the seller will be selling the property to the buyer without providing any repairs. A sale under these conditions is totally permissible. Nevertheless, this type of sale does not relieve the seller of the responsibility to disclose the property's defects.



The TDS is also required on the sale, transfer, lease or exchange of **mobile homes** as defined in Sections 18007 or 18008 of the Health and Safety Code. Mobile homes, although deemed "personal property," now must be treated as realty for TDS disclosure purposes.

The TDS is *not* required when the sale or transfer involves any of the following:

- Transfers following a court order, including probate court in the administration of an estate.
- Transfers that require a copy of a public report to be furnished to a prospective transferee pursuant to the Subdivided Lands Act.
- Transfer by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.
- Transfers following a writ of execution, by a trustee in bankruptcy, by eminent domain, or resulting from a decree for specific performance.
- Transfers arising out of default and/or foreclosure:
 - Transfers to a mortgagee by a mortgagor or successor in interest or a successor in interest who is in default
 - Transfers by any foreclosure sale after default in an obligation secured by a mortgage
 - Transfers by a sale under a power of sale
 - Transfers under any foreclosure sale under a power of sale after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale

Chapter 2: Transfer Disclosure Statements

- Transfer by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage
- Transfers by sale following a decree of foreclosure or by transfer due to a deed in lieu of foreclosure
- Transfer from one co-owner to one or more other co-owners
- Transfers made to a spouse or to a person or persons in the lineal line of blood relationship of one or more of the transferors
- Transfers between spouses resulting from a judgment of divorce or of legal separation or from a property settlement agreement incidental to such a judgment
- Transfer by the Controller in the course of administering the Unclaimed Property Law
- Transfer under Chapter 7 or Chapter 8 of the Revenue and Taxation Code
- Sale of Tax-Deeded property
- Transfer or exchanges to or from any governmental agency

The TDS and Seller Disclosure

In preparing the TDS, the seller is required to make all statements in good faith. **"Good faith" can be defined as the total absence of any intention to seek an unfair advantage or to defraud another party.** Put another way, it is an honest and sincere intention to fulfill one's obligations. "Good faith" means making the statements by honesty in fact. This means that all statements made in the disclosure statement must be based upon the seller's actual knowledge of the property at the time the disclosure is made. Actual knowledge of a condition becomes the standard upon which the seller's actual disclosure statements will be evaluated in the event an issue later arises with respect to a specific item on the disclosure report.

EXAMPLE: To the question, "To your knowledge, has the roof leaked?" The seller marks "no" when, in fact, the roof has leaked and has been repaired at least once by the seller. The seller would have had actual knowledge of the roof leak at the time the disclosure was made to the buyer. The statement made by the seller was not made in good faith. In fact, it is an outright misrepresentation. As will be discussed, this misrepresentation may have serious legal consequences for the seller.

Some items that appear on the disclosure statement may be unknown or not available to the seller at the time the disclosures are made. **In this circumstance, the seller is under an obligation to use reasonable efforts to obtain the information.** If the information cannot be obtained, the seller is to make a statement based upon the best information available. If this is the case, *this fact should be noted.* The statement should not be used for circumventing or evading the disclosure statute.

Chapter 2: Transfer Disclosure Statements

EXAMPLE: The question dealing with the exterior siding: if the seller knows that the house has manufactured siding, that fact must be disclosed. However, if the seller does not know the type of siding, reasonable efforts should be made to contact the builder, etc. to determine the actual type of siding installed. The builder says that it is not LP siding, but rather that it is OMNI Board™. Consequently, the seller discloses that "it is not LP siding", while at the same time knowing that OMNI Board™ also has problems. This then would be considered as a way to evade the statute by giving correct information relating to LP siding, but giving misleading information by *not* stating that the siding is OMNI Board™.

Sometimes a seller will complete the disclosure form in good faith and still have given the purchaser erroneous information or simply omitted to provide information. Most courts facing this issue would not hold the seller, listing agent, or selling agent liable for such errors or omissions *as long as the seller did not know of the mistake*. Most courts would also relieve the seller of responsibility for providing erroneous information if a public agency or professional third party provided the information, which in turn was passed on to the buyer.

A third party report may not relieve a seller of liability if the third party expert indicates that a specific problem does not exist when the seller knows that it does. The seller cannot find an expert to report there is no defect when the seller knows there is a defect and then expect to not have to disclose that defect to the buyer. For example: The seller knows that his roof leaks, but hires a roofer to certify that the roof does not leak. The roofer prepares a report stating the roof appears to be in good condition and is providing good cover for normal weather. The seller cannot give this report to the buyer and check the answer "no" on the roof leak question on the Seller's Disclosure Form. The answer would be erroneous and known to be so by the seller.

If the TDS does not address a specific property defect, such failure of the form itself to address that specific defect does not relieve the seller of his/her common law duty to disclose it. This omission to disclose would be misleading and an intentional misrepresentation (fraud). Additionally, if a seller had various reports from various experts relating to a specific property component and the two reports varied, the seller cannot elect to give only the most favorable report to the buyer without *also* giving the less favorable. The seller has a duty to disclose *both* reports.

A seller may deliver to a prospective buyer a report or opinion prepared by a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, other expert dealing with the matters within the scope of that professional's license or expertise. Additionally, any professional reports may limit the liability of the seller and the licensee. The overall intention of the TDS and its required disclosures is to provide information and disclosures to the buyer regarding the condition of the property being transferred.

It is best to disclose all material facts. Trying to hide, ignore, discount, or brush off material facts can expose a licensee to unwanted legal liability.

The TDS and Agent Disclosure

It is neither the listing nor selling agent's responsibility to fill out the seller's portion of the TDS. However, the best advice a California licensee can give to a seller regarding what should be disclosed is that **everything should be disclosed**, even if it was a former problem or defect that has or has not been remedied. It is the failure to make these types of disclosures that leads to lawsuits when the prior defect and remedy is later discovered. **Quite simply, disclosure is a proven roadblock against litigation. Both the listing and the selling licensees need to review the seller's completion of the TDS.** Licensees need to additionally conduct a visual inspection of the property and report in the TDS any items missed by the seller. The legal basis for this agent disclosure is based upon the historical development of agent disclosure as developed by the courts and statutory mandates. It ranges from the agent's obligations not to lie to a buyer and, conversely, to affirmatively disclose what is known about a property to a buyer. The obligation to disclose has been expanded to include the principles of Easton and its subsequent incorporation into California Civil Code **Section 2079.12**¹.



This imposes upon California licensees an affirmative duty to disclose to a buyer that which could have been reasonably discovered about a property using due diligence. Agents are deemed to have expertise regarding real estate matters over and above the general public. Therefore, **the public has a right to expect that an agent will make a reasonable, competent, and diligent investigation of the property and disclose all facts** that would materially affect the value or desirability of the property.

The TDS has incorporated all of the above principles into the seller's disclosure statement. Both the listing and the selling licensees must complete a section of the TDS. At this writing, the portion to be completed by each licensee states the following:

"The undersigned, listing or selling agent as the case may be, based on the above inquiry of the seller(s) as to the condition of the property and based on a reasonably competent and diligent visual inspection of the accessible areas of the property in conjunction with that inquiry, states the following:

_____ Agent notes no items for disclosure

_____ Agent notes the following:"

The TDS clearly requires an on-site inspection by a licensee. The inspection should consist of three general areas:

- **Exterior Inspection.** Included in this visual inspection of the outside of the building and surrounding grounds should be, but not limited to, the following:
 - The general slope of land and any indication of earth movement, flooding potential, drainage or water runoff problems, or other potentially adverse material site conditions.
 - Cracks in sidewalks and other flatwork, foundations, exterior walls, and fireplaces.

¹ http://www.onlineded.com/pages/filecab/CA/laws/ca_civil_code_2079.htm

Chapter 2: Transfer Disclosure Statements

- The general condition of the exterior of the structure, including exterior siding and roof, doors, and windows.
- The surrounding property, including hazardous trees, vegetation, or other surrounding property conditions that may adversely affect the enjoyment of the property that is the subject of the TDS.
- Other exterior amenities such as a pool, tennis court, guest house or garage.
- **Interior Inspection.** Included in this visual inspection of the interior of the building and surrounding grounds should be, but not limited to, the following:
 - Floors
 - Doors
 - Windows
 - Walls
 - Stairway
 - Systems such as stove, furnace, fireplaces
 - Appliances
- **Environmental Hazards**

Statutory TDS Delivery Requirements

The seller or his/her agent must deliver the TDS to the buyer as follows:

- In the case of a **sale**, as soon as practical before transfer of title.
- In the case of a **transfer** by a real property sales contract, or by a **lease** together with an option to purchase, or on a ground lease coupled with improvements, before execution of the contract.

The seller/transferor, must indicate compliance with the statutory delivery requirements on:

- The Real Estate Purchase Agreement and receipt for deposit
- The real property sales contract
- The lease
- On any addendum attached to the receipt for deposit, the real property sales contract or the lease
- On any separate document



Delivery of the TDS to the buyer is the responsibility of the licensee who has obtained the offer made by the buyer (transferee). If the buyer is represented by a buyer's agent, this would obviously

Chapter 2: Transfer Disclosure Statements

be the buyer's agent. In cases of where the buyer and seller are represented by the same licensee, the dual agent is responsible for the TDS delivery from the seller to the buyer.

If the licensee responsible for the delivery of the TDS to the buyer cannot obtain the TDS and does not have written assurance from the buyer (transferee) that the TDS has been received, **that licensee must advise the transferee in writing of his or her right to the disclosure.** The licensee must maintain a record of what has been done to comply with the statutory requirements for the delivery of the statement.

The TDS contains three separate parts to be completed by the following parties:

- The seller
- The listing agent
- The buyer's agent (if any)

If anyone of the above parties does not complete his or her part of the TDS, the buyer has the right to rescind.

Example: The seller and buyer's agent completed their portion of the TDS, but the listing agent failed to execute his/her portion of the TDS. Although the statement was executed and delivered promptly by the seller and buyer's agent, the buyer would have the absolute right to rescind the contract.

The buyer also has the absolute right to rescind the contract within the following periods after delivery to the buyer (transferee) of the original TDS or any amendment to the TDS, whichever last occurs:

- Three days after delivery in person
- Five days after deliver by deposit in the mail

Regardless of the delivery method, in order for the buyer to terminate the offer, the buyer must do so by delivering a **written notice of termination** to the seller or the seller's agent.

Discussion of the Required Information on the TDS

The required Real Estate Transfer Disclosure Statement (TDS) form is prescribed in Civil Code Section 1102.6. This form is readily available from the California Association of REALTORS® and is identified as **TDS-14**. The form is available at the CAR web site at [http : / /www .car .org /](http://www.car.org/)

The form is divided into five sections. The first two sections are to be completed by the seller. Sections 3 and 4 are to be completed by the listing and selling agent involved in the transaction. Section 5 is to be

Chapter 2: Transfer Disclosure Statements

completed by the seller, buyer, and the agents involved in the transaction. The form is set forth below in its entirety. After each section, a discussion of the important elements of that section is given.

The TDS Introduction

The TDS introduction section identifies the property that is the subject of the Real Estate Disclosure Transfer Statement. This section also recites the fact that **the TDS is not a warranty of any kind**. It further states that **the TDS is not a substitute for any inspections or warranties** that may be obtained or available. Therefore, the TDS should be viewed as the seller's and agent(s) disclosure of facts known about the property or which *became* known due to a reasonable, visual inspection of the property. These disclosures are to be viewed as informational for the buyer. A buyer should be advised to seek additional professional inspections as necessary. These inspections might include a full home inspection, pest and dry rot inspection, environmental phase one surveys, engineering reports, soils reports, and geological reports.

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS _____ THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF _____ (date). IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

Section 1

In Section 1, the seller must insert the "as of" date. **The "as of" date should be the date the report was signed by the seller.** Although this may seem like a minor issue, it may not be in all cases. For example, assume that the seller inserted the date of December 1. At that time there was no problem with the roof system. However, on December 4 a major rain and windstorm occurred causing a portion of the roof to suffer damage. Consequently, as of December 4, the previously answered question regarding the roof would be incorrect, as the condition of the roof had changed. Since the "TDS" is really a picture of the property at a specific moment frozen in time, the "as of" date should truly reflect the condition of the property as of the specific date inserted. **However, a seller would also have to inform a buyer of any material changes to the property after the "as of" date.**



This section also notifies the buyer (transferee) that the TDS is the disclosure statement required by section 1102 of the California Civil Code. The TDS itself does not fulfill the other required statutory disclosures that may apply in a given residential transaction such as special study zone disclosures. If the property is located in a potentially active earthquake fault zone, the seller or the agent of the seller must disclose to the prospective buyer that the property is located within a special earthquake faults zone study. In that Section, the seller should refer to any special study zone report required under the Civil Code.

Chapter 2: Transfer Disclosure Statements

The seller should attach to the TDS any inspection reports that the seller may have in his/her possession regarding the property. These reports may include, but are not limited to the following:

- Surveys
- Geologists reports
- Engineering reports
- Structural pest control reports
- Full home inspection reports (often those reports are obtained at the time the house was listed in order to inform the seller of potential issues that may later arise during any real estate transaction)
- Soils reports
- Environmental hazards reports
- Underground storage tank soils reports
- Structural reports
- Lead Paint Disclosures

These reports may be helpful in explaining any areas that the TDS addresses by further providing an explanation relating to a specific property condition.

I. COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zone and purchase-money liens on residential property).

Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:

___ Inspection reports completed pursuant to the contract of sale or receipt for deposit.

___ Additional inspection reports or disclosures.

Section 2 Introduction

The introduction to Section 2 states the purpose of the TDS. It clearly informs the potential buyer that the TDS is not a warranty. It further states that the TDS is information provided by the seller regarding the condition of the property which may be relied upon by the buyer in deciding whether to purchase, and upon what terms to purchase the property that is the subject of the TDS. As was noted, the delivery of the TDS must be delivered to the buyer (transferee) as soon as practical before transfer of title. **In actual practice it is advisable to provide the completed TDS to the buyer before signing the offer to purchase.** Potential issues relating to property conditions can then be addressed in the buyer's offer. This helps avoid renegotiations of the original offer. From *both* the buyer's and the seller's standpoint, it is usually better to address potential property condition issues up front. If the buyer receives the TDS after execution of the offer to purchase, the buyer has three or five days to cancel the transaction.



The introduction to Section 2 also states that **the representations made by the seller are not the representations of the agents.** Clearly, the legal implication of this clause is to place liability for potential misrepresentation under this section with the seller. As will be noted in Sections 3 and 4 of the TDS, **the agents to the transaction do not escape liability.**

This section also states that the "information is a disclosure and is not intended to be part of any contract between the buyer and seller." The intent and purpose of this language is to separate the TDS from the Real Estate Purchase Contract. **The TDS is for informational purposes, while the Real Estate Purchase Contract document defines the terms and conditions of the sale.** If the TDS were to be incorporated into the Real Estate Purchase Contract, it could be argued that the list of things the seller disclosed that needed to be fixed might actually have to be fixed prior to the closing. That, however, is not the intent of the TDS. As noted, the earlier the TDS is given to the buyer, the earlier issues relating to the condition of the property can be addressed. If the TDS is delivered prior to the buyer making the offer, a majority of the condition of property issues can be addressed within the offer. After an offer has been accepted, additional inspections will usually occur. If the inspections discover items not addressed within the TDS, then further negotiations between the buyer and the seller may become necessary. If they carefully complete the TDS, most sellers will at least raise issues that will be of concern to the buyer, thereby allowing for early negotiation of those issues.

It is usually best to deliver the TDS as soon as possible. This avoids potential renegotiation of an offer and can speed up a transaction.

Section 2 (A)

Section 2 (A) of the TDS provides a list of items that the seller must check if that specific item is found on or is a part of the property being transferred. (NOTE: the list should be read from left to right, because it does not make sense if read vertically.) After the seller has checked any items, Section 2 (A) asks the question, "Are there, to the best of your knowledge, any of the above that are not in operating condition?" If the seller answers "yes," a description of the condition of the item must be given. **The seller should address each of these issues in good faith.** All statements made here must be based upon the seller's actual knowledge of the item in question at the time the disclosure is made.



If the conditions of some items on the list are not known, the seller is under an obligation to use reasonable efforts to obtain the information. If it cannot be obtained, the seller is to make a statement based upon the best information available. If that becomes the case, then that fact should be noted. The statement should not be used for circumventing or evading the disclosure statute.

It should also be noted that the following items, due to the extreme safety hazards which they represent if not present, installed properly, or properly maintained, should be evaluated as per the footnote at the end of Section 2 (A). These items are:

- Hot Tub: Locking Safety Cover
- Pool: Child Resistant Barrier
- Spa: Locking Safety Cover
- Water heater: anchored, braced or strapped
- Automatic Garage Door Opener: Automatic Reversing devices
- Bedroom Windows: Quick Release Mechanism

II. SELLER'S INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

Seller ____ is ____ is not occupying the property.

A. The subject property has the items checked below (read across):

Chapter 2: Transfer Disclosure Statements

Range Oven Microwave
 Dishwasher Trash Compactor Garbage Disposal
 Washer/Dryer Hookups Rain Gutters
 Burglar Alarms Smoke Detectors(s) Fire Alarm
 TV Antenna Satellite Dish Intercom
 Central Heating Central Air Conditioning Evaporative Cooler(s)
 Wall/Window Air Conditioning Sprinklers Public Sewer System
 Septic Tank Sump Pump Water Softener
 Patio/Decking Built-in Barbecue Gazebo
 Sauna
 Hot Tub (Locking Safety Cover) Pool (Child Resistant Barrier)
 Spa (Locking Safety Cover)
 Security Gate(s) Automatic Garage Number Remote Controls Door Opener(s)
 Garage: Attached Not Attached Carport
 Pool/Spa Heater: Gas Solar Electric
 Water Heater: Gas Water Heater Anchored, Braced, or Strapped *
 Water Supply: City Well Private Utility or Other
 Gas Supply: Utility Bottled
 Window Screens Window Bars Quick Release Mechanism on Bedroom Windows *

Exhaust Fan(s) in _____ 220 Volt Wiring in _____ Fireplace(s) in _____

Gas Starter _____ Roof(s): Type: _____ Age: _____ (approx.)

Other:

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? Yes No. If yes, then describe.

(Attach additional sheets if necessary):

* This garage door opener or child resistant pool barrier may not be in compliance with the safety standards relating to automatic reversing devices as set forth in Chapter 12.5 (commencing with Section 19890) of Part 3 of Division 13 of, or with the pool safety standards of Article 2.5 (commencing with Section 115920) of Chapter 5 of Part 10 of Division 104 of, the Health and Safety Code. The water heater may not be anchored, braced, or strapped in accordance with

Chapter 2: Transfer Disclosure Statements

Section 19211 of the Health and Safety Code. Window security bars may not have quick-release mechanisms in compliance with the 1995 Edition of the California Building Standards Code.

Section 2 (B)

Section 2 (B) asks the seller to **disclose any significant defects or malfunctions** that he/she is aware of, with respect to the items listed. Most of the items in this section deal more with the structural components of the property than those that were listed in Section 2 (A). If the seller is aware of any defects in these components, an explanation is to be provided by the seller.

The standard the seller should follow to complete this section of the TDS is the same good faith standard discussed in Section 2 (A). The standard requires that all statements made within the section are based upon the seller's actual knowledge of the item in question and at the time the disclosure was made. The seller is under an obligation to use reasonable efforts to obtain unknown information and, if the information cannot be obtained, to make a statement based upon the best information available. If that is the case, then that fact should be noted and the statement should not be used for circumventing or evading the disclosure statute.



B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? ___
Yes ___ No. If yes, check appropriate space(s) below.

___ Interior Walls ___ Ceilings ___ Floors ___ Exterior Walls ___ Insulation ___ Roof(s)

___ Windows ___ Doors ___ Foundation ___ Slab(s) ___ Driveways ___ Sidewalks

___ Walls/Fences ___ Electrical Systems ___ Plumbing/Sewers/Septic ___ Other

Structural Components (Describe): _____

If any of the above is checked, explain. (Attach additional sheets if necessary):

Section 2 (C)

Chapter 2: Transfer Disclosure Statements

Section 2 (C) asks the seller to answer yes or no to a series of questions. The seller may be inclined to check the "no" response box without giving adequate thought to the question. The seller should complete this section of the TDS with the same good faith standard discussed previously.



At the end of Section 2(C), the seller is to certify by his/her signature that the information given in Section 2 is true and correct to the best of seller's knowledge as of the date signed by the seller. These representations merely emphasize two critical issues:

- **The TDS is time sensitive.** It is the seller's "picture" of the property as of a specific date and time. If subsequent material changes to the property occur after the "as of" date, the seller should advise the buyer in writing of any such amendments necessary to the TDS.
- **The seller is to complete the TDS using the "good faith" standard.** Where the seller has actual knowledge of a specific component or condition, the actual knowledge should be expressed on the TDS. Where actual knowledge is not possible, the seller is under an obligation to use reasonable efforts to obtain the information. If the information cannot be obtained, the seller is to make a statement based upon the best information available.

C. Are you (Seller) aware of any of the following:	
1. Substances, materials or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property.	___ Yes ___ No
2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have effect on the subject property.	___ Yes ___ No
3. Any encroachments, easements, or similar matters that may affect your interest in the subject property?	___ Yes ___ No
4. Room additions, structural modifications, or other alterations or repairs made without necessary permits.	___ Yes ___ No
5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes.	___ Yes ___ No
6. Fill (compacted or otherwise) on the property or any portion thereof.	___ Yes ___ No
7. Any settling from any cause, or slippage, sliding, or other soil problems.	___ Yes ___ No
8. Flooding, drainage or grading problems.	___ Yes ___ No
9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides.	___ Yes ___ No

Chapter 2: Transfer Disclosure Statements

10. Any zoning violations, nonconforming uses, violations of "setback" requirements.	____ Yes ____ No
11. Neighborhood noise problems or other nuisances.	____ Yes ____ No
12. CC&Rs or other deed restrictions or obligations.	____ Yes ____ No
13. Homeowner's Association which has any authority over the subject property.	____ Yes ____ No
14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided Interest with others).	____ Yes ____ No
15. Any notices of abatement or citations against the property?	____ Yes ____ No
16. Any lawsuits by or against the seller threatening to or Affecting this real property, including any lawsuits alleging a Defect or deficiency in this real property or "common areas" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others).	____ Yes ____ No
<p>If the answer to any of these is yes, explain. (Attach additional sheets if necessary.) _____</p> <p>Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.</p> <p>Seller _____ Date _____</p> <p>Seller _____ Date _____</p>	

Section 3

Section 3 is to be completed by the **seller's agent** in the transaction. In completing this section the agent is certifying that, based upon the information obtained from the seller as well as the agent's own visual inspection of the property, the agent either finds no additional items to disclose or that the agent notes items that must be disclosed to the prospective buyer in addition to those in Section 2. **It is not sufficient for the agent to simply complete this section by making blanket statements** such as "Per seller's statements" or "suggest buyer obtain an inspection to satisfy themselves that property is in good condition."

Section 3 is based upon the principles of the Easton case as codified in Section 2079 of the California Civil Code. Agents are advised to fully understand the implications of these laws in fulfilling their obligations under Section 3 of the TDS disclosures.

III. AGENT'S INSPECTION DISCLOSURE

(To be completed only if the Seller is represented by an agent in this transaction.)

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING:

Chapter 2: Transfer Disclosure Statements

_____ Agent notes no items for disclosure.

_____ Agent notes the following items:

Agent (Broker Representing Seller) _____ By _____ Date _____

Section 4

Section 4 is to be completed by the **buyer's agent**, if that agent is not also representing the seller (listing agent) in the transaction. In completing this section, the buyer's agent is certifying that there are no additional items to disclose or that there are items that must be disclosed to the prospective buyer in addition to those in Section 2. Like Section 3, **It is not sufficient for the agent to simply complete this section by making blanket statements** such as "Per seller's statements" or "suggest buyer obtain an inspection to satisfy themselves that property is in good condition."

Section 4 is also based upon the principles of the Easton case as codified in Section 2079 of the California Civil Code. Agents are advised to fully understand the implications of these laws. It is also important to note that both the listing and selling agent have the responsibility to disclose material defects to the buyer.

IV. AGENT'S INSPECTION DISCLOSURE

(To be completed only if the agent who has obtained the offer is other than the agent above.)

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING:

_____ Agent notes no items for disclosure.

_____ Agent notes the following items:

Agent (Broker obtaining the Offer) _____ By _____ Date _____

Section 5

Section 5 notifies the seller and buyer that they may wish to obtain professional advice and/or inspections of the property. It further states that due to the advice and/or inspections of the property, that appropriate provision in a contract between the seller and the buyer may be necessary. These statements merely redefine provisions that are included in the Real Contract for Purchase and Sale. In that document, the buyer has the option of obtaining professional inspections. The results of those inspections may result in further negotiation between the seller and buyer with respect to price or other terms relating to the purchase of the property.



The seller and buyer also acknowledge receipt of the TDS in Section 5. Because the seller normally signs the TDS prior to the agent's completion of Sections 3 and 4, the seller should get a completely executed copy as soon as possible after the buyer's agent completes and executes Section 4. **As soon as Sections 1 through 4 have been completed, the buyer's agent should deliver the TDS to the buyer.** Upon delivery to the buyer, the buyer should acknowledge receipt of the document by signature.

V. BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER(S) WITH RESPECT TO ANY ADVICE, INSPECTIONS, OR DEFECTS

I / WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT

Seller _____ Date _____ Buyer _____ Date _____

Seller _____ Date _____ Buyer _____ Date _____

Agent (Broker Representing Seller) _____ By _____
Date _____

(Associate Licensee or Broker-Signature)

Agent (Broker obtaining the Offer) _____ By _____
Date _____

(Associate Licensee or Broker-Signature)

SECTION 1102.3 OF THE CIVIL CODE PROVIDES A BUYER WITH THE RIGHT TO RESCIND A PURCHASE CONTRACT FOR AT LEAST THREE DAYS AFTER THE DELIVERY OF THIS DISCLOSURE IF DELIVERY OCCURS AFTER THE SIGNING OF AN OFFER TO PURCHASE. IF YOU WISH TO RESCIND THE CONTRACT, YOU MUST ACT WITHIN THE PRESCRIBED PERIOD.

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

(Civil Code Section 1102 et seq.)

Local Option Real Estate Transfer Disclosure Statement

Since July 1, 1990, any city or county may elect to require disclosure in addition to those disclosures required on the TDS form. The form of the disclosure is set forth on the Local Option Real Estate Transfer Disclosure Statement (LORETDS) set forth below. The overall type of information that a city or county may require will generally relate to specific information about the neighborhood or community in which the property is located.

EXAMPLE: If a property borders a wooded open space and the city has plans to develop the property as a community center in the future, the city may require that any property owner desiring to sell property bordering the wooded property to inform potential buyers that the city has plans to develop it, thereby altering its current use.

Much like the regular TDS, keep in mind:

- "Good Faith" is the standard in the seller's completion of the Local Option Disclosure Statement.
- The LORETDS is valid "as of" the date completed and executed by seller.
- The LORETDS is not a warranty.

Unlike the TDS, the LORETDS does not require any disclosure participation on the part of the agents representing either the seller or the buyer in the transaction. The only role the agents have is the delivery of the document to the buyer, as the seller prepared it.

LOCAL OPTION REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS _____. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH ORDINANCE NO. _____ OF THE _____ CITY OR COUNTY CODE AS OF _____ (date). IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I. SELLER'S INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

Chapter 2: Transfer Disclosure Statements

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AS REQUIRED BY THE CITY OR COUNTY OF _____ AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

1. _____
2. _____

(Example: Adjacent land is zoned for timber production which may be subject to harvest).

Seller Certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____

Seller _____ Date _____

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER WITH RESPECT TO ANY ADVICE/INSPECTION DEFECTS.

I / WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller _____ Date _____ Buyer _____ Date _____

Seller _____ Date _____ Buyer _____ Date _____

Agent (Broker Representing Seller) _____ By _____ Date _____

(Associate Licensee or Broker-Signature)

Agent (Broker Obtaining the Offer) _____ By _____ Date _____

(Associate Licensee or Broker-Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

(Civil Code Section 1102.6a)

Chapter 3: Natural Hazards Disclosure

At the conclusion of this chapter you will be able to:

1. Name and describe each of the major hazard zones.
2. Explain when and what form facts concerning hazard zone housing are to be disclosed.
3. Identify the NHDS form.

Introduction

As of June 1, 1998, new real estate disclosure requirements relating to natural hazards became effective throughout the state of California. This law was, in part, a result of the state's seismic hazard mapping act program dating back to the 1972 *Alquist-Priolo Special Studies Zone Act*. Additional natural hazards relating to floods and fire were identified as potential natural hazards that many Californians might be subject to. The new natural hazard disclosure law was enacted as a part of the trend to give buyers of real estate more consumer protection by disclosing whether a home for sale is in any of the following six hazard zones:



- A Federal Emergency Management Agency (FEMA) designated special **flood hazard zone**.
- A California Office of Emergency Services designated area of **potential flooding after a dam failure**.
- A California Board of Forestry designated special **high fire hazard area**.
- A California Board of Forestry designated **wild-land fire area**.
- A California state designated **earthquake fault zone**.
- A California State designated **seismic hazard zone**.

In addition to the usual Transfer Disclosure Statement required by Civil Code Section 1102.6, a seller (or the seller's agent) must give the prospective buyer a separate "Natural Hazard Disclosure Statement" if the residential property lies within one or more of these six areas.

Chapter 3: Natural Hazards Disclosure

Although the form for the natural hazard disclosures is generally mandated only for those properties subject to the requirement of TDS delivery, the appropriate environmental hazards disclosures must be made in some manner when any real property located in one of the zones is to be sold. Written disclosure that has been acknowledged by the prospective buyer is recommended.

The 1998 natural hazard disclosure legislation is a *consolidation* of the six independent natural hazards disclosure requirements. Three of the disclosure requirements were required prior to the 1998 legislation; these disclosures related to earthquake fault zone, seismic hazards zones, and wild-land fire zones. The remaining three zones, special flood hazard area, dam inundation failure area, and high-fire severity zones became law under the new legislation. Each separate disclosure applies to the sale of real property, including residential resales, new subdivision sales, and commercial property transactions. If the transaction is subject to the TDS disclosure requirement, then the NHDS disclosure form must be made. However, in these cases the seller or agent may elect the form in which the disclosure is given.

When Natural Hazard Area Disclosures Must Be Made

The NHDS disclosures must be made if the seller or the seller's agent has actual knowledge of the property being located within one of the six designated hazard zones. Disclosure must also be made *without* regard to actual knowledge if the local jurisdiction has been provided with either:

- A list by parcel of the properties within the area which are in special flood and dam failure inundation areas.
- The required maps for high fire severity zones, wild-land fire areas, earthquake fault zones, and seismic hazard zones.



If either the parcel list or required maps are available, the local jurisdiction must post the required notice regarding the location of the list or map in the applicable local government office. Thus, sellers and their agents will be considered to have constructive knowledge of any hazard area information available through local agencies.

The major challenge for sellers and their agents is how to best determine whether the property is located in one of the designated six hazard areas. The task to accomplish this may be very daunting. Often, calls to various local governmental agencies will result in a lack of knowledge by those attempting to assist in the process, confusion between various departments, and lack of consistent, reliable information.

In order to assist sellers and their agents in this disclosure process, **a number of private companies have formed or added additional services to meet the demand created by the new law.** These companies have the needed maps and the personnel to accurately read and interpret the data that has been provided by the federal and state governmental agencies. They provide the reports to help sellers and their agents to better comply with the hazard disclosure law. The reports provided by these companies generally range from \$60 to \$125. **In most cases, the seller will pay for the reports to fulfill their disclosure obligations.** In so doing they are, in essence, transferring any potential liability for disclosure to the company for any wrong interpretations of the available data as applied to a specific property.

The Six Natural Hazards Required to be Disclosed

Following are brief descriptions for each of the six natural hazard areas and the sources of information relating to each.

Zone A or Zone V (Special Flood Hazard Areas)

The properties within Zones A and V are found on the flood insurance rate maps issued by the Federal Emergency Management Agency (FEMA). Zone A is the 100-year flood plain and Zone V is the 100-year coastal flood area. These zones include "Special Flood Areas" where, in any given year, there is a 1% chance that a portion, or all of the property is likely to be inundated by a flood. Some cities and/or counties publish their own maps which designate local flood hazards that might vary from FEMA maps. If the property is partially or wholly located within a "Special Flood Hazard Area," the lending institution will likely require flood insurance. In addition, government restrictions may impact new or additional construction in this zone.

Government Code Section 8589.3 is the statute that applies to this natural hazard disclosure requirement.

Dam Failure Inundation Areas

These zones are areas where, in the event one or more nearby dam(s) or dike(s) fail or spill over, the property could be subject to flooding and/or damages associated with flash flooding. Dam failures can be caused by severe earthquakes or by heavy rainfall resulting in flooding and overflowing of a reservoir. The zones covered in this category include properties designated by the State Office of Emergency Services (OES) as being subject to potential flooding in case of partial or total failure of any dam. The OES has the primary responsibility in distributing the inundation maps. The maps are kept on file with the OES and the State Department of Water Resources. Some cities and/or counties publish their own maps which designate local flood hazards and dam inundation areas that might vary from the OES maps. If the property is located within a dam inundation



Chapter 3: Natural Hazards Disclosure

area, there is currently no requirement for the lending institution to demand flood insurance, as would be the case if the property was located in a FEMA Special Flood Hazard Area.

Government Code Section 8589.4 is the statute that applies to this natural hazard disclosure requirement.

Designated Very High Fire Hazard Severity Zones

The Oakland hills fire was the impetus for the creation of this natural hazard zone. The Director of Forestry and Fire Protection has the responsibility of identifying high fire hazard severity zones and to transmit this information to the local jurisdictions.

These high fire hazard severity zones are identified by physical conditions of the area that could cause fires that are more severe, more difficult to put out, or cause more damage. **These conditions may include fuel, slope, and weather.** In most cases, if the property is in one of these areas, a Class "A" roof will be necessary for the new construction or roof replacement. Other fire defense improvements, including minimum clearances around the structure, may be required to be maintained.

Government Code Sections 51183.5 through 51188 are the statutes that apply to this natural hazards disclosure requirement.

Designated Wild Land Areas ("State Responsibility Areas")



A State Fire Responsibility Area (SRA) is a zone where the state, as opposed to city or county fire departments, has the responsibility for wild-land fire suppression. Property owners in SRA areas are responsible for organizing structural fire protection services, including cooperative fire fighting agreements and individual homeowner fire prevention measures such as the maintenance of firebreaks around all structures. If no such fire service exists, there may be significantly added risks associated with fires. Additionally, government institutions may force new or additional constraints in an SRA. The California State Board of Forestry is required to classify the wild-land fire areas and to provide maps identifying these areas to the county assessor of each county that contains such areas.

Public Resources Code Sections 4136, 4142 and 4291 are the statutes that apply to this natural hazards disclosure requirement.

Earthquake Fault Zones

The original mapping of the earthquake fault zones was authorized by the Alquist-Priolo Special Studies Zones Act in 1972. This act was passed due to the potential consequences of building on land located in or near active fault zones.

The areas covered in this natural hazard category includes all property located within a delineated earthquake fault zone as shown on an official earthquake fault zone map. The State Geologist is required to compile maps that identify the zones that include all potential and recently active movements of the San Andreas, Claveras, Hayward, and San Jacinto faults. In addition to these well-defined fault areas, the State Geologist is also required to include other faults so as to constitute a potential hazard to structures from surface faulting or fault creep. These zones may be as narrow as 600 feet and as wide as approximately 1,500 feet, extending to either side of a known or suspected fault.

If a property is located within a designated geologic fault zone, a geologic study may be required prior to any new or additional construction, and construction requirements may be more expensive. In addition, the availability of insurance and its relative costs could be impacted in these zones.

Public Resources Code Section 2621.9 is the statute that applies to this natural hazard disclosure requirement.

Seismic Hazard Zones

Seismic hazard zones are areas defined by the State Geologist as those areas which may be subject to strong ground shaking, liquefaction, landslides or ground failures, and other seismic hazards caused by earthquakes. These may result in structural damage to any building located in these areas. If a property is within one of these zones, a geologic study may be required prior to any new or additional construction. There may also be special permit requirements or restrictions. Construction requirements may be more expensive.

The State Geologist must provide copies of these seismic zone maps to each city and county having jurisdiction over property within the zone.

Public Resources Code Section 2694 is the statute that applies to this natural hazard disclosure requirement.

Natural Hazard Disclosure Procedures

Chapter 3: Natural Hazards Disclosure

If the real estate transaction is subject to the TDS requirement, the natural hazards disclosures statement must be made using either the Natural Hazards Disclosure Statement (California Civil Code Section 1102.6c(b)), or on the Local Option Real Estate Transfer Disclosure Statement (LORETDS). The LORETDS may only be used if the local jurisdiction has mandated use of a LORETDS for some disclosure purpose. The information and warnings are substantially the same as on the NHDS.

Although some property transactions do not require the seller to provide a TDS, the seller may still be required to make the natural hazards disclosures. In these situations, it may be advisable to use the mandated form or at a minimum, incorporate the substantive provisions of the form.

The primary responsibility to make the natural hazard disclosures is on the seller's agent for properties located in an *earthquake fault zone, seismic hazard zone, FEMA Zone A or V, or dam failure inundation area*. If the seller has no agent, the seller is completely responsible for the disclosures. Additionally, **the seller has direct responsibility for making the disclosure for properties located in high-fire severity zones and wild-land fire areas.**



In completing the NHDS, **it may often be difficult for the seller or the seller's agent to determine if a specific property is located within one of the six hazard zones.** The maps or property lists may not be of sufficient accuracy or scale so that a reasonable person could determine whether the property is within the zone area. **For the purposes of completing the NHDS in these cases, the seller or the seller's agent must assume that the property is located within the specific hazard areas** by checking "YES" on the applicable NHDS zone category. "NO" can *only* be marked if an expert's report has been prepared pursuant to California Civil Code Section 1102.4 (c) which verifies that the property is not in the specific hazard zone. The expert's report must be attached to the NHDS.

It is primarily the **seller's agent's** responsibility to make most natural hazard disclosures, but it is directly the **seller's** responsibility when dealing with fire-related hazard zones. If it is difficult to determine if a property is inside a hazard zone, it must be marked as "YES."

The following is a sample of the required NHDS form:

NATURAL HAZARD DISCLOSURE STATEMENT

This statement applies to the following property: _____

The transferor and his or her agent(s) or a third-party consultant disclose the following information with the knowledge that even though this is not a warranty, prospective transferees may rely on this information in deciding whether and on what terms to purchase the subject property. Transferor hereby authorizes any agent(s) representing any principal(s) in this action to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

Chapter 3: Natural Hazards Disclosure

The following are representations made by the transferor and his or her agent(s) based on their knowledge and maps drawn by the state and federal governments. This information is a disclosure and is not intended to be part of any contract between the transferee and transferor.

THIS REAL PROPERTY LIES WITHIN THE FOLLOWING HAZARDOUS AREAS(S):

A SPECIAL FLOOD HAZARD AREA (Any type Zone "A" or "V") designated by the Federal Emergency Management Agency.

Yes _____

No _____

Do not know and information not available from local jurisdiction _____

AN AREA OF POTENTIAL FLOODING shown on a dam failure inundation map pursuant to Section 8589.5 of the Government Code.

Yes _____

No _____

Do not know and information not available from local jurisdiction _____

A VERY HIGH FIRE HAZARD SEVERITY ZONE pursuant to Section 51178 or 51179 of the Government Code. The owner of this property is subject to the maintenance requirements of Section 51182 of the Government Code.

Yes _____

No _____

A WILDLAND AREA THAT MAY CONTAIN SUBSTANTIAL FOREST FIRE RISKS AND HAZARDS pursuant to Section 4125 of the Public Resources Code. The owner of this property is subject to the maintenance requirements of Section 4291 of the Public Resources Code.

Additionally, it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency for those purposes pursuant to Section 4142 of the Public Resources Code.

Yes _____

No _____

AN EARTHQUAKE FAULT ZONE pursuant to Section 2622 of the Public Resources Code.

Yes _____

No _____

A SEISMIC HAZARD ZONE pursuant to Section 2696 of the Public Resources Code.

Yes (Landslide Zone) _____

Yes (Liquefaction Zone) _____

Chapter 3: Natural Hazards Disclosure

No _____

Map not yet released by state _____

THESE HAZARDS MAY LIMIT YOUR ABILITY TO DEVELOP THE REAL PROPERTY, TO OBTAIN INSURANCE, OR TO RECEIVE ASSISTANCE AFTER A DISASTER.

THE MAPS ON WHICH THESE DISCLOSURES ARE BASED ESTIMATE WHERE NATURAL HAZARDS EXIST. THEY ARE NOT DEFINITIVE INDICATORS OF WHETHER OR NOT A PROPERTY WILL BE AFFECTED BY A NATURAL DISASTER. TRANSFEREE(S) AND TRANSFEROR(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE REGARDING THOSE HAZARDS AND OTHER HAZARDS THAT MAY AFFECT THE PROPERTY.

Signature of Transferor(s) _____ Date _____

Signature of Transferor(s) _____ Date _____

Agent(s) _____ Date _____

Agent(s) _____ Date _____

Check only one of the following:

Transferor(s) and their agent(s) represent that the information herein is true and correct to the best of their knowledge as of the date signed by the transferor(s) and agent(s).

Transferor(s) and their agent(s) acknowledge that they have exercised good faith in the selection of a third-party report provider as required in Civil Code Section 1103.7, and that the representations made in this Natural Hazard Disclosure Statement are based upon information provided by the independent third-party disclosure provider as a substituted disclosure pursuant to Civil Code Section 1103.4.

Neither transferor(s) nor their agent(s) (1) has independently verified the information contained in this statement and report or (2) is personally aware of any errors or inaccuracies in the information contained on the statement. This statement was prepared by the provider below:

Third-Party Disclosure Provider(s) _____ Date _____

Transferee represents that he or she has read and understands this document. Pursuant to Civil Code Section 1103.8, the representations made in this Natural Hazard Disclosure Statement do not constitute all of the transferor's or agent's disclosure obligations in this transaction.

Signature of Transferee(s) _____ Date _____

Signature of Transferee(s) _____ Date _____

Failure to Disclose and Erroneous Disclosures

A transaction is not invalidated by failure to make the required natural hazard disclosures. However, **any person who willfully or negligently fails to make the required disclosures is liable for actual damages suffered by the transferee.** It does not take much imagination to realize that the failure to disclose opens sellers and their agents up to potentially vast amounts of exposure. Earthquakes, fires, or floods often leave the homeowner victimized by the natural disaster facing inadequate or nonexistent insurance proceeds. Sellers and their agents may be the source of recovery for losses sustained by victims of these disasters.



Consequently, it is important that all sellers and their agents understand the consequences of failing to make the required natural hazards disclosures or negligently making the disclosures. **It is important that sellers and agents diligently fulfill these disclosure requirements.**

Sellers and their agents in transactions subject to the TDS disclosure requirements may receive some liability protection if they rely on information received from public agencies or qualified experts (California Civil Code Section 1102.4). Under this code section, neither the seller nor the agent is liable for any error, inaccuracy, or omission if:

- It is based on information received from a public agency or qualified expert
- The error, inaccuracy, or omission was not within the personal knowledge of the seller or agent
- The seller or agent exercised ordinary care in obtaining and transmitting the information.

A "qualified" expert may be a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert dealing with matters within the scope of the professional's license or expertise. Presumably, the numerous companies now providing natural hazards disclosure information and reports would qualify as a "qualified" expert.

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

At the conclusion of this chapter you will be able to list several miscellaneous property transfer disclosure requirements and discuss the expectations of each.

Introduction

There are a number of additional miscellaneous property disclosures that must be made pursuant to California or federal law. This section will discuss the additional required property component disclosures. The majority of these disclosures must be made on the TDS or the Local Option TDS. Some of these disclosures relate to physical components of the property. Others are either general informational disclosures or relate to matters involved in the transfer of real property.

Agent Visual Inspection Disclosure (AVID)

The National Association of REALTORS® Code of Ethics Article 2 requires its members not to conceal pertinent facts about a property. The law relating to disclosure requires a licensee to disclose what he or she already knows about a property.

The California Civil Code Section 2079 goes a step beyond the basic disclosure requirements under the Code of Ethics and disclosure law. Not only must the agent disclose what he or she already knows, but also there is a statutory obligation to do an investigation of the property.

California Civil Code Section 2079 requires both a buyer's agent and a seller's agent "to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to [the] prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal..." The investigation is not excessively demanding. The code specifies that it "does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property..."

Furthermore, compliance with the law does not demand expertise in fields such as construction, engineering, or geology. The code states that the standard of care is "the degree or care that a reasonably prudent real

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

estate licensee would exercise" and that it is measured by the degree of knowledge "required to obtain a license".

The following Agent Visual Inspection Disclosure (AVID) form was developed by the California Association of REALTORS® (CAR). This form is designed to help licensees fulfill their inspection duties. This particular form is not legally mandated by statute, but should be regarded as a convenient way to comply with Section 2079's investigation and disclosure requirements. In most cases, both the listing and selling agent should complete the AVID during the buyer's inspection and investigation period. Note that the CAR AVID form indicates that the AVID form is to be used when a residential transfer disclosure is required or when a seller is exempt from completing the TDS.

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements



**CALIFORNIA
ASSOCIATION
OF REALTORS®**

AGENT VISUAL INSPECTION DISCLOSURE (CALIFORNIA CIVIL CODE § 2079 ET SEQ.)

**For use by an agent when a transfer disclosure statement is
required or when a seller is exempt from completing a TDS
(C.A.R. Form AVID, Revised 4/11)**

This inspection disclosure concerns the residential property situated in the City of Any Town USA, County of _____, State of California, described as 123 Any Street ("Property").

Inspection Performed By (Real Estate Broker Firm Name) _____

California law requires, with limited exceptions, that a real estate broker or salesperson (collectively, "Agent") conduct a reasonably competent and diligent visual inspection of reasonably and normally accessible areas of certain properties offered for sale and then disclose to the prospective purchaser material facts affecting the value or desirability of that property that the inspection reveals. The duty applies regardless of whom that Agent represents. The duty applies to residential real properties containing one-to-four dwelling units, and manufactured homes (mobilehomes). The duty applies to a stand-alone detached dwelling (whether or not located in a subdivision or a planned development) or to an attached dwelling such as a condominium. The duty also applies to a lease with an option to purchase, a ground lease or a real property sales contract of one of those properties.

California law does not require the Agent to inspect the following:

- Areas that are not reasonably and normally accessible
- Areas off site of the property
- Public records or permits
- Common areas of planned developments, condominiums, stock cooperatives and the like.

Agent Inspection Limitations: Because the Agent's duty is limited to conducting a reasonably competent and diligent visual inspection of reasonably and normally accessible areas of only the Property being offered for sale, there are several things that the Agent will not do. What follows is a non-exclusive list of examples of limitations on the scope of the Agent's duty.

Roof and Attic: Agent will not climb onto a roof or into an attic.

Interior: Agent will not move or look under or behind furniture, pictures, wall hangings or floor coverings. Agent will not look up chimneys or into cabinets, or open locked doors.

Exterior: Agent will not inspect beneath a house or other structure on the Property, climb up or down a hillside, move or look behind plants, bushes, shrubbery and other vegetation or fences, walls or other barriers.

Appliances and Systems: Agent will not operate appliances or systems (such as, but not limited to, electrical, plumbing, pool or spa, heating, cooling, septic, sprinkler, communication, entertainment, well or water) to determine their functionality.

Size of Property or Improvements: Agent will not measure square footage of lot or improvements, or identify or locate boundary lines, easements or encroachments.

Environmental Hazards: Agent will not determine if the Property has mold, asbestos, lead or lead-based paint, radon, formaldehyde or any other hazardous substance or analyze soil or geologic condition.

Off-Property Conditions: By statute, Agent is not obligated to pull permits or inspect public records. Agent will not guarantee views or zoning, identify proposed construction or development or changes or proximity to transportation, schools, or law enforcement.

Analysis of Agent Disclosures: For any items disclosed as a result of Agent's visual inspection, or by others, Agent will not provide an analysis of or determine the cause or source of the disclosed matter, nor determine the cost of any possible repair.

What this means to you: An Agent's inspection is not intended to take the place of any other type of inspection, nor is it a substitute for a full and complete disclosure by a seller. Regardless of what the Agent's inspection reveals, or what disclosures are made by sellers, California Law specifies that a buyer has a duty to exercise reasonable care to protect himself or herself. This duty encompasses facts which are known to or within the diligent attention and observation of the buyer. Therefore, in order to determine for themselves whether or not the Property meets their needs and intended uses, as well as the cost to remedy any disclosed or discovered defect, **BUYER SHOULD: (1) REVIEW ANY DISCLOSURES OBTAINED FROM SELLER; (2) OBTAIN ADVICE ABOUT, AND INSPECTIONS OF, THE PROPERTY FROM OTHER APPROPRIATE PROFESSIONALS; AND (3) REVIEW ANY FINDINGS OF THOSE PROFESSIONALS WITH THE PERSONS WHO PREPARED THEM. IF BUYER FAILS TO DO SO, BUYER IS ACTING AGAINST THE ADVICE OF BROKER.**

Buyer's Initials (____)(____)

Seller's Initials (____)(____)

The copyright laws of the United States (Title 17 U.S. Code) forbid the unauthorized reproduction of this form, or any portion thereof, by photocopy machine or any other means, including facsimile or computerized formats. Copyright © 2011, CALIFORNIA ASSOCIATION OF REALTORS®, INC. ALL RIGHTS RESERVED.

Reviewed by _____ Date _____



AVID REVISED 4/11 (PAGE 1 OF 3)

AGENT VISUAL INSPECTION DISCLOSURE (AVID PAGE 1 OF 3)

Agent: _____	Phone: _____	Fax: _____	Prepared using zipForm® software
Broker: _____			

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

Property Address: 123 Any Street
Any Town USA, Date: _____

Other Room: _____

Other: _____

Other: _____

Other: _____

Garage/Parking (excluding common areas): _____

Exterior Building and Yard - Front/Sides/Back: _____

Other Observed or Known Conditions Not Specified Above: _____

This disclosure is based on a reasonably competent and diligent visual inspection of reasonably and normally accessible areas of the Property on the date specified above.

Real Estate Broker (Firm who performed the inspection) _____
By _____ Date _____
(Signature of Associate Licensee or Broker)

Reminder: Not all defects are observable by a real estate licensee conducting an inspection. The inspection does not include testing of any system or component. Real Estate Licensees are not home inspectors or contractors. BUYER SHOULD OBTAIN ADVICE ABOUT AND INSPECTIONS OF THE PROPERTY FROM OTHER APPROPRIATE PROFESSIONALS. IF BUYER FAILS TO DO SO, BUYER IS ACTING AGAINST THE ADVICE OF BROKER.

I/we acknowledge that I/we have read, understand and received a copy of this disclosure.

Date _____ Date _____
SELLER _____ SELLER _____

Date _____ Date _____
BUYER _____ BUYER _____

Real Estate Broker (Firm Representing Seller) _____
By _____ Date _____
(Associate Licensee or Broker Signature)

Real Estate Broker (Firm Representing Buyer) _____
By _____ Date _____
(Associate Licensee or Broker Signature)

The copyright laws of the United States (Title 17 U.S. Code) forbid the unauthorized reproduction of this form, or any portion thereof, by photocopy machine or any other means, including facsimile or computerized formats. Copyright ©2007, CALIFORNIA ASSOCIATION OF REALTORS®, INC. ALL RIGHTS RESERVED. THIS FORM HAS BEEN APPROVED BY THE CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.). NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE TRANSACTIONS. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL.

This form is available for use by the entire real estate industry. It is not intended to identify the user as a REALTOR®, REALTORS® is a registered collective membership mark which may be used only by members of the NATIONAL ASSOCIATION OF REALTORS® who subscribe to its Code of Ethics.

Published and Distributed by:

REAL ESTATE BUSINESS SERVICES, INC.
a subsidiary of the CALIFORNIA ASSOCIATION OF REALTORS®
528 South Virgil Avenue, Los Angeles, California 90020

Reviewed by _____ Date _____



AVID REVISED 4/11 (PAGE 3 OF 3) AGENT VISUAL INSPECTION DISCLOSURE (AVID PAGE 3 OF 3) 1013 Tamarisk

Window Security Bars

Homeowners have, in many parts of California, installed security bars as a deterrent to unauthorized entry into the home through windows. If not properly installed or if bars do not have operable safety release mechanisms, exit from the structure may be prevented or delayed in the event of a fire or other quick evacuation. The potential consequences could be fatal. The current California Building Standards Code requires properly installed security bars with operable safety release mechanisms. **This disclosure requirement is designed to ensure that the prospective buyer is aware of the danger posed by malfunctioning security bars and/or their release mechanisms.**



California Civil Code Section 1102.16 **requires the disclosure of the existence of any window security bars and any safety release mechanisms on them.** These disclosures should be made on the TDS, or if mandated, on the Local Option TDS. This issue is addressed in the TDS, Section II (A).

Smoke Detector Statement of Compliance

Smoke detectors have long been recognized as an effective first line of defense against indoor fires. As a result, whenever a sale (or exchange) of a single family dwelling occurs, **the seller must provide the buyer with a written statement representing that the property is in compliance with California law regarding smoke detectors.** The TDS, Section II (A) is where this required disclosure is to be made. Current California law requires that in all existing dwelling structures, **a smoke detector must be installed in a central location outside of each sleeping area.** If sleeping areas are on different floors in the structure, **smoke detectors must be present on each floor where sleeping areas are located.**



In the case of **new construction** or any additions and/or alterations to an existing structure exceeding \$1,000 for which a permit is required, **a smoke detector must be installed in each sleeping area and at a point centrally located in a corridor or area outside of sleeping areas.** In new construction, the smoke detector must be hard-wired and must have a battery backup power supply. In existing structures, battery operated smoke detectors are all that is required.

Statutory authority: California Building Code Section 1210; State Fire Marshall Regulation 92-04 and Health and Safety Code Section 13113.8.

These smoke detector placement requirements are state-mandated minimum standards. Local jurisdictions may impose standards that are more stringent.

Water Heater Bracing and Disclosure Requirements

One of the dangers posed by an earthquake is the displacement of a water heater. This is especially the case in a gas-fired water heater where, if the unit falls or is displaced horizontally, it may result in a disturbance of the gas line connection which can lead to a potential fire or explosion. The falling of a water heater with the potential for the spilling of gallons of extremely hot water is also considered a safety hazard.

In order to address this issue, **all new and replacement water heaters sold in California on or after July 1, 1991 must be braced, anchored, or strapped to resist falling or horizontal displacement due to motion caused by an earthquake.** Effective January 1, 1996 the original law was expanded to include all *existing* water heaters as well.

The seller of any real property must certify to a prospective purchaser that either the 1991 or 1996 expanded law requirements have been complied with. The water heater bracing, anchoring, or strapping must meet either the minimum state of California code or any more stringent code that may be applicable in a given local jurisdiction. This certification must be in writing and may be done in any of, but not limited to, the following transaction documents:

- Real Estate Purchase Contract
- Homeowner's Guide to Earthquake Safety
- The TDS
- The Local Option TDS
- California Association of REALTORS® Form SDC-14 (The Smoke Detector/Water Heater Statement of Compliance)



Statutory authority: Health and Safety Code Section 19211.

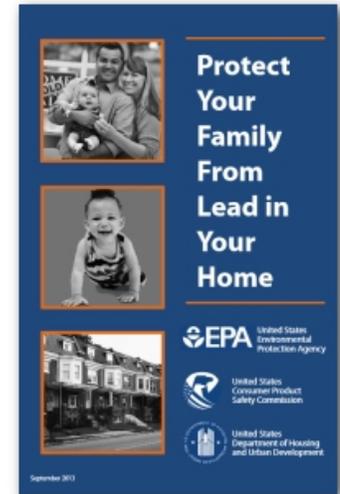
PROPER METHOD OF ANCHORING: The minimum standard for anchoring is set forth in the *California Plumbing Code*. This minimum method involves strapping the tank with flexible metal plumber's tape and affixing that plumber's tape securely to the wall next to the tank. Local building codes may impose stricter anchoring procedures. If a seller or buyer were to refer to the "Homeowner's Guide to Earthquake Safety" booklet prepared by the Seismic Safety Commission, the drawing in the guide shows metal tubing used in addition to the plumber's tape strapping as the proper method to anchor the water tank. The metal tubing in the drawing is often confusing to the consuming public. The minimum state standard, which requires the use of plumber's tape, meets most local building codes and should be regarded as compliance with the water heater anchoring law and the required disclosures.

Lead-Based Paint Hazards Disclosure

In 1994, in order to address the issues raised by the lead health concerns, the United States Environmental Protection Agency (EPA) and the United States Department of Housing and Urban Development (HUD) drafted new federal regulations on the disclosure of lead-based paint hazards in residential property to comply with the Residential Lead-based Paint Hazard Reduction Act of 1992. These new rules were implemented in 1996 in cooperation with the National Association of REALTORS®.

The 1996 rules provide that sellers or their real estate broker/agent must:

- Provide to buyers and tenants a federally approved **lead-based paint hazard information pamphlet** entitled "Protect Your Family from Lead in Your Home."
- **Disclose the presence of any known lead-based paint** and or lead-based hazard in any house built prior to 1978.
- Provide buyers and tenants **copies of any available reports** dealing with the presence of lead-based paint or lead-based hazards.
- Provide buyers (but not tenants) with a 10-day or **mutually agreeable period for a lead paint assessment** or inspection before a purchaser becomes obligated under the contract to purchase. The buyer may waive this right to test for lead.



The lead disclosure rules apply to both the purchase of residential property and to the renting of residential property built prior to 1978, with the following exceptions:

- Property sold at foreclosure.
- Rental property that is certified "lead-based paint free" by an inspector who is certified under a federal program or federally authorized state certification program.
- Property leased for 100 days or less with no lease renewal or extension
- Renewal of existing leases if disclosure was made at the time of the initial lease. However, disclosure must be made when renewing leases that were in effect on September 6, 1996.
- Units with no bedrooms, no separation between sleeping and living areas (e.g., studio apartments, dormitories, individual rental rooms in a residential dwelling).
- Housing for the elderly or disabled if children under the age of six are not expected to live there.

The signed documentation demonstrating that the home purchaser or home lessee received the required disclosure information must be retained by the seller, the landlord, or his/her agent for a period of three years from the date of the sale or lease. The burden of compliance with the lead disclosure law is on the seller and/or lessor. **If a licensed real estate agent is involved in the transaction, it is the licensee's responsibility to advise the seller/lessor of the lead disclosure obligation.** This responsibility extends to all agents involved in the transaction except for a Buyer's Agent.

Compliance with the Lead-based Paint Disclosure Law is mandatory. Civil penalties can range up to \$16,000 for each violation. Those who intentionally ignore or violate the law can face up to one-year

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

imprisonment and a fine of up to a \$16,000, or both. The injured party (buyer or tenant) is also able to pursue relief under the federal statute for failure to disclose a hazardous condition, which by law is a material fact. The injured party may receive up to three times the damages sustained. The damages may include medical costs related to lead-based paint poisoning and costs associated with correcting the lead-based paint problem in the structure.

The federal courts are becoming very aggressive in enforcing the provisions of the Residential Lead-Based Paint Disclosure Law. In July 2001, a Washington, D.C.-area landlord pleaded guilty to obstructing justice and making false statement to federal officials in order to conceal his failure to notify his tenants of the known presence of lead and the hazards associated with lead-based paint in his rental units. He will serve two years in prison. Another federal district court in Connecticut, in the case of *Smith v. Coldwell Banker Real Estate Services, Inc.*, held a listing agent liable for triple damages in a case involving lead-based paint disclosure requirements. Both of these cases were based upon federal law that applies in all 50 states. All sellers and licensees should be aware of the provisions of HUD and EPA regulations as they apply to lead-based paint.

In California, delivery of the federally-required lead informational pamphlet may be met by giving the buyer the *California* information pamphlet entitled "Environmental Hazards: A Guide for Homeowners, Buyers, Landlords and Tenants." In August 1996, the EPA granted a one-year provisional approval of the California pamphlet for use only in California for compliance with the federal Real Estate Lead-based Paint Disclosure and Notification Rule. At that time it was anticipated that certain revisions could be made that would justify the EPA's unconditional approval of the California pamphlet for this purpose. This issue has been resolved by incorporating into the California pamphlet the federal pamphlet's discussion of lead hazards. Therefore, the delivery of the California "Environmental Guide" fulfills the federal lead-based paint notification requirements.

The following is a sample of the Federal Lead-Based Hazards Disclosure Form:

Lead-Based Paint and/or Lead-based Paint Hazards

Lead Warning Statement:

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, Landlords must disclose the presence of know lead-based paint and lead-based paint hazards in the dwelling. Tenants must also receive a federally approved pamphlet on lead poisoning prevention.

Seller's Disclosure (Initial)

_____ (a) Presence of lead-based paint and / or lead-based paint hazards (check one below):

_____ Known lead-based paint and/or lead-based paint hazards are present in the housing (explain).

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

_____ Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

_____ (b) Records and reports available from the seller (check one below):

_____ Seller has provided Buyer with all available records and reports pertaining to lead-based paint. (list documents):

_____ Seller has no reports or records or the knowledge thereof, pertaining to lead-based paint and/or lead-based paint hazards in or around the housing and property.

Purchaser's Acknowledgment (Initial)

_____ (c) Purchaser has received copies of all information listed above.

_____ (d) Purchaser has received the pamphlet "Protect your Family From Lead in Your Home."

_____ (e) Purchaser has (check one below):

_____ Received a 10-day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection of the presence of lead-based paint or lead-based paint hazards; or

_____ Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Agent's Acknowledgment (Initial)

_____ (f) Agent has informed the Landlord of the Landlord's obligations under 42 U.S.C. 4582(d) and has made seller aware of their responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information provided by the signatory is true and accurate.

Seller _____ Date ____/____/____

Seller _____ Date ____/____/____

Buyer _____ Date ____/____/____

Buyer _____ Date ____/____/____

Agent _____ Date ____/____/____

Agent _____ Date ____/____/____

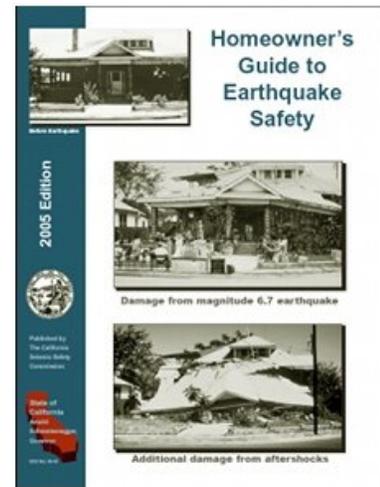
Earthquake Guides

In many parts of California, the potential for severe earthquakes is a threat lived with on a daily basis. California Legislature, in recognizing this constant threat, desires that all homeowners prepare for the potentially devastating effects of an earthquake. One way this can be accomplished is to provide prospective buyers with information on the possible vulnerability of the dwelling being purchased.

The Seismic Safety Commission has prepared a "Homeowner's Guide to Earthquake Safety" and a "Commercial Property Owner's Guide to Earthquake Safety." Both of these guides contain information in the following general topic areas:

- General information on geologic and seismic hazards
- Explanations of related structural and nonstructural hazards
- Recommendations for mitigating earthquake damage. Examples are adequately braced cripple walls, anchoring of framing structure to the foundation, bracing, strapping, and anchoring of water heaters, and so forth.
- Warnings relating to safety and major earthquakes, and the need for retrofitting to reduce risk of various types of damage caused by major earthquakes.

Beginning in 1991, **California law requires delivery of a copy of the "Homeowner's Guide to Earthquake Safety" as soon as practical before transfer of title.** This requirement is in addition to the mandatory earthquake fault zone or seismic hazard zone disclosure requirements of the NHDS. The delivery of the homeowner's guide is required in conjunction with the sale or transfer of any real property improved with a residential dwelling that was built prior to January 1, 1960 and consisting of one-to-four units, any of which are of conventional light-frame construction. The delivery of the commercial property owner's guide is required in conjunction with the sale or transfer of any real property that is constructed of unreinforced masonry with wood-frame floors, or roofs built before January 1, 1975. Interesting to note, if the Homeowner's Guide to Earthquake Safety is delivered to a transferee (buyer), a seller or broker is not required to provide additional information on earthquake safety. The information in the guide is deemed adequate to inform the transferee (buyer) about seismic and earthquake hazards, and the possible remedial measures that can be taken to lessen the impact of these hazards. However, **the delivery of the guide DOES NOT alter the broker's duty to disclose that a property is situated in either a Seismic Hazard Zone or Earthquake Hazard Zone.**



In any of the transfers of property that are covered by the law, the following structural deficiencies and any corrective measures taken that are within the seller's actual knowledge are to be disclosed to the prospective purchaser:

- Unbraced or inappropriately braced perimeter cripple walls
- Absence of foundation anchor bolts

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

- Unbraced or inappropriately braced first-story wall or walls
- Unreinforced masonry perimeter foundation
- Unreinforced masonry dwelling walls
- Habitable rooms above a garage
- Water heater not anchored, strapped, or braced.

Although the delivery of the earthquake guides are required in the property transactions described above, **there are certain exemptions where there is no obligation to deliver the guide.** These exemptions are similar in scope to those that apply with respect to delivery of a TDS. The exemptions are as follows:

- The buyer has agreed in writing that the dwelling will be demolished within one year of the date of transfer
- The transfer requires the furnishing of a public report
- A transfer made pursuant to a court order, such as transfer due to bankruptcy or probate
- A transfer made by foreclosure sale
- A transfer made by a fiduciary in the course of administering a decedent's estate, guardianship, conservatorship, or trust
- A transfer made from one co-owner to one or more other co-owners
- A transfer made to a spouse, child, grandchild, or further descendant
- A transfer made between spouses in connection with a divorce
- A transfer made by the State Controller pursuant to the unclaimed Property Law
- The transfer is made because of a failure to pay property taxes.

Statutory Authority: Public Resources Code Sections 2621 et seq. and 2690, et seq.; Business and Professions Code Sections 10147 and 10149; Civil Code Sections 2079.8 and 2079.9; Government Code Sections 8875 et seq. 8893.2 and 8897 et seq.

Environmental Hazards Pamphlet

As discussed in Chapter 2, a seller of residential real property consisting of one-to-four dwelling units in most cases must provide the buyer with a Real Estate Transfer Disclose Statement (TDS). In the TDS statement, at section C, question 1, the seller must disclose any actual knowledge of any environmental hazard that the seller is aware. The following are examples, but not an all-inclusive list, of environmental hazards that the seller is required to disclose:

- Lead-based paint
- Asbestos

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

- Radon
- Formaldehyde
- Underground fuel or chemical storage tanks
- Contaminated soil
- Contaminated water

California Civil Code Section 2079.7 provides that if a buyer receives from a seller or seller's agent a pamphlet entitled "Environmental Hazards: A Guide for Homeowners, Buyers, Landlords, and Tenants," neither the seller nor any agent in the transaction is required to furnish more environmental hazards information. However, **if the seller or the agent has actual knowledge of the existence of a specific environmental hazard affecting the property, this must be disclosed.** The statute deems the pamphlet to provide adequate information concerning the most common environmental hazards that can affect residential property. This section of the TDS is merely an attempt to limit the licensee's obligation to a reasonably conducted visual inspection, subsequent disclosure, and delivery of the consumer information booklet. Presumably, however, this code section does not add or take away from the duty of the licensee to conduct a visual inspection and to disclose to the buyer the results. Once this has been done by the licensee, the burden is on the buyer to act upon the information provided.

As noted previously, the delivery of the California "Environmental Guide" fulfills the federal lead-based paint notification requirements.

Structural Pest Control Inspections and Certification Reports

Many transactions in California will require a structural pest control inspection and certification report to be performed and issued prior to the transfer of real property. Usually this is required in the Contract for the Sale and Purchase of Real Property, but may also be a lender requirement.

If this is required in any transaction, the seller or the seller's agent must deliver to the buyer a copy of the report and written certification. Delivery must occur before transfer of title.

A *registered* structural pest control company must prepare any pest control inspection and certification report. A home inspector, who is not licensed as a registered structural pest control operator, is not permitted under California law to perform this type of inspection or to issue any certification report regarding the presence or absence of wood-destroying organisms (termites).

Statutory Authority: Civil Code Section 1099; Business and Professions Code Sections 8519 et seq.; Business and Professions Code 10148; Commissioner's Regulation 2905.

Energy Conservation Retrofit and Thermal Insulation Disclosures

The state of California requires minimum energy conservation standards for all new construction. These requirements are generally to be found in the California Uniform Building Code. Some local jurisdictions will impose minimum conservation standards that are more stringent than the state standards for all new construction. Some local jurisdictions will also require that structures may require energy conservation retrofitting as a condition of the sale of *existing* property. In all of these cases, **the seller and/or the agents involved in the transaction should disclose to a prospective buyer the requirements of the various ordinances.** This disclosure will include who is responsible for energy conservation code compliance.

Federal law requires that the seller disclose to the buyer the type, thickness, and R-value of the insulation that has been or will be installed in the finished structure for "new home" sales.

Statutory Authority: Federal Trade Regulation Section 460.16 and Public Resources Code Section 25402 et seq.

Right to a Home Inspection Disclosure

As of August 1, 1999, the United States Department of Housing and Urban Development **requires that real estate agents give to potential FHA buyers a notice which informs the buyer of their right to a home inspection**, how a home inspection is different from an appraisal, and why the buyer should have a home inspection.

The following is a sample Acknowledgment. The licensee is cautioned that this form is not intended to be reproduced for distribution to the public and that the licensee should always check with their brokerage, MLS, or Board of REALTORS® for approved forms. This form is intended only as an educational example to demonstrate the concepts contained within this course.

Acknowledgment: Get a Home Inspection

To: _____ (Buyer), in connection with the Real Estate Sale Agreement for the property located at:

_____,

or any property after execution of this Acknowledgement:

Appraisals and Home Inspections are Different: While your lender may require an appraisal to establish the value of the property, it is not a home inspection. Appraisals are for lenders and home inspections are for buyers. The lender may do an appraisal to a) estimate the value of a property; b) to make sure that the property meets with their minimum standards and c) to make sure that the property is marketable. An appraisal IS NOT a home inspection!

Why You Should Obtain a Home Inspection: A home inspection will give you more detailed information than an appraisal or your personal inspection of the property. With this information, you should be able to make a wise decision regarding the condition of the property. Your home

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

inspector will take an in-depth, unbiased look at the property to evaluate the physical condition of the structure, its construction, and the condition of its mechanical systems.

What the Home Inspection May Reveal to You: A home inspection will give you an impartial, physical evaluation of the overall condition of the structure by listing items that need to be repaired or replaced. The inspection will give a detailed report on the condition of the structural components, exterior, roofing, plumbing, electrical, heating, insulation and ventilation, air conditioning, and interior and exterior items of the structure.

Be Informed and Educate Yourself About the Property: As a buyer, it is your responsibility to become informed about the property you are considering for purchase. This responsibility is not that of your real estate agent, your lender, your title insurance company, the seller of the property or the appraiser. You should be granted the right to carefully examine your potential purchase using the services of a qualified home inspector. As part of your offer to purchase, you may have your real estate agent arrange for the inspection and make your offer contingent upon your approval of the results of the home inspection, which cannot be unreasonably withheld. Should the seller of the property deny you the opportunity to perform a home inspection, you should seriously consider any decision to proceed with the purchase of the property.

Inspections are Also Available for Hazardous Substances and Materials: In addition to a professional home inspection, inspections are available for substances or materials which may cause or are suspected of causing damage to your health and/or adversely affecting the value of real estate. You may obtain inspections for, but not limited to the following: lead-based paint products, radon gas, asbestos, high voltage power lines, in-ground systems such as heating fuel tanks or sewage disposal systems and hazardous waste which may have been stored on or about the property.

By this document, your real estate agent has informed you to make your offer contingent upon a professional home inspection. You do hereby release your real estate agent from any further obligation or liability arising from the condition of the property. Should you desire to have your real estate agent select a home inspector for you or refer a home inspector to you, you understand that your real estate agent does not warrant or guarantee the services of the home inspector. You hereby release your real estate agent from any liability for assisting you with or in the home inspection process. Before proceeding to engage the services of an inspector, you understand you must use your own due diligence in investigating a home inspector's reputation, guarantees, warranties, and thoroughness.

Signature _____ Date _____

Signature _____ Date _____

Delivered by: _____ Date _____

(Agent Signature)

Ordinance Location

The federal government and the state of California have identified certain areas within the state that were once used for military training. These areas may contain live ammunition that has not yet been detonated and that may remain on the property. **If a seller of residential property has actual knowledge of this potential hazard, the seller is to give written notice of the hazard to buyer as soon as possible prior to transfer of title.** This obligation to disclose relates only to the sale of residential property that is located within a mile of the subject property. Residential property, for purposes of this disclosure, relates to one-to-four dwelling units only.

Statutory Authority: Civil Code Section 1102.15

Mello-Roos Bonds and Taxes

In 1982, the California Legislature passed the Mello-Roos Community Facilities Act. This legislation authorized the formation of community facilities districts, the issuance of bonds, and the levying of special taxes to finance the specific public facilities and services. Since these special tax levies are *liens on real property*, **the seller of one-to-four dwelling units must make a good faith effort to obtain from the district a disclosure notice concerning the special tax and deliver that notice to the prospective buyer.** Usually, the preliminary title report should list any Mello-Roos Community Facilities type levies as an exception to clear title. The obligation of the seller to disclose to the buyer such levies would then be accomplished through delivery of the preliminary title report to the buyer prior to the closing of the transaction.

Statutory Authority: Civil Code Section 1102.6b.

Foreign Investment in Real Property Tax Act

As of January 1, 1985, **sales of real property by a foreign person within the United States are subject to the Foreign Investment in Real Property Tax Act (FIRPTA).** The Internal Revenue Service is responsible for the administration of this tax law. Under FIRPTA, the Internal Revenue Service (IRS) requires a transferee (buyer) to withhold a portion of the sales price on all sales of real property owned by a foreign person. The transactions subject to this withholding include all sales, installment sales, exchanges, foreclosures, and deeds in lieu of foreclosure. In most transactions, the amount to be withheld by the transferee (buyer) from the transferors (sellers) proceeds, is an amount equal to ten percent (10%) of the gross sales price. This sum is to be sent to the IRS within 20 days after the transfer of the real property interest. In most cases, escrow is instructed to deliver the funds to the IRS and to make sure that the proper IRS procedures and documentation have been properly complied with.



Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

The withholding law only applies to "foreign persons." The Internal Revenue Code (IRC) defines a foreign person as a nonresident alien or a foreign corporation that has not made a proper election to be treated as a domestic corporation or a foreign partnership, trust, estate or other taxable entity. A United States citizen is not a foreign person. A resident alien, if he or she is a lawful permanent resident of the United States, is not a "foreign person." An individual whose residence is not within the United States and who is not a United States citizen, is a nonresident alien.

In most cases, the real issue is whether an alien is a United States resident for federal income tax purposes. An alien that is considered a U.S. resident is not subject to withholding under FIRPTA if the alien meets either of the following two tests:

- **Substantial Presence Test.** Under this test, an alien is considered a United States resident if the individual meets the substantial presence test for any given calendar year. The alien must be physically present in the United States on at least 31 days during the current calendar year, and 183 days during the current year and the two preceding years, counting all the days of physical presence in the current year but only 1/3 the number of days of presence in the first preceding year and only 1/6 the number of days in the second preceding year.

NOTE: For purposes of this rule, a person is generally treated as physically present in the United States on any day he/she is physically present in the country at any time during the day.

- **Green Card Test.** An alien is considered an U.S. resident if the individual was a lawful permanent resident of the United State at any time during the calendar year.

There are a number of exemptions available where the transferee (buyer) is *not* required to withhold from the seller's sale proceeds:

- **If each seller in a transaction delivers to the buyer a non-foreign affidavit stating that the seller is not a foreign person.** The affidavit, which is executed by the seller(s), is done so under the penalty of perjury. Included in the affidavit must be the seller's taxpayer identification number and home or office address. The non-foreign affidavit will protect the buyer from personal withholding liability if the buyer relied upon the affidavit in good faith and had no actual knowledge that the affidavit was false. The seller and buyer should retain the affidavit for a period of five years after the end of the year in which the transfer of title occurred.

Since it is often difficult for the buyer to have an independent means of knowing whether the seller is a "foreign person," it is recommended that a seller's affidavit of non-foreign status be executed in each transaction by the seller.

- **If the buyer is purchasing the property as a personal residence and the sales price does not exceed \$300,000.** A buyer must reside in the property for at least fifty percent of the number of days the property is used. This means that if the property is rented, the buyer must occupy the property for more days than it is to be occupied by tenants. This is particularly important in the case of vacation property that the buyer intends to occupy only periodically.

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

- If the buyer receives a withholding certificate or qualifying statement issued by the Internal Revenue Service stating that no withholding is required or that a lesser amount may be withheld.
- The transaction is a non-recognition transaction for the seller and the seller furnishes a notice of non-recognition.

WARNING: If the buyer fails to withhold the FIRPTA tax from the seller's sale proceeds, and if the seller does not pay the required taxes on time, the *buyer* may be liable for either the seller's tax or a penalty equal to ten percent of the purchase price, plus interest and penalties, whichever is less. Therefore, **it is important in each transaction for the buyer to obtain a non-foreign affidavit from the seller.** As long as the buyer relies in good faith upon the seller's execution of the non-foreign affidavit, the buyer is not liable for the tax, even if the affidavit is false. However, if the buyer knows the affidavit is false, then the buyer has personal liability for the tax.

An *agent* of the buyer or seller is also potentially liable to the IRS if either:

- the seller provides a non-foreign affidavit and the agent knows the affidavit is false.
- the interest being sold is shares of stock or some other interest in a U. S. Real Property Holding Corporation and the corporation furnishes statement that the transfer of the interest is not a transfer of a U.S. real property interest and the agent knows the statement is false.

In addition to potential IRS liability, the licensee(s) may be subject to disciplinary action by the California Bureau of Real Estate for failure to disclose a material fact to the buyer, if the licensee had actual knowledge that the non-foreign affidavit or other statements by the seller is false.

Statutory Authority: Title 26, U.S. Codes, Section 1445.

State Tax Withholding on Disposition of California Real Property

The *Notice and Disclosure to Buyer of State Tax Withholding on Disposition of California Real Property* is similar in concept to the federal Foreign Investment in Real Property Tax Act. Its purpose is to ensure that, in certain California real estate transactions, income tax is collected upon the sale of property and turned over to the State Franchise Tax Board. Since the transactions to which this requirement applies involves out of state sellers, **the burden to collect the tax is put on the buyer.**

The Notice and Disclosure to Buyer of State Tax Withholding on Disposition of California Real Property is to be delivered to the buyer by escrow. If a buyer does not withhold and deliver the required 3 1/3% of the total sales price as state income tax to the State Franchise Tax Board, the buyer may be subject to penalties. In addition, if the escrow company fails to properly notify the buyer of his obligation to collect the tax, penalties may also be levied against the escrow company.

The following are California real estate transactions to which this law applies:

Chapter 4: Miscellaneous Property Transfer Disclosure Requirements

- The seller shows an out of state address or the sale proceeds are to be disbursed to a financial intermediary of the seller
- The sales price exceeds \$100,000
- The seller does NOT certify the he or she is a resident of California or that the property being conveyed is his or her personal residence.

Statutory Authority: Revenue and Taxation Code Sections 18805, 18815 and 26131.

Advisability of Title Insurance

In certain transactions for the sale or exchange of real property, sellers and buyers may determine that a title insurance policy is not necessary or, in many cases, neither the buyer nor seller wants to spend the money on a title insurance policy. This may often be in cases where title to property is transferred from one family member to another or where title to property has transferred within a short period from one party to another. In all of these cases, the parties feel that there is little or no risk in obtaining a property with a cloud on the title.

In some cases where no title insurance is to be issued, the buyer must receive, sign, and acknowledge the following notice as a separate escrow document:

IMPORTANT: IN A PURCHASE OR EXCHANGE OF REAL PROPERTY, IT MAY BE ADVISABLE TO OBTAIN TITLE INSURANCE IN CONNECTION WITH THE CLOSE OF ESCROW SINCE THERE MAY BE PRIOR RECORDED LIENS AND ENCUMBRANCES WHICH AFFECT YOUR INTEREST IN THE PROPERTY BEING ACQUIRED. A NEW POLICY OF TITLE INSURANCE SHOULD BE OBTAINED IN ORDER TO ENSURE YOUR INTEREST IN THE PROPERTY THAT YOU ARE ACQUIRING.

Statutory Authority: Civil Code Section 1057.6

Locations of Registered Sex Offenders

The following notice must be in all real property sale contracts of one-to-four dwelling units and in all written leases or rental agreements as of July 1, 1999. The purpose of this notice is to inform both buyers and prospective tenants of the presence of any sex offenders near the property being considered for purchase or for rent.

NOTICE: The California Department of Justice, sheriff's departments, police departments serving jurisdictions of 200,000 or more and many other local law enforcement authorities maintain for public access a data base of the locations of persons required to register pursuant to paragraph (1) of subdivision (a) of Section 290.4 of the Penal Code. The database is updated on a quarterly basis and a source of information about the presence of these individuals in any neighborhood. The Department of Justice also maintains a Sex Offender Identification Line through which inquiries about individuals may be made. This is a "900" telephone service. Callers must have specific information about individuals they are checking Information regarding neighborhoods is not available through the "900" telephone service.

Disclosures for Manner/Occurrence of Death and Occupants with AIDS

A licensee is not required to disclose natural deaths that may have occurred on a property. However, licensees are required to disclose deaths for which the circumstances of the death may be regarded as "material" that occurred within the prior three years. Such material deaths are those that are gruesome such as a murder or suicide. After three years, these types of deaths do not have to be disclosed. **If specifically asked by a prospective tenant or purchaser after the three year period, the licensee would have to disclose any known information about deaths that might be deemed material.**

A licensee does not have an affirmative duty to disclose that the prior occupant of the property had AIDS or died from AIDS or an AIDS related illness no matter when it occurred. However, if asked by a prospective purchaser or tenant, a licensee may not make an intentional misrepresentation in response to a direct inquiry concerning deaths on the property. In the case of AIDS related deaths, California public policy prohibits a licensee from disclosing to a prospective tenant or buyer that the prior occupant was afflicted with AIDS or died from AIDS. **Persons with AIDS are considered "disabled" under the Federal Fair Housing law and are protected from discrimination.** Therefore, if an inquiry relating to death on the property relates to AIDS, **the licensee or landlord's agent may simply refuse to answer the question about AIDS.** This information, even if known, is considered confidential and private.

It should also be noted that disclosure of any other physical or mental condition or disease of an occupant should be disclosed if it occurs within the three-year period. For example, if the occupant died of tuberculosis, this fact should be disclosed.

Statutory Authority: Civil Code Section 1710.2

Chapter 5: California Agency Disclosure Law and Disclosure of Negotiability of Real Estate Commissions

At the conclusion of this chapter you will be able to:

1. Understand the requirements of Civil Code 2079.14.
2. Explain the process of DISCLOSURE FORM delivery.
3. Summarize the main components of the initial oral Disclosure of Agency and written Confirmation of Agency.
4. Discuss the typical sequence of events regarding Agency Disclosure.

Introduction

Effective January 1, 1988, the California Legislature, through Civil Code **Section 2079.14**², requires the listing and buyer's agents in residential property transactions to provide both the seller and the buyer with written and oral disclosures relating to agency issues. The legislature was motivated to pass this legislation in an effort to educate the public regarding the confusing issues of agency in residential property transactions and to provide a uniform way to provide information on agency disclosure in simple, non-technical, and comprehensible terms.

The basic requirements of Civil Code Section 2079.14 are the following:

- The *listing agent* must deliver to the seller prior to the time the listing is signed by the seller a DISCLOSURE FORM entitled "DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIP" (hereinafter referred to as DISCLOSURE FORM). The purpose of this form is informational.



² http://www.onlineed.com/pages/filecab/CA/laws/ca_civil_code_2079.htm

Chapter 5: California Agency Disclosure Law and Disclosure of Negotiability of Real Estate Commissions

- The *buyer's agent* must deliver to the buyer a DISCLOSURE FORM entitled "DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIP" (hereinafter referred to as DISCLOSURE FORM) as soon as practical but always prior to the execution of an offer. The purpose of this form is informational.
- Agents must **orally inform** the buyer and seller whether they are acting exclusively as agents of the buyer, exclusively as agents of the seller, or representing both seller and buyer as a dual agent. The purpose of this oral disclosure is to inform the buyer or seller about whom the agent intends to represent.
- In the contract for purchase and sale of real property, the selling broker must **confirm in writing**, or in a separate document executed or acknowledged by the seller, the buyer and the selling agent, the agency relationships involved in the transaction. The purpose of the confirmation is for all parties in the transaction to acknowledge whom the various agents represent.

Because compliance with the disclosure provisions is mandatory, it is important for all licensees in California to understand the details of the California Agency Disclosure Law.

Section 2079 Disclosure Provisions

The full text of California Civil Code Section 2079.14 may be found in Appendix 2 at the end of this chapter, and in the **OnlineEd File Cabinet** * .

* http://www.onlineed.com/pages/filecab/CA/laws/ca_civil_code_2079.htm

The delivery of the Agency DISCLOSURE FORM that is specified in Section 2079.14 of the California Civil Code requires the following:

Types of Transactions Where DISCLOSURE FORM is Required

The DISCLOSURE FORM is required by statute in the following transactions, as set forth in California Civil Code 2079.13(k):

- Any sale or exchange of 1-4 dwelling units.
- Any commercial real property
- Any lease on 1-4 dwelling units for more than 1 year.
- Mobilehomes when sold by a real estate licensee.

Chapter 5: California Agency Disclosure Law and Disclosure of Negotiability of Real Estate Commissions

Although not required in raw land or business opportunity transactions, it would be advisable for a licensee to make the agency disclosures as outlined in the agency disclosure law.

Delivery of Form

Disclosure to the Seller

The listing agent, if any, shall provide the DISCLOSURE FORM to the seller, prior to entering the listing agreement. - *California Civil Code Section 2079.14 (a)*

The selling agent shall provide the DISCLOSURE FORM to the seller as soon as practical prior to the presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the DISCLOSURE FORM. - *California Civil Code Section 2079.14 (b)*

Where the selling agent does not deal on a face-to-face basis with the seller, the DISCLOSURE FORM may be furnished to the seller and acknowledgment of receipt obtained for the selling agent from the seller by the listing agent, or the selling agent may deliver the DISCLOSURE FORM by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment or receipt is required. - *California Civil Code Section 2079.14 (c)*

Selling Agent Disclosure to the Buyer

The selling agent shall provide the DISCLOSURE FORM to the buyer prior to the execution of the buyers offer to purchase, except if the offer to purchase is not prepared by the selling agent. In that case the selling agent shall present the DISCLOSURE FORM to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer. The selling agent is defined in the California Civil Code as the licensee who sells the property. The selling agent could be either the listing agent or a cooperating broker. - *California Civil Code Section 2079.14 (d)*

Seller or Buyer Acknowledgment of Receipt

The listing and selling agents are required to obtain from the seller or buyer a signed acknowledgment of receipt of the DISCLOSURE FORM. However, sometimes, a seller or buyer may refuse to sign the acknowledgment or receipt. This refusal may be due to the perceived difficulty of understanding the form or because of its length. Some sellers or buyers may not even want to read the form. In these cases, in which the seller or buyer refuses to sign the acknowledgment of receipt, the agent or an associate of the licensee acting for an agent shall set forth, sign, and date a written declaration of the facts of the refusal.

In case of a refusal to sign, the agent should also be prepared to *explain* the form to either the seller or the buyer. After the agent's explanation of the meaning of the form's content, the buyer or the seller may then be willing to sign the DISCLOSURE FORM. Therefore, an agent should be familiar with the content of the form.

**Chapter 5: California Agency Disclosure Law and
Disclosure of Negotiability of Real Estate Commissions**

The DISCLOSURE FORM

The actual DISCLOSURE FORM required to be delivered to the seller or the buyer by section 2079.14 of the California Civil Code is set forth in Civil Code Section 2079.16. The specific content and language of the form is that required by the statute. At this writing, the following is a representation of the form set forth by statute:

DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIP(As required by the Civil Code)

When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction.

SELLER'S AGENT

A Seller's agent under a listing agreement with the Seller acts as the agent for the Seller only. A Seller's agent or a subagent of that agent has the following affirmative obligations:

To the Seller:

A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller.

To the Buyer and the Seller:

1. Diligent exercise of reasonable skill and care in performance of the agent's duties.
2. A duty of honest and fair dealing and good faith.
3. A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

BUYER'S AGENT

A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for a Buyer has the following affirmative obligations:

To the Buyer:

A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.

To the Buyer and the Seller:

1. Diligent exercise of reasonable skill and care in performance of the agent's duties.
2. A duty of honest and fair dealing and good faith.
3. A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of,

Chapter 5: California Agency Disclosure Law and Disclosure of Negotiability of Real Estate Commissions

the parties. An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

AGENT REPRESENTING BOTH SELLER AND BUYER

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

1. A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.
2. Other duties to the Seller and the Buyer as stated above in their respective sections.

In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect his or her own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

This disclosure form includes the provisions of Sections 2079.13 to 2079.24, inclusive, of the Civil Code set forth on the reverse hereof. **Read it carefully.**

_____ Agent(signature) (date)

_____ Buyer/Seller(signature) (date)

_____ Associate Licensee(signature) (date)

_____ Buyer/Seller(signature) (date)

Initial Oral Disclosure and Written Confirmation of Agency

Oral Disclosures as required by California Civil Code Section 2079.17.

As soon as practical,

- **A selling agent shall disclose to the buyer and the seller** as to whether the selling agent is acting in the real property transaction exclusively as the *buyer's agent*, exclusively as the *seller's agent*, or as a *dual agent* representing both the buyer and the seller.
- **The listing agent shall disclose to the seller** whether the listing agent is acting in the real property transaction exclusively as the *seller's agent*, or a *dual agent* representing both the buyer and the seller.

Note: The Civil Code specifically prohibits a selling agent in a real property transaction from acting as an agent for the *buyer only*, when the selling agent is also acting as the listing agent in the transaction. (California Civil Code **2079.18** *)

* http://www.onlineed.com/pages/filecab/CA/laws/ca_civil_code_2079.htm

Written Confirmation of the Agency Relationship

The agency relationship between the **selling agent**, the **buyer**, and the **seller** that was orally disclosed to the seller and the buyer must be confirmed in writing. This confirmation is normally done in the purchase and sale agreement. - *California Civil Code Section 2079.17 (a)*

The relationship between the **listing agent** and the **seller** that was orally disclosed to the seller must be confirmed in writing. This confirmation is normally done in the purchase and sale agreement as well. - *California Civil Code Section 2079.17 (b)*

The form of the written confirmation is required by the Civil Code to be in the following format: - *California Civil Code Section 2079.17 (c)*

(Name of Listing Agent) is the agent of (check one): the seller exclusively; or both the buyer and seller

(Name of Selling Agent) is the agent of (check one): the buyer exclusively; or the seller exclusively; or both the buyer and the seller.

Typical Sequence of Events Regarding Agency Disclosure

The following examples point out practical usage of the California Civil Code agency disclosure laws in actual real estate brokerage practice:

Example 1 - A buyer walks into a Sunday "Open House" being held by a Listing Agent. The buyer spends a great deal of time in the house and begins to ask a number of questions about the property. The Listing Agent orally advises the buyer that he will represent the seller only in this transaction, and consequently the buyer should find a Selling Agent to represent him. It would probably be advisable for the Listing Agent to give the buyer the Agency DISCLOSURE FORM at this time, although since the contact between Listing Agent and buyer was probably rather casual in nature, the form would not have to be delivered.

Example 2 - A buyer walks into a Sunday "Open House" being held by a Listing Agent. The buyer spends a great deal of time in the house and asks many questions about the property. The Listing Agent asks the buyer if there is interest in purchasing the property. The buyer says he would like to make an offer. The Listing Agent indicates to the buyer that he would be happy to write the offer. At this time, the Listing Agent must orally disclose to the buyer that he would be representing both the seller and the buyer. The Agency DISCLOSURE FORM must be given to the buyer by the Listing Agent at this time, but in no case later than the signing of the offer by the buyer. It should be noted that in this example, the agency relationship between the agent and the seller could change during the course of marketing the property. In addition, in the offer, the buyer must confirm in writing the agency relationship that was initially orally disclosed to the buyer by the Listing Agent.

Example 3 - A Selling Agent shows a buyer a number of properties. The buyer selects one to purchase. The Selling Agent orally indicates that he will write the offer for the buyer, but that he will be acting as an agent of the seller in the transaction. The agent must, between this time and prior to the offer being signed by the buyer, give the buyer the Agency DISCLOSURE FORM. In addition, in the offer, the buyer will confirm in writing that the Selling Agent is representing the seller exclusively in the transaction. **Note:** Even though this fact situation may seem wrong to those in the real estate industry today, this is the way the industry operated for years. All agents in the multiple listing system were sub agents of the listing agent whose sole fiduciary duties were to the seller of the property.

Chapter 5: California Agency Disclosure Law and Disclosure of Negotiability of Real Estate Commissions

Example 4 - A Selling Agent begins to work with a buyer to find a property. The Selling Agent orally explains that he works as a buyers broker, representing exclusively the interests of the buyer. Between this moment and the time the buyer executes an offer on a property, the Selling Agent must give to the buyer the Agency DISCLOSURE FORM. In the offer, the buyer will confirm in writing that the Selling Agent represents the buyer exclusively.

Example 5 - A Selling Agent begins to work with a buyer to find a property. The Selling Agent orally explains that he works as a buyers broker, representing exclusively the interests of the buyer. A property is located for purchase that is listed by a branch office of the company for which the Selling Agent works. The Selling Agent must at this time orally advise the buyer that on this property, since the property is listed with the company in which the Selling Agent has his license, that he will be representing both the seller and the buyer in this transaction. The Selling Agent must deliver to the buyer the Agency DISCLOSURE FORM at some time between the initial oral agency disclosure and the time the buyer signs the offer to purchase. In addition, the buyer will confirm in writing in the offer to purchase that the Selling Agent will be representing both the seller and the buyer in the transaction.

Example 6 - A Listing Agent receives a call from an owner of a property who is interested in listing his house for sale. The Listing Agent makes a listing appointment. At the appointment, the Listing Agent should orally explain to the seller that he will represent the seller exclusively in any potential transaction unless the selling agent should happen to work for the same company as the listing agent. In that case, the selling agent would be representing both the seller and the buyer. Prior to signing the listing agreement, the Listing Agent must deliver to the seller the Agency DISCLOSURE FORM. In addition, once an offer is received, the appropriate agency relationship must be confirmed in writing in the offer to purchase and sale, or in some other document executed by the seller.

Negotiability of Real Estate Commissions

Listing agreements and/or agreements for purchase and sale of real estate must contain the following disclosure:

NOTE: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the seller and broker.

This disclosure is required by statute. A licensee may not state or imply that he/she is precluded (by law, regulation, or rules of any organization other than that of the licensee's firm) from charging less than the commission or fee quoted to a property owner by the licensee.

Chapter 5: California Agency Disclosure Law and Disclosure of Negotiability of Real Estate Commissions

In the past, many local real estate boards or multiple listings services *suggested* commission schedules to be used by their members. In order to comply with the provisions of the Sherman Anti-Trust Act, such suggested fee schedules were "voluntary." The ostensible purpose of these schedules was to notify the public that fees exceeding these suggested fees were possible "gouging." However, more often than not, the licensees used the schedules as a tool to *not* lower the commission rate by claiming that their multiple listing service did not allow a lower fee.

Naturally, such a statement by a licensee is a misrepresentation. **The brokerage itself may have specific fee requirements, but brokerages cannot agree among each other to a specific fee schedule.** The area of fixed fees is of such great concern that the California legislature forbids the printing of the commission rate in the preprinted listing agreement form that a brokerage may use (Business and Professions Code Section 10147.5). Preprinting the fee may lead the seller to believe that the fee is not negotiable. Therefore, **code Section 10147.5 also requires the disclosure regarding the negotiability of the commission.**

It is also interesting to note that some brokerages are now offering fees for services. Many of the fees for service schedules represent greatly reduced fees when compared to traditional fee schedules. No licensee should make any representation to any seller that fee for service schedules are against the law or not permitted by the local multiple listing service.

Statutory Authority: Business and Professions Code Section 10147.5

Chapter 6: RESPA - Real Estate Settlement Procedures Act

At the conclusion of this chapter you will be able to:

1. Summarize the purpose and function of RESPA.
2. List the scenarios to which RESPA is and is not applicable.
3. Outline the RESPA disclosures time-line.

Introduction

The United State Congress enacted the **Federal Real Estate Settlement Procedures Act**, more commonly known as RESPA, in 1974. The act became law on June 30, 1976. Minor revisions to the original Act were made in 1990, 1992 and 1994. A major revision to the Act was enacted in 2008. Some of the 2008 changes became effective on January 16, 2009 and the balance became effective on January 1, 2010. The Act applies to all federally related loans secured with a mortgage placed on a one-to-four family residential property. Generally, **RESPA covers residential real estate secured with a first or subordinate lien, lender approved assumptions, refinance loans, property improvement loans, and equity lines of credit.**

Prior to the passage of the act, the consumer was often confused with loan terms and closing costs. There was also a great potential for additional costs to be added to a loan due to kickbacks and referral fees without the consumer's knowledge. In enacting RESPA, **Congress was clearly providing protective legislation to help consumers become better shoppers for settlement services and to protect consumers from abusive settlement practices.** Specifically, RESPA addressed the following issues:

- Providing more effective advance disclosure of settlement costs to home buyers and sellers
- The elimination of kickbacks or referral fees that tend to unnecessarily increase the costs of certain settlement services
- The reduction in the amounts home buyers are required to place in escrow accounts that are established to ensure the payment of real estate taxes and insurance.

The Consumer Financial Protection Bureau (CFPB) administers and enforces RESPA requirements. Most of the RESPA requirements are the responsibility of the lender. However, some of the RESPA requirements

also affect the roles of the title insurance company, escrow company, attorneys, real estate agents, and others involved in the real estate transaction.

When RESPA Rules Apply

RESPA rules apply to the financing of residential property by all "federally related mortgage loans." For the purposes of RESPA, "residential property" is all residential real estate that is for occupancy by one-to-four families. RESPA also includes individual units in a condominium or cooperative development. "Federally related mortgage loans" are loans that meet the following requirements:

- All loans in which the loan proceeds are used in whole or in part to finance the purchase by the borrower or other transfer of legal title of the mortgaged property, a home improvement loan, or a loan to refinance an existing home loan, lender approved assumptions, or an equity line of credit.
- The loan is secured by a first lien and/or subordinate lien covering real estate including a fee simple, life estate, remainder interest, ground lease, or other long-term leasehold interest.
- Upon which there is located a structure designed principally for the occupancy of one-to-four families.
- Upon which there is located a mobile home.
- Upon which a structure designed principally for the occupancy of one-to-four families is to be constructed using the proceeds of the loan.
- Upon which there will be placed a mobile home to be purchased using the proceeds of the loan.
- Upon that which there is a condominium unit (or a first lien covering a cooperative unit) designed principally for the occupancy of one-to-four families.
- The loan is made, insured, guaranteed, supplemented or assisted by any federal office or agency or in connections with any housing or urban development administered by any federal office or agency.
- The loan is intended to be sold by the originating lender to the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA) or the Federal Home Loan Mortgage Corporation (FHLMC).
- The loan is made by a person defined as a "creditor" in the Truth in Lending Act, other than a state instrumentality (agency) that makes loans aggregating more than one million dollars a year.

Chapter 6: RESPA - Real Estate Settlement Procedures Act

RESPA does not apply to the following:

- A loan to finance the purchase or transfer of a property of 25 or more acres.
- A loan to finance the purchase or transfer of a vacant lot where no proceeds of the loan are to be used for the construction of a one-to-four family residential structure or for the purchase of a mobile home to be placed on the lot.
- A construction loan, except where the construction loan is used as or converted to a permanent loan to finance the purchase by the first user.
- A permanent loan, the proceeds of which will be used to finance the construction of 1-to-4 family units, where the lot is already owned by the borrower(s).
- A loan to finance the purchase of a property where the primary purpose of the purchase is for resale.
- Execution of a land sale contract or installment land contract where legal title is not transferred to the purchaser upon execution. However, a loan to finance the acquisition of title pursuant to a land sale contract is a Federally Related Mortgage Loan.



RESPA Disclosures at the Time of the Loan Application

When a borrower applies for a mortgage loan, the lender and/or mortgage broker must give the borrowers the following informational materials or disclosures at the time the loan application is first taken:

- Special Information Booklet
- Loan Estimate (LE)
- Mortgage Servicing Disclosure

As of October 3, 2015, the Loan Estimate (LE) will replace the Good Faith Estimate (GFE).

Special Information Booklet

The lender must provide a copy of the **Special Information Booklet** to all applicants for federally related mortgage loans at the time of loan application. The booklet's general purpose is to help persons borrowing money to finance a purchase of residential real estate to better understand the nature and costs of real estate settlement services. **The booklet is only necessary to deliver to the consumer in purchase transactions.** It is not required in refinance transactions. This booklet will explain:

- All costs.
- The standard real estate settlement form that will be used.
- Escrow accounts (if needed).
- Choices available to buyers.
- Unfair settlement practices and unreasonable or unnecessary charges to be avoided.

To view a copy of the Special Information Booklet, go to:

- http://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf



Loan Estimate

The lender must provide a **Loan Estimate (LE)** of settlement service charges that are likely to be incurred as a dollar amount by the borrower at settlement. The LE must be delivered to the borrower no later than three business days after the lender receives the borrower's application. If the loan is closed within three days, a LE must still be provided. A LE is not required if the application is denied within three business days or withdrawn within three business days.

The consumer should view these as estimates; actual charges may differ. If the lender and/or mortgage broker quotes a number of different loan programs for the borrower, a separate good faith estimate must be prepared for each one.

There are specific tolerance amounts for the estimated fees on the LE. These rules define the maximum amount that charges may exceed the estimate. The specific tolerances in comparing the LE to the final settlement statement are:

- 0% tolerance increases for such items as origination charges, points, transfer taxes.
- 10% tolerance increases for required services selected by the lender as well as government recording charges. The 10% tolerance increase also applies to a required provider as identified by the lender but selected by the borrower.

When a loan originator permits a borrower to shop for a third-party settlement service provider, the loan originator must provide the borrower with a written list of settlement service providers at the time of the LE. The purpose of the tolerance rules is to address the practice of lenders or loan originators intentionally underestimating settlement charges or that their loan product would appear more favorable and competitive

Chapter 6: RESPA - Real Estate Settlement Procedures Act

than a competitor's loan product. The tolerance rules impose a penalty on the loan originator whose LE stated amounts fall outside of the tolerance increase permitted range.

There are specific tolerances for fee increases when comparing Loan Estimate settlement charges with the final Closing Disclosure settlement charges. A miscalculation can result in the loan originator having to pay to cure a tolerance violation.

Mortgage Servicing Disclosure Statement

The lender must provide a **Mortgage Servicing Disclosure Statement**, which discloses to the borrower whether the lender intends to service the loan or transfer it to another lender. It also provides information about complaint resolution.

If the borrowers do not get all or some of the documents at the time the loan application is taken, the lender and/or mortgage broker must mail them to the borrower within three business days after receiving the loan application. If the lender denies the loan within three days after the loan application is taken, RESPA does not require the lender to provide any of the documents. RESPA does *not* provide for a specific penalty for failure to provide these documents on time. However, bank regulators may impose penalties on lenders who consistently fail to comply with these RESPA disclosure provisions.

The *Special Information Booklet*, *Loan Estimate*, and *Mortgage Servicing Statement* are required to be given to the borrower either at the time of application or within three business days after the loan application is received.

RESPA Disclosures Before Settlement (Closing) Occurs

An **Affiliated Business Arrangement (AFBA) Disclosure** is required whenever a settlement service provider involved in a RESPA covered transaction refers the consumer to a provider with whom the referring party has an ownership or other beneficial interest.

The referring party must give the AFBA disclosure to the consumer at or prior to the time of referral. The disclosure must describe the business arrangement that exists between the two providers and give the borrower an estimate of the second provider's charges. Except in cases where a lender refers a borrower to an attorney, credit reporting agency, or real estate appraiser to represent the lender's interest in the transaction, **the referring party may not require the consumer to use the particular provider being referred.**

Chapter 6: RESPA - Real Estate Settlement Procedures Act

The **Closing Disclosure** will clearly show all charges imposed on borrowers and sellers in connection with the settlement. The Closing Disclosure will be given at least 3 business days before closing. The lender must then provide the borrowers with a completed CD based on the information known at that time. Separate forms are usually prepared for the borrower and seller showing only their respective side of the transaction.

The purpose of the Closing Disclosure is to make it easier for the borrower to compare the estimated settlement charges on the Loan Estimate with actual settlement charges.

The Closing Disclosure requires that the loan originator must be sure to calculate the settlement charges correctly when compared to the Loan Estimate. A miscalculation may result in the loan originator having to cure a tolerance violation. If a violation has occurred, the loan originator has 30 days after settlement to cure the violation.

RESPA Disclosures at Settlement

The **Initial Escrow Statement** itemizes the estimated taxes, insurance premiums and other charges anticipated to be paid from the escrow account during the first 12 months of the loan. It lists the escrow payment amount and any required cushion. Although the statement is usually given at settlement, the lender has 45 days from settlement to deliver it.

RESPA Disclosures After Settlement

Loan servicers must deliver to borrowers an **Annual Escrow Statement** once a year. This statement summarizes all escrow account deposits for items such as taxes and insurance and payments made out of the escrow account during the past year relating to those items. It also notifies the borrower of any shortages or surpluses in the escrow account and notifies the borrower how these shortages may be paid or if in the case of a surplus how the surplus can be refunded or adjusted.

A **Servicing Transfer Statement** is required if the loan servicer sells or assigns the servicing rights to a borrower's loan to another loan servicer. In recent years, selling or transferring loans from one lender to another has become very common. In all of these situations, the loan servicer must notify the borrower 15 days before the effective date of the loan transfer. If the borrower makes timely payment to the older servicer within 60 days of the loan transfer, the borrower cannot be penalized if the new loan servicer did not receive the payment after the loan transfer effective date. The notice requirement must include the name and address of the new servicer, toll-free contact numbers, and the date the new servicer will begin accepting payments.

California Civil Code Section 2937 requires that if a loan is secured by California real property containing one-to-four residential dwelling units, the lender or loan servicer must give notice to the borrower when the servicing/collection function is transferred. *This is the case even if the loan is not subject to RESPA.*

Prohibited Settlement Practices - Kickbacks, Fee-Splitting, Unearned Fees

RESPA banned a number of practices that involved kickbacks, fee-splitting, and unearned fees by parties involved or related to a real estate transaction. These unearned fees and kickbacks were often adding to the cost of settlement services. **It was therefore deemed in the best interest of the consumer to ban, or at the very least, reign in these types of practices.** The ban on these practices may be found in RESPA, Section 8.



RESPA prohibits anyone from giving or accepting a fee, kickback, or anything of value in exchange for referrals of settlement service business involving a federally related mortgage loan. In addition, RESPA prohibits fee-splitting and receiving unearned fees for services not actually performed. Examples of such prohibited fee arrangements include:

- Lenders giving a referral fee to a real estate agent referring a purchaser
- Title companies giving kickbacks to lenders who refer loans to them in exchange for something of value
- Appraisers sharing the appraisal fee with the lender who ordered the appraisal for a borrower.

However, **nothing in the law prohibits agents from identifying and recommending service providers who will perform quality services for the client.** Recent consumer research suggests that *homebuyers want such recommendations*. These services may include inspection, title, escrow, loan, pest control, land survey, home insulation, home warranty, lead-based paint and radon inspections, and many others. A recent study conducted by the National Association of REALTORS® relating to the profile of homebuyers and sellers offered no theories as to why agents don't make a wider range of service provider recommendations to their clients. Many industry analysts have identified a trend where real estate agents are offering clients more formalized and extensive service provider recommendations. This trend will fulfill the need of buyers who want recommendations from agents whose judgment they trust. The real estate agent also benefits from providing these recommendations, as they become a valuable part of the package of professional services offered to the client.

Violations of RESPA's anti-kickback, referral fees, and unearned fees provisions are subject to criminal and civil penalties. If brokers or agents are to receive fees from lenders or other service providers involving the settlement process, legal counsel should be engaged to determine whether the fee arrangement meets the requirements of RESPA. For example, a lender may be able to provide a fee to a real estate agent if the agent prepares collects the original borrower information from the purchaser and provides this package of information to the lender. However, the rules and regulations regarding this type of activity are very specific and must be followed. Criminal penalties may result in fines of up to \$10,000 and imprisonment for up to one year. In civil litigation, the borrower may recover up to three times the amount of the charge paid for any violation of the anti kickback, fee splitting, or unearned fee provisions.

Chapter 6: RESPA - Real Estate Settlement Procedures Act

Specific California Regulations Regarding Disclosure by Agents Receiving Compensation from a Lender or Others: In addition to the disclosures for agent compensation required under RESPA, the California Business and Professions Code Section 10177.4 prohibits certain referrals for compensation by real estate licensees. A real estate licensee may not receive compensation for referring customers to any escrow agent, structural pest control firm, home protection company, title insurer, controlled escrow company, or underwritten title company. Under Penal Code Section 641.4, any receipt of such compensation from an employee of a title insurer, underwritten title company or controlled escrow company is deemed commercial bribery for which criminal prosecution and penalties are possible.

Commissioners Regulation 2904 and Business and Professions Code Sections 10176 (a) and (g) also require that a real estate licensee who acts as the agent for either the seller or the buyer must disclose to both parties the form, amount, and source of any compensation received or expected to be received from a lender involved in financing related to the transaction. This disclosure must be given to each party to the transaction prior to the transactions close. Real estate licensees must disclose to their principals all compensation or expected compensation, regardless of the form, time, or source of payment.

For example: If the licensee completes the loan application on behalf of an applicant and forwards it to the lender for processing, the lender may legally pay the licensee a fee for doing so. This fee must be disclosed to the loan applicant.

RESPA Section 9 - Seller Required Title Insurance

RESPA Section 9 **prohibits a seller from requiring the home buyer to use a particular title insurance company**, either directly or indirectly, as a condition of sale. Buyers may sue a seller who violates this provision for an amount that is equal to three times all charges made for the title insurance.

CAUTION LICENSED AGENTS: It has long been the practice for listing agents in many parts of California to, indirectly through the seller, require that a particular title company be used as a condition of sale. **This practice is prohibited under RESPA Section 9.** It should be noted that title services are not the same as escrow services. The listing agent and/or seller may try to require use of a specific escrow company. However, the seller and/or listing agent cannot require that the title insurance policy be obtained from a specific company. Title companies make the majority of their profits by issuing title policies, not escrow services. Therefore, it would be unusual for escrow services to be provided by one company and the title policy issued by another.

Chapter 7: Disclosures Relative to Subdivisions

At the conclusion of this chapter you will be able to:

1. Define the parameters of subdivided land.
2. Summarize the purpose and function of the Subdivision Public Report.
3. Discuss the function of a Blanket Encumbrance Disclosure.
4. Understand the required components of Annual Association Disclosures.

Introduction

When a buyer desires to purchase a lot or a completed house in a subdivision, the **Subdivided Lands Law** requires a number of material fact disclosures to be made about the subdivision. The purpose of this law is to protect the consumer from fraud, deceit, or misrepresentation in the sale or lease of subdivided parcels of real property.

In cases where disclosure under the Subdivided Lands Law is required, the Seller's Transfer Disclosure Statement (TDS) is not required to be delivered to the prospective purchaser.

Chapter 7: Disclosures Relative to Subdivisions

In general, "subdivision" may be defined as dividing a tract of improved or unimproved land into individual lots. Subdivisions may be categorized as either *standard subdivisions* or *common interest subdivisions*.

- A **standard subdivision** is a tract of land that has been subdivided but that does not have any commonly owned areas.
- A **common interest subdivision** has common areas and/or facilities that are owned and/or operated by a homeowner's association.

The basic statutory authority for disclosures that are required for subdivisions are those set forth in the Subdivided Lands Law and such disclosures apply to all subdivisions as defined by Business and Professions Code Section 11000. Specifically, Business and Professions Code Section 11004.5 defines subdivided lands and subdivisions as the following:

- Any planned development containing five or more lots
- Any community apartment project containing five or more apartments
- Any condominium project containing five or more condominiums
- Any stock cooperative having or intending to have five or more shareholders
- Any time-share project consisting of 12 or more time-share estates or where time-shares have terms of five years or more
- Any limited-equity housing cooperative

The Subdivided Lands Act's disclosure requirements apply to the owner of the subdivided property and to any subdivider working with or for the owner of the property. The disclosure requirements also apply to any real estate licensee acting as an agent for the seller of a subdivision. Any violation of the subdivision disclosure laws, regardless of whether such violation was negligent or intentional, may expose the licensee to potential disciplinary action by the California Bureau of Real Estate.



The Subdivision Public Report

Chapter 7: Disclosures Relative to Subdivisions

Any person who intends to offer subdivided lands for sale or lease must apply to the California Bureau of Real Estate to obtain a public report. The public report is a detailed statement that discloses material facts to prospective purchasers of the subdivided property. This report provides information to the consumer on the following:

- **Utilities and water** serving the subdivision. Utilities include electricity, natural gas, telecommunications, sewer and potable water.
- **Roads** constructed within the subdivision, including completion of roads within the subdivision, maintenance responsibilities, and road dedications.
- **Soil and geologic conditions** and study findings.
- **Title.**
- **Zoning** and use restrictions.
- **Hazards** (cross reference with the six hazard disclosures).
- **Financial arrangements** for completion of the subdivision. (Example, usually the developer will pave the road with only one layer, with the final layer or final "lift" not installed until the subdivision's construction is complete or nearly complete. The report will detail the financial arrangements the developer has made to complete the roads within the subdivisions.)
- If the subdivision is a common interest subdivision, a "Common Interest Development General Information" statement must also be included in the Public Report. Examples of common interest developments are community apartment projects, condominium projects, planned unit developments, and stock co-operatives. The following information must be contained in the Public Report under the "Common Interest Development General Information" section:
 - The declaration of covenants, conditions and restrictions.
 - The Articles of Incorporation and bylaws of the association.
 - Any other instrument that establishes or defines the common, mutual, and reciprocal rights and responsibilities of the owners or lessees of interests in the development.
 - The current budget and related financial statements of the association that must include but not be limited to current fiscal year operating budget, project revenue and expense, and association current reserves and potential for special assessments.
 - A statement prepared by the governing body of the association regarding any outstanding delinquent assessments and related charges levied by the association against the subdivision interest the prospective purchaser (or lessee) is considering buyer (or leasing).
 - Explanation of payment of regular and special assessment.
 - Statement of ownership and use of the recreational facilities.
 - Explanation of the responsibilities and powers of the homeowner's association governing board of directors.



Chapter 7: Disclosures Relative to Subdivisions

Once obtained from the California Bureau of Real Estate, the Public Report must be made available by the subdivider and his/her agents as follows:

- Posting of the public report in a conspicuous place in any office where sales of subdivision interests are conducted.
- Delivering a copy to any member of the public who requests one.
- Delivering a copy to each prospective purchaser prior to entering into a contract to purchase. In this case, the owner, subdivider or agent of the subdivider or owner must have each prospective buyer sign a receipt that he or she has received the report and has had an opportunity to read it before entering into an agreement to purchase. The subdivider is required to keep these receipts for three years after their execution.

Failure to provide the Public Report and other required disclosures may subject the seller to any actual damages that the purchaser may suffer along with a potential civil penalty for \$500 (check cited amount).

Blanket Encumbrance Disclosure



If a lot is subject to a blanket encumbrance that affects more than one lot in a subdivision, that fact must be disclosed to the prospective buyer. Because a buyer could lose his interest through foreclosure of the blanket encumbrance, even though the purchaser is not delinquent in his or her payment under his mortgage or trust deed, this disclosure and warning must be made to the buyer.

A **Blanket Trust Deed** (Mortgage) is a trust deed where two or more properties are used to cover a single debt. This situation is very common in subdivision financing. For example, if a developer is going to develop 200 lots, he will obtain a blanket trust deed covering all of those lots in one loan, instead of obtaining 200 separate loans. The blanket trust deed will contain a "partial release" clause. "Partial release" means that upon the payment of a specific predetermined sum,

an individual lot will be released from the lien of the blanket trust deed. Free and clear title then can be conveyed to the purchaser of the lot although the remaining lots are still subject to the blanket trust deed.

In order to protect the buyer in blanket encumbrance situations, Business and Professions Code Section 11013.2 **requires that the buyer's funds be protected unless the lot or unit can be unconditionally released from the blanket encumbrance.** The prospective buyer must receive and sign the following notice in blanket encumbrances situations if the project is not subject to an exemption:

BUYER/LESSEE IS AWARE OF THE FACT THAT THE LOT, PARCEL, OR UNIT WHICH HE OR SHE IS PROPOSING TO PURCHASE OR LEASE IS SUBJECT TO A DEED OF TRUST, MORTGAGE, OR OTHER LIEN KNOWN AS A "BLANKET ENCUMBRANCE."

Chapter 7: Disclosures Relative to Subdivisions

IF BUYER/LESSEE PURCHASES OR LEASES THIS LOT, PARCEL, OR UNIT, HE OR SHE COULD LOSE THAT INTEREST THROUGH FORECLOSURE OF THE BLANKET ENCUMBRANCE OR OTHER LEGAL PROCESS EVEN THOUGH BUYER/LESSEE IS NOT DELINQUENT IN HIS OR HER PAYMENTS OR OTHER OBLIGATIONS UNDER THE MORTGAGE, DEED OF TRUST OR LEASE.

Date Signature of Buyer or Lessee

Encumbered projects that are not subject to the above notice are those which are zoned for and limited to industrial or commercial purposes (Business and Professions Code Section 11013.2).

Disclosure of the Right to Rescind

In addition to the *Public Report* and *Blanket Encumbrance Disclosure*, the **Disclosure of the Right to Rescind** may be required.

The unqualified right of rescission is granted by statute to purchasers in *undivided interest* and *timeshare* subdivisions. In both of these cases, **the purchaser may rescind by midnight of the third calendar day following the day the purchaser executed the offer to purchase.**

Under this right of rescission, it is the responsibility of the owner, subdivider, or the agent of the owner or subdivider to disclose to all prospective buyers the right of rescission and to deliver to each buyer the rescission form for possible exercise of the right. **The buyer may rescind within the permitted time frame without giving any reason or incurring any penalty.**

Annual Association Disclosures to Common Interest Owners

Licenses should be aware that **all projects, developments, or subdivisions that have common interest ownership are subject to annual disclosures to all of the common interest owners.** When a licensee is marketing a property in one of these projects, the licensee should be aware that these annual disclosures exist and that these disclosures should be made available to any prospective buyer in that project. Unless standards that are more stringent are imposed in the master documents, **annual financial statements are to be prepared** by the association governing a common interest development. The financial statement of the association is to be reviewed in accordance with general accounting principles by a licensee of the California State Board of Accountancy for any fiscal year in which the gross income to the association exceeds \$75,000.00. The association must distribute to the individual owners a copy of that review within 120 days after the close of the fiscal year.



Chapter 7: Disclosures Relative to Subdivisions

Copies of the pro forma (proposed) budget are to be distributed by the association not less than 45 days or more than 60 days prior to the beginning of the association's fiscal year. The operating budget shall include the following:

- The estimated revenue and expenses on an accrual basis.
- A detailed summary and evaluation of the reserve fund based on an estimate of the current replacement costs, estimated remaining useful life, and the methods of funding used to defray the future repair, replacement, or additions to major components which the association is obligated to maintain.
- A general statement addressing the procedures used for the calculation and establishment of the reserve funds.
- A statement regarding any anticipated special assessment to repair, replace, or restore any major component or provide adequate reserves for such repair, etc.

In lieu of distributing the pro forma budget, **the board of directors may elect to distribute copies of a summary of the pro forma budget together with a written notice that the budget is available at the business office** of the association or at another suitable location within the boundaries of the development. The notice must indicate that the association will, at its expense, give a copy of the pro forma budget to any member upon request.

During the 60-day period immediately preceding the beginning of the association's fiscal year, **the association must deliver to each owner a statement describing the association's policies and practices in enforcing lien rights or other legal remedies for a member's failure to pay assessments.**

Within 30 days of the meeting, **the association must make available the minutes of any meeting of the board of directors**, other than an executive session. Upon request, the association must give a member a copy of those minutes. The member must reimburse the association for the cost of that distribution.

The association must provide each owner with notice by first class mail of **any increase in regular or special assessments**. The association must give this notice not less than 30 days or more than 60 days before the increased assessment becomes due.

If applicable, the association must adopt and deliver to each member a **schedule of the monetary penalties that may be assessed for a member's violation** or violation by a member's guest, of the governing documents or rules of the association.

During the 60-day period immediately preceding the beginning of the association's fiscal year, the association must provide a summary of its property, general liability, earthquake and flood insurance policies, along with a statement that:

- the summary should not be relied upon for a complete understanding of the policies.
- the actual policies will be made available for review and, for a fee, duplication.
- the policies may not cover an owner's personal property or all of an owner's real property.
- the insurance may not cover personal injuries or other losses that occur within or around an owner's dwelling.
- even if a loss is covered, the owner may have to pay all or a portion of a deductible.

Chapter 7: Disclosures Relative to Subdivisions

- an owner ought to consult with his/her insurance broker or agent regarding appropriate additional coverage.

The association shall, as soon as reasonably practical, notify the members of any significant change in the association's insurance coverage.

Each year, the association must give the members a **summary of the provisions of Civil Code Section 1354 relating to alternative dispute resolution** (ADR) proceedings (e.g., mediation or arbitration) as a means of enforcing the governing documents. The summary must include a notice that a member who does not attempt to employ ADR may lose his/her rights to sue the association or another member regarding enforcement of the governing documents.

If a claim for alleged common area construction defects is resolved prior to correction of all the alleged defects, the association must, as soon as reasonably practical, give the members a summary of the defects the association believes will be corrected, a schedule for the corrections, and the status of alleged defects that are not scheduled for correction.

Statutory Authority: Civil Code Sections 1354, 1363, 1365, 1366 and 1375.1)

Statement of Defects Disclosure for a Common Interest Development Conversion

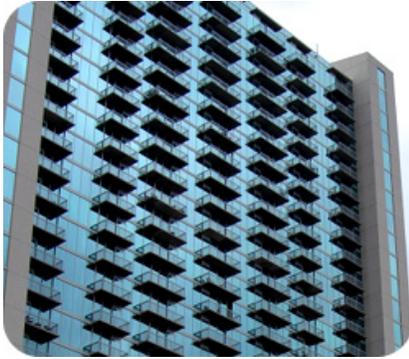
As soon as practical before the transfer of title for the first sale of a unit in a common interest development that has been converted from an existing dwelling, the owner, subdivider, or the agent for the owner or subdivider must deliver to a prospective buyer a **written statement of defects**. This statement must disclose all substantial defects and malfunctions in the major systems in the individual unit and the common area, as known to the owner after a reasonable inspection. Major systems include but are not limited to the roof, walls, floors, heating, air conditioning, plumbing, electrical systems, and recreational facilities. After making the inspection, and if the owner finds no defects or malfunctions, the owner must provide a written statement to the buyer disclaiming knowledge of any defects or malfunctions.



If the required disclosure is delivered to the buyer after the buyer has executed an offer to purchase, the buyer has three days after personal delivery of the disclosure statement or five days after delivery by deposit in the mail to terminate the offer. The termination must be by written notice to the owner, subdivider, or the agent of the owner or subdivider. Any disclosure delivered after the buyer has signed an offer to purchase must contain a statement describing the buyer's right, methods, and time to rescind. Any person who willfully fails to carry out the requirements of this law will be liable for any actual damages suffered by the buyer.

Statutory Authority: Civil Code Section 1134

Special Case of Existing Building Conversions



An owner of an existing apartment building may desire to convert the apartment units to condominiums or some other form of common interest development such as community apartment project or a stock cooperative. In these cases, the owner will usually offer for sale the units previously rented. **The owner is required to first receive approval from the local government in compliance with the provisions of the Subdivisions Map Act.**

Approval of the local government requires that, among other things, each existing tenant be given written notice of the developer's intention to convert the building at least 180 days prior to the termination of the tenancy and 60 days prior to the filing of a tentative map. This written notice must include information relative to public hearings regarding the proposed conversion and the right of the current tenant to purchase his/her unit. In addition, at least 10 days prior to any public hearing on the tentative map describing the conversion, each tenant must receive a written notice of hearing. The notice must inform the tenant of his/her right to attend the hearing and to be heard at the hearing. The notice must be mailed and published. The local government cannot deny approval of the conversion because the owner failed to give proper the notices to the tenants. However, the tenant may recover damages incurred because of the termination of the tenancy.

The owner must also give each tenant in a conversion notice of the tenants' exclusive right to purchase the unit he/she lives in. The tenant must be offered terms equal to or better than those under that which the unit will be offered to the public.

Under the existing building conversion law, a developer may agree with the city or county, as a condition of condominium map approval, to enter into an agreement that the newly constructed units will be rented for 10 years or more and *then* may be sold as condominiums. Any such agreement will require the developer to provide current and prospective tenants with certain notices relative to the eventual sale, including notice of his/her right to purchase the unit when the unit is made available for sale.

The following is an example of the required notice to existing tenants. The licensee is cautioned that this form is not intended to be reproduced for distribution to the public and that the licensee should always check with their brokerage, MLS, or Board of REALTORS® for approved forms. This form is intended only as an educational example to demonstrate the concepts contained within this course:

To the occupant(s) of

_____ Address

The owner(s) of this building, at (address), plans to file a tentative map with the (city, county, or city and county) to convert this building to a (condominium, community apartment, or stock cooperative project). You shall be given notice of each hearing for which notice is required pursuant to Sections 66451.3 and 66452.5 of the Government Code, and you have the right to appear and the right to be heard at any such hearing.

_____ Signature of owner or owner's agent

_____ Date

I have received this notice on _____ (date)

Chapter 7: Disclosures Relative to Subdivisions

_____ Signature of existing tenant
_____ Date

Any prospective tenant who files an application for a rental unit within 60 days preceding the filing of a tentative map for conversion must receive a written notice of intention to convert the building before they pay any deposit to the landlord. Following is an example of the required notice to the prospective tenant:

To the prospective occupant(s) of:

_____ Address

The owner(s) of this building, at (address), has filed or plans to file a tentative map with the (city, county, or city and county) to convert this building to a (condominium, community apartment, or stock cooperative project). NO units may be sold in this building unless the conversion is approved by the (city, county, or city and county) and until after a public report is issued by the Bureau of Real Estate. If you become a tenant of this building, you shall be given notice of each hearing for which notice is required pursuant to Sections 66451.3 and 66452.5 of the Government Code, and you have the right to appear and the right to be heard any such hearing.

_____ Signature of owner or owner's agent
_____ Date

_____ Signature of existing tenant
_____ Date

Image References

6. Photographer: Kenn W. Kiser

Chapter 8: Real Property Financing Disclosures

At the conclusion of this chapter you will be able to:

1. List the duties of a licensee who is engaged in seller "carry-back" financing.
2. Provide a definition of an "arranger of credit."
3. Summarize the Truth-in-Lending Act (TILA) / Regulation Z.
4. List the Regulation Z and ARM Loan disclosures.
5. Summarize the Equal Credit Opportunity Act (ECOA)/Regulation B.
6. List the Regulation B disclosures.
7. Discuss the purpose of The Holden Act.

Introduction

Most real estate transactions will involve some sort of financing. A number of disclosures are required in these cases. These disclosures are generally required of the *lender*. **However, some disclosures are also required by the real estate licensee.** This section will give a brief overview of the disclosures required when financing of real estate is to occur.

Seller Carry-Back Financing Disclosures

Licensees who negotiate sales have specific duties as an "arranger of credit" if the seller extends credit to the buyer in the form of seller "carry-back" financing. An "arranger of credit" is defined as a person who is:

- not a party to the transaction
- involved in the negotiation of the credit terms and completion of the credit document
- compensated by arranging the credit or for facilitating the transaction.



Since the real estate licensee who negotiated the transaction had, in essence, arranged for credit, the licensee is subject to seller carry-back disclosure law. The seller carry-back disclosure requirements only apply to the following transactions:

- Residential dwellings of one-to-four units where the seller extends credit to the buyer through a written agreement that provides for a finance charge.
- The seller extends credit to the buyer through a written agreement that has more than four payments of principal and interest (or interest only), not including the down payment.

Exempt transactions under the statute where seller financing disclosure is not required are situations where the buyer is entitled to receive a disclosure under any of the following in conjunction with credit being extended:

- Truth-In-Lending disclosure statement
- Real Estate Settlement Procedures Act (RESPA)
- A lender/purchaser disclosure statement under Business and Professions Code Section 10232.4

The delivery of the disclosure statement must be made as soon as possible before execution of the note or security instruments. The seller, the buyer, and the arranger of credit must sign the

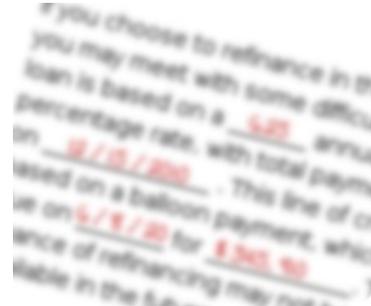
Chapter 8: Real Property Financing Disclosures

disclosure statement. If there is more than one arranger of credit, **the arranger obtaining the offer from the buyer is responsible for making the disclosure unless another person is designated in writing** by the parties to the transaction to make the disclosures. If the purchaser makes disclosures after the execution of the credit documents, such documents must be contingent on the purchaser's approval of the disclosures prior to execution of the security instruments.

The Disclosure Statement

The disclosure statement should include the following:

- **Identification** of the note, credit, or security document and the property that is or will become the security.
- **A copy of the note**, credit, or security document, or a description of the terms of these documents.
- The **terms and conditions of each encumbrance recorded against the property** that shall remain as a lien or is an anticipated lien that will be senior to the financing being arranged.
- A warning about the hazards and **potential difficulty of refinancing**. If a **balloon payment** is involved, it should include the amount and due date of the balloon payment. It should also include a warning that new financing may not be available.
- An explanation of the possible effects of an *increase* in the amount owed due to **negative amortization** as a result of any variable or adjustable-rate financing being arranged.
- If the financing involves an **all-inclusive trust deed (AITD)**, a statement of the possible penalties, discounts, responsibilities, and rights of parties to the transaction with respect to acceleration and/or prepayment of a prior encumbrance as the result of the creation and/or refinancing of the AITD.
- If the financing involves an AITD or a real property sales contract, a statement **identifying the party to whom payments will be made** and to whom such payments will be forwarded. If the party receiving and forwarding the payments is not a neutral third party, include a **warning that the principals may wish to designate a neutral third party**.
- **A complete disclosure about the prospective buyer**, including credit and employment information along with a statement that the disclosure is not a representation of the credit worthiness of the prospective buyer or a statement that no representation regarding the credit worthiness of the prospective buyer is being made.
- A warning regarding **possible limitations on the seller's ability to recover proceeds** of the sale financed in the event of foreclosure (*Code of Civil Procedure Section 580b*).
- **A statement recommending loss payee clauses be added** to the property insurance policy to protect the seller's interest (e.g., Board of Fire Underwriters' Endorsement No. B.F.U. 438) and advising of the existence or availability of services which will notify the seller if the property taxes are not paid.
- A statement suggesting or acknowledging that the seller should file or has filed a **request for notice of delinquency** (Civil Code Section 2924e) and a **request for notice of default** (Civil Code Section 2924b) in case the buyer fails to pay liens senior to the financing being arranged.



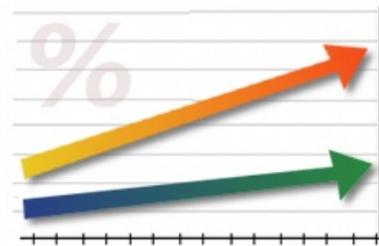
Chapter 8: Real Property Financing Disclosures

- A statement that a **title insurance policy** has been or will be obtained and furnished to the buyer and seller insuring their respective interests, or that the buyer and seller should each obtain title insurance coverage.
- **A disclosure stating whether the security documents for the financing have been recorded** or will be recorded, and what might occur if the documents are not recorded.
- **Information as to whether the buyer is to receive any "cash back" from the sale**, including the amount, source, and purpose of the cash refund. The requirement of a seller financing disclosure statement also applies to transactions by real property sales contracts (as defined in Civil Code Section 2985) and to leases with option-to-purchase provisions where the facts demonstrate intent to transfer equitable title. If the extension of credit is subject to a balloon payment, a balloon payment notice is to be included on the face of the promissory note or other evidence of debt.

Statutory Authority: Civil Code Section 2956 et seq.

Adjustable-Rate Loan Disclosure

A copy of the most recent Federal Reserve Board publication which provides information on adjustable-rate mortgage loans must be provided to prospective borrowers of such loans. It must be provided at the request of the prospective borrower or when the lender first provides information concerning adjustable-rate type mortgages, which ever occurs first.



Regulation Z - Truth in Lending

The **Truth-in-Lending Act (TILA)** is a federal law enacted to promote the informed use of consumer credit by requiring creditors and lenders to disclose various terms and conditions of credit. Regulation Z and the Official Staff Commentaries that interpret it are issued by the Board of Governors of the Federal Reserve System to implement the TILA. The Federal Trade Commission enforces the TILA and Regulation Z. The purpose of Regulation Z is to enable the consumer to compare the cost of cash-versus-credit transaction and the difference in the cost of credit among different lenders or loan programs.

In general, Regulation Z applies to each individual or business that offers or extends credit when

- the credit is offered or extended to consumers
- the credit is subject to a finance charge or is payable by a written agreement in more than four installments

Chapter 8: Real Property Financing Disclosures

- the credit is primarily for personal, family, or household purposes
- the loan balance equals or exceeds \$25,000 or is secured by an interest in real property or a dwelling.

The TILA requires a creditor to be responsible for furnishing certain disclosures to the consumer before a contract for a loan is made. With respect to real estate loans, a creditor includes a person or company who regularly (two-or-more per-year or one-or-more per-year through a mortgage broker) extends credit for loans secured by a dwelling (including a mobile home or trailer, if used as a residence) and the credit extended is subject to a finance charge or payable by written agreement in more than four installments, excluding the down payment.

Exemptions from the TILA with respect to real estate loans include, among others:

- credit extended primarily for business, commercial, or agricultural purposes.
- credit extended to other than a natural person (an individual, as opposed to any other entity or organization).

Regulation Z Disclosures

Regulation Z requires that creditors disclose the following items for real property secured loans. The first four disclosures must include simple descriptive phrases of explanation similar to those shown in bold font:

- **Name and Address of Creditor** - The purpose is to identify the lender or creditor making the disclosure.
- **Amount financed** - The amount of credit provided to the borrower (principal amount borrowed less prepaid finance charges included).
- **Itemization of Amount Financed** - This is optional if a good faith estimate is provided (under RESPA).
- **Finance charge** - The dollar amount the credit will cost the borrower.
- **Annual percentage rate** - The cost of credit as a yearly rate.
- **Total of payments** - The amount the borrower will have paid when the borrower has made all the scheduled payments.
- **Payment schedule** - The number, amount, and timing of payments.
- **Variable rate information** - Variable interest rate and discounted variable rate disclosures, including limitations and effects of a rate increase and an example of payment terms resulting from the increase (may be accomplished by giving the consumer the "Consumer Handbook on Adjustable Rate Mortgages" or a suitable substitute).
- **Demand feature** of the loan, excluding borrower default or due-on-sale clauses.
- **Loan prepayment penalties** and whether such penalties are charged by the lender/creditor or, if uncertainty exists, a statement to that effect and whether any prepaid finance charges are subject to rebate.
- **Late payment charge**, stated either as a percentage or a dollar amount.

Chapter 8: Real Property Financing Disclosures

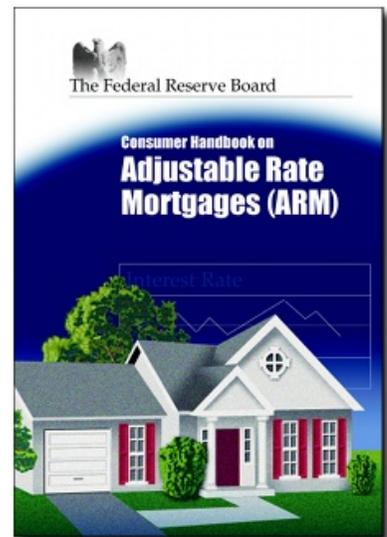
- **Description of the security interest** which will be retained by the lender/creditor as security for the loan.
- **Insurance requirements** and whether premiums for coverage are included in the finance charge.
- **Certain security interest charges** to be excluded from the finance charge, such as taxes or other fees paid to public officials or the premium for insurance in lieu of perfecting the security interest (if subject to RESPA, the required RESPA statement is sufficient disclosure).
- **Specific contract references** to terms of the contract related to nonpayment, default, acceleration, or prepayment penalties.
- **Assumption policy** - In applicable transactions, a statement that a due-on-sale clause or other conditions about the loan assumption policy is contained in the loan documents and a statement whether the lender/creditor will allow subsequent buyers to assume the remaining obligation.
- **Required deposit information** - Whether there is a required deposit by the borrower as a condition of the loan and a statement that the annual percentage rate does or does not reflect the effect of any such required deposit.

If the deposit is any kind of fee or charge collected by the mortgage broker and not the lender, California law requires that the broker have an "advance fee" contract preapproved by the Real Estate Commissioner, except for advance payment of appraisal and credit report fees collected by the broker for payment to third parties.

Disclosure Requirements for ARM Loans

Additional Adjustable Rate Mortgage (ARM) disclosures must be provided for ARM loans with terms greater than one year. The most important of these disclosures are:

- The booklet entitled "**Consumer Handbook on Adjustable Rate Mortgages**," published by the Federal Trade Commission and the Federal Home Loan Bank Board, or a suitable substitute.
- **A loan program disclosure** for each variable-rate program in which the consumer expresses an interest. The loan program disclosure must contain the necessary information as prescribed by Regulation Z.
- The loan service provider must also provide **subsequent disclosure** to the consumer about the variable rate loan program in each month an interest rate adjustment takes place.



Rescission Rights

The right to rescind a real estate loan applies to most consumer credit transactions in which the lender/creditor will acquire or retain a security interest in the borrower's principal dwelling. **The lender/creditor must provide each borrower who is entitled to rescind with a written notice of this right.** The borrower has the right to rescind without penalty until midnight of the third business day (Sundays and federal holidays excluded) following the later of these events:



- consummation of the loan transaction.
- delivery of all material truth-in-lending disclosures.
- delivery of the notice of the right to cancel.

Certain real estate loan transactions are exempt from rescission under Regulation Z, including:

- a residential (purchase) mortgage
- refinancing or consolidation by the same lender who currently holds the loan secured by the principal dwelling, provided no "new" money is advanced
- any transaction in which a state agency is a creditor
- loans for vacant lots or vacation and retirement homes (not the principal residence of the borrower)
- a business-purpose line of credit, although secured by the borrower's dwelling.

In order to exercise the right to rescind, the consumer must notify the creditor of the rescission by written communication. Notice is considered "given" when sent or when delivered to the lender's designated place of business. The consumer may exercise the right to rescind only within the required three-day rescission period.

When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer will no longer be liable for any amount, *including any finance charge*. **Within 20 calendar days after receipt of a notice of rescission, the lender is required to return any money or property that was given to anyone in connection with the transaction** and must take any action necessary to reflect the termination of the security interest.

There is no right to rescission for buyers **purchasing a residence** under Regulation Z, but the three-day right to rescind does apply to home equity lines of credit (HELOCs), refinances (if a different lender than the original loan), and home improvement loans.

High-rate or High-Fee Loan Transactions

The Truth in Lending Act was amended in 1994 with respect to certain loans (other than purchase money loans) that are secured by the borrower's principal dwelling. The 1994 amendment applies to high-rate or high-fee loan transactions. The Home Ownership and Equity Protection Act (HOEPA) added more restrictions for lenders who issue these types of loans, along with additional consumer protections. These types of loans are also known as *high-cost mortgage loans* or *Section 32 loans*.

These types of loans have additional restrictions placed on creditors, require more disclosures, and give borrowers more cancellation rights. A loan is covered by HOEPA if:

- for first-lien mortgages, the annual percentage rate (APR) exceeds the Average Prime Offer Rate (APOR) by 6.5% or more,
- for second-lien mortgages, the APR exceeds the APOR by 8.5%, or
- the total points and fees charged to the borrower exceeds 5% of the loan amount.

In these cases the law defines a *creditor* as someone who originates more than one high rate/fee loan in any 12-month period. In addition, any such loan arranged by a mortgage broker is subject to the new requirements.

Loans that are covered by HOEPA have additional restrictions in comparison to other loan products, such as:

- No negative amortization
- Homeownership counseling sessions are required
- No prepayment penalties may be charged
- Late fees are restricted to 4% of the past due payment

Loans Subject to RESPA

Federally related senior and junior loan transactions for the financing of the initial purchase, construction/take-out, and refinancing of owner and non-owner occupied residential property of one-to-four units are subject to the Real Estate Settlement Procedures Act (RESPA). **Borrowers of loans subject to RESPA are entitled to receive an advance truth-in-lending disclosure from the lender/creditor.** The purpose of the advance disclosure is to give the borrower an opportunity to compare the loan terms being offered to the terms available from other lenders/creditors. This good faith estimate (the Loan Estimate) was discussed in detail in the RESPA section of this course. **The good faith estimate is required under RESPA and must be given at the time of application or within three business days of receiving a complete written application by the borrower.**

Regulation B - Equal Credit Opportunity Act

The Equal Credit Opportunity Act (ECOA) was enacted in 1974 to make it unlawful for creditors to discriminate in any credit transaction based on gender or marital status. In 1976, the act was amended to also make it unlawful to discriminate in any credit transaction based on race, color, religion, national origin, age, receipt of public assistance, and the good faith exercise of rights under the Consumer Protection Act.

Regulation B was issued by the Board of Governors of the Federal Reserve System to implement the provisions of the Equal Credit Opportunity Act.



Notice and Disclosures of Adverse Loan Action

Under Regulation B, a lender must notify an applicant of action taken on the loan application generally within 30 days after receiving a completed application. **When a lender denies an application for credit, a notification of the adverse action must be given to the applicant in writing.** The statement must contain the following:

- Statement of the action taken
- The name and address of the lender
- A statement of the provisions commonly known as the *ECOA Notice*
- The name and address of the federal agency that administers compliance with respect to the lender
- Either a statement of a specific reasons for the adverse action or a disclosure of the applicant's *right to a statement* of specific reasons within a 30-day period of time

Appraisal Notification

Regulation B requires the lender to notify an applicant of a loan of their right to receive a free copy of an appraisal, provided that the loan is to be secured by residential real property.

The appraisal notice must be given within 3 business days of receiving the borrower's loan application. The lender is required to give the borrower free copies of all *items of written valuation*, which may be appraisals, broker price options, and the like, promptly after the reports are completed or at least 3 business days before loan closing. Even if the loan does not successfully close, a borrower still has the right to receive copies of all items of written valuation.

While lenders cannot charge for copies of the items of written valuation, they can charge a reasonable fee for the cost to prepare the appraisal or other written valuations.

Notice of Information for Monitoring Purposes

A lender that receives an application for credit primarily for the purchase or refinancing of a principal residence is required to request the following information as a part of the application:

- Race or national origin (categories to be: American Indian, Alaskan Native, Asian or Pacific Islander, Black, White, Hispanic, or Other)
- Gender
- Marital Status (categories may only be: married, unmarried or separated)
- Age

The applicant is not required to supply the requested information. However, if the applicant does not provide any part of the requested information, that fact will be noted on the form. The lender is then required to note on the form, to the extent possible, the race and national origin and sex of the applicant based upon visual observation and surname.

The lender is required to inform applicants that the information is being requested by the federal government for the purpose of monitoring compliance with federal statutes that prohibit lender discrimination on the basis of race or national origin, sex, marital status, or age. The lender should also inform the applicant(s) that if the applicant chooses not to provide the information the lender is required to note the race or national origin and sex based on visual observations.

Holden Act Disclosure Requirements

The California legislation that prohibits financial discrimination in housing is known as "The Holden Act." The Holden Act became effective January 1, 1978. The legislation prohibited state chartered financial institutions from engaging in the practice of "redlining." **Redlining is the practice of refusing to make loans or making loans on discriminatory terms because of the location of the property.** Although the Holden Act prohibits "redlining," its practical effect is to *encourage*:

- Lending in areas where conventional financing has traditionally been unavailable
- Increasing the availability of housing to creditworthy persons
- Ensuring the supply of decent and safe housing throughout California
- Preventing the abandonment and decay of neighborhoods



The Holden Act more specifically prohibits financial institutions from:

- Engaging in any discriminatory loan practices due to the consideration of condition, characteristics, or trends in the general area surrounding the housing unit being financed.
- Discriminating against individuals or properties in the availability of financing.

Chapter 8: Real Property Financing Disclosures

- Any appraising practice that uses neighborhood trends based upon changes in race, color, etc.

The financial institutions covered under the act include all state of California chartered savings and loan associations, state chartered banks, personal property brokers, industrial loan companies, insurance companies, credit unions, thrift companies, and mortgage bankers. *Federally* chartered banks or savings and loans are exempt from The Holden Act, but would be covered under federal law.

The Holden Act applies to the financing to purchase, construct, rehabilitate, improve, or refinance a one-to-four unit owner-occupied dwelling.

Holden Act Notification

All applicants for loans subject to the Holden Act are required to be given a NOTICE TO APPLICANTS by the financial institution setting forth the applicants rights under The Holden Act at the time of loan application. The notice must include the address where complaints may be filed and where information may be obtained.

Conclusion

California real estate licensees must be very aware of their disclosure responsibilities in each real estate transaction. **Legal liability and discipline by the California Bureau of Real Estate may result from failure to disclose many factors in real estate transactions.**

Licensees must understand the concept of a "material" fact. Within certain limitations, material facts must be disclosed. The recent trends in case law would indicate that the seller, listing agent, and selling agent have a duty to disclose *all* known material facts to the buyer. Additionally, recent case law would also indicate that both the listing and selling agent have a duty as experts in real estate to make a reasonable inspection of the property and to disclose to the buyer any observations that would or could indicate a potential problem.



Licensees should also understand the California disclosure laws. Disclosures are required by the seller and agents relating to a wide range of issues in the typical real estate transaction. In addition, under RESPA, a number of additional disclosures are required by all those involved in the settlement process. If a property is to be financed, whether through seller carry-back financing or through a federal or state chartered lender, disclosures relating to loan terms are required.

Licensees should also note the responsibility of properly disclosing their agency status. Who the agent works for must be properly disclosed and acknowledged by all parties to the transaction.

Disclosure should not be viewed as an onerous obligation required of each agent. It should be viewed as the first line of defense in potential litigation that is always a very real potential in any real estate transaction.

Checklist of Disclosures Required Under California Law

You can download a PDF copy of the following checklist by clicking on **this link** ³ .

Disclosures required of the Seller and/or Real Estate Licensee:

- Real Estate Transfer Disclosure Statement (TDS)
- Local Option Transfer Disclosure Statement
- Natural Hazards Disclosure
- Window Security Bars
- Notice Regarding Water Heater's Security against Earthquake
- Smoke Detector Statement of Compliance
- Disclosure Regarding Lead-based Paint
- Mello-Roos Bonds and Taxes
- Ordinance Location
- Earthquake Guide
- California Environmental Hazards Pamphlet
- Structural Pest Control Inspection and Certification Reports
- Energy Conservation Retrofit and Thermal Insulation Disclosures
- Foreign Investment in Real Property Tax Act
- State Tax Withholding on Disposition of California Real Property

³ http://www.onlineed.com/system/content/refs/DutyToDisclose/ca_disclosure_checklist.pdf

Checklist of Disclosures Required Under California Law

_____ Data Base Regarding Location of Sex Offenders

Disclosures Required of Real Estate Licensees in Transfer of Residential Real Estate

- _____ Agency Status Disclosure
- _____ Visual Inspection of Property and Results Disclosure
- _____ Negotiability of Commissions
- _____ RESPA Disclosures on applicable issues
- _____ Seller Financing Disclosures - when applicable

Disclosures Relative to Subdivisions

- _____ Public Report
- _____ Right to Rescind Disclosures
- _____ Blanket Encumbrances Disclosure
- _____ Governing Instruments Delivery in Common Interest Subdivisions
- _____ Conversion Disclosures (where applicable)

Property Financing Disclosures (Usually made by lender)

- _____ Adjustable-Rate Loan Disclosure
- _____ Truth-in-Lending (Regulation Z)
- _____ Notice of Transfer of Loan Servicing

Appendix 1: California Civil Code Section 1102-1102.14

1102. (a) Except as provided in Section 1102.2, this article applies to any transfer by sale, exchange, installment land sale contract, as defined in Section 2985, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units.

(b) Except as provided in Section 1102.2, this article shall apply to a resale transaction entered into on or after January 1, 2000, for a manufactured home, as defined in Section 18007 of the Health and Safety Code, or a mobilehome, as defined in Section 18008 of the Health and Safety Code, which manufactured home or mobilehome is classified as personal property and intended for use as a residence.

(c) Any waiver of the requirements of this article is void as against public policy.

(Amended by Stats. 1999, Ch. 517, Sec. 2. Effective January 1, 2000.)

1102.1. (a) In enacting Chapter 817 of the Statutes of 1994, it was the intent of the Legislature to clarify and facilitate the use of the real estate disclosure statement, as specified in Section 1102.6. The Legislature intended the statement to be used by transferors making disclosures required under this article and by agents making disclosures required by Section 2079 on the agent's portion of the real estate disclosure statement, in transfers subject to this article. In transfers not subject to this article, agents may make required disclosures in a separate writing. The Legislature did not intend to affect the existing obligations of the parties to a real estate contract, or their agents, to disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the physical conditions of the property and previously received reports of physical inspections noted on the disclosure form set forth in Section 1102.6 or 1102.6a, and that nothing in this article shall be construed to change the duty of a real estate broker or salesperson pursuant to Section 2079.

It is also the intent of the Legislature that the delivery of a real estate transfer disclosure statement may not be waived in an "as is" sale, as held in *Loughrin v. Superior Court* (1993) 15 Cal. App. 4th 1188.

(b) In enacting Chapter 677 of the Statutes of 1996, it was the intent of the Legislature to clarify and facilitate the use of the manufactured home and mobilehome transfer disclosure statement applicable to the resale of a manufactured home or mobilehome pursuant to subdivision (b) of Section 1102. The Legislature intended the statements to be used by transferors making disclosures required under this article and by agents making disclosures required by Section 2079 on the agent's portion of the disclosure statement and as required by Section 18046 of the Health and Safety Code on the dealer's portion of the manufactured home and mobilehome transfer disclosure statement, in transfers subject to this article. In transfers not subject to this article, agents may make required disclosures in a separate writing. The Legislature did not

Appendix 1: California Civil Code Section 1102-1102.14

intend to affect the existing obligations of the parties to a real estate contract, or their agents, to disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the physical conditions of the property and previously received reports of physical inspections noted on the disclosure form set forth in Section 1102.6 or 1102.6a or to affect the existing obligations of the parties to a manufactured home or mobilehome purchase contract, and nothing in this article shall be construed to change the duty of a real estate broker or salesperson pursuant to Section 2079 or the duty of a manufactured home or mobilehome dealer or salesperson pursuant to Section 18046 of the Health and Safety Code.

It is also the intent of the Legislature that the delivery of a mobilehome transfer disclosure statement may not be waived in an "as is" sale.

(c) It is the intent of the Legislature that manufactured home and mobilehome dealers and salespersons and real estate brokers and salespersons use the form provided pursuant to Section 1102.6d. It is also the intent of the Legislature for sellers of manufactured homes or mobilehomes who are neither manufactured home dealers or salespersons nor real estate brokers or salespersons to use the Manufactured Home/Mobilehome Transfer Disclosure Statement contained in Section 1102.6d.

(Amended by Stats. 1999, Ch. 517, Sec. 3. Effective January 1, 2000.)

1102.2. This article does not apply to the following:

(a) Transfers which are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code and transfers which can be made without a public report pursuant to Section 11010.4 of the Business and Professions Code.

(b) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in the administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(c) Transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure, transfers to the legal owner or lienholder of a manufactured home or mobilehome by a registered owner or successor in interest who is in default, or transfers by reason of any foreclosure of a security interest in a manufactured home or mobilehome.

(d) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust. This exemption shall not apply to a transfer if the trustee is a natural person who is sole trustee of a revocable trust and he or she is a former owner of the property or an occupant in possession of the property within the preceding year.

(e) Transfers from one coowner to one or more other coowners.

(f) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

(g) Transfers between spouses resulting from a judgment of dissolution of marriage or of legal separation or from a property settlement agreement incidental to that judgment.

Appendix 1: California Civil Code Section 1102-1102.14

(h) Transfers by the Controller in the course of administering Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure.

(i) Transfers under Chapter 7 (commencing with Section 3691) or Chapter 8 (commencing with Section 3771) of Part 6 of Division 1 of the Revenue and Taxation Code.

(j) Transfers or exchanges to or from any governmental entity.

(Amended by Stats. 2000, Ch. 135, Sec. 11. Effective January 1, 2001.)

1102.3. The transferor of any real property subject to this article shall deliver to the prospective transferee the written statement required by this article, as follows:

(a) In the case of a sale, as soon as practicable before transfer of title.

(b) In the case of transfer by a real property sales contract, as defined in Section 2985, or by a lease together with an option to purchase, or a ground lease coupled with improvements, as soon as practicable before execution of the contract. For the purpose of this subdivision, "execution" means the making or acceptance of an offer.

With respect to any transfer subject to subdivision (a) or (b), the transferor shall indicate compliance with this article either on the receipt for deposit, the real property sales contract, the lease, or any addendum attached thereto or on a separate document.

If any disclosure, or any material amendment of any disclosure, required to be made by this article, is delivered after the execution of an offer to purchase, the transferee shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent.

(Added by renumbering Section 1102.2 by Stats. 1995, Ch. 335, Sec. 4. Effective January 1, 1996.)

1102.3a. (a) The transferor of any manufactured home or mobilehome subject to this article shall deliver to the prospective transferee the written statement required by this article, as follows:

(1) In the case of a sale, or a lease with an option to purchase, of a manufactured home or mobilehome, involving an agent, as defined in Section 18046 of the Health and Safety Code, as soon as practicable, but no later than the close of escrow for the purchase of the manufactured home or mobilehome.

(2) In the case of a sale, or lease with an option to purchase, of a manufactured home or mobilehome, not involving an agent, as defined in Section 18046 of the Health and Safety Code, at the time of execution of any document by the prospective transferee with the transferor for the purchase of the manufactured home or mobilehome.

(b) With respect to any transfer subject to this section, the transferor shall indicate compliance with this article either on the transfer disclosure statement, any addendum thereto, or on a separate document.

(c) If any disclosure, or any material amendment of any disclosure, required to be made pursuant to subdivision (b) of Section 1102, is delivered after the execution of an offer to purchase, the transferee shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer by delivery of a written notice of termination to the transferor.

(Added by Stats. 1999, Ch. 517, Sec. 5. Effective January 1, 2000.)

Appendix 1: California Civil Code Section 1102-1102.14

1102.4. (a) Neither the transferor nor any listing or selling agent shall be liable for any error, inaccuracy, or omission of any information delivered pursuant to this article if the error, inaccuracy, or omission was not within the personal knowledge of the transferor or that listing or selling agent, was based on information timely provided by public agencies or by other persons providing information as specified in subdivision (c) that is required to be disclosed pursuant to this article, and ordinary care was exercised in obtaining and transmitting it.

(b) The delivery of any information required to be disclosed by this article to a prospective transferee by a public agency or other person providing information required to be disclosed pursuant to this article shall be deemed to comply with the requirements of this article and shall relieve the transferor or any listing or selling agent of any further duty under this article with respect to that item of information.

(c) The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise, shall be sufficient compliance for application of the exemption provided by subdivision (a) if the information is provided to the prospective transferee pursuant to a request therefor, whether written or oral. In responding to such a request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of Section 1102.6 and, if so, shall indicate the required disclosures, or parts thereof, to which the information being furnished is applicable. Where such a statement is furnished, the expert shall not be responsible for any items of information, or parts thereof, other than those expressly set forth in the statement.

(Amended by Stats. 1986, Ch. 460, Sec. 4.)

1102.5. If information disclosed in accordance with this article is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this article. If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the transferor, and the transferor or his or her agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information, provided the approximation is clearly identified as such, is reasonable, is based on the best information available to the transferor or his or her agent, and is not used for the purpose of circumventing or evading this article.

(Added by Stats. 1985, Ch. 1574, Sec. 2. Operative January 1, 1987, by Sec. 3 of Ch. 1574.)

1102.6. (a) The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form:

NOTICE OF INCOMPLETE TEXT: The Local Option Real Estate Transfer Disclosure Statement appears in the hard-copy publication of the chaptered bill. See Sec. 15 of Chapter 71, Statutes of 2014.

PRINTER PLEASE NOTE: TIP-IN MATERIAL TO BE INSERTED

(b) The amendments to this section by the act adding this subdivision shall become operative on July 1, 2014.

Appendix 1: California Civil Code Section 1102-1102.14

(Amended by Stats. 2014, Ch. 71, Sec. 15. Effective January 1, 2015. Note: See published chaptered bill for complete section text; the Real Estate Transfer Disclosure Statement appears on pages 18 to 22 of Stats. 2014, Ch. 71.)

1102.6a. (a) On and after July 1, 1990, any city or county may elect to require disclosures on the form set forth in subdivision (b) in addition to those disclosures required by Section 1102.6. However, this section does not affect or limit the authority of a city or county to require disclosures on a different disclosure form in connection with transactions subject to this article pursuant to an ordinance adopted prior to July 1, 1990. An ordinance like this adopted prior to July 1, 1990, may be amended thereafter to revise the disclosure requirements of the ordinance, in the discretion of the city council or county board of supervisors.

(b) Disclosures required pursuant to this section pertaining to the property proposed to be transferred, shall be set forth in, and shall be made on a copy of, the following disclosure form:

NOTICE OF INCOMPLETE TEXT: The Local Option Real Estate Transfer Disclosure Statement appears in the hard-copy publication of the chaptered bill. See Sec. 33 of Chapter 181, Statutes of 2012.

PRINTER PLEASE NOTE: TIP-IN MATERIAL TO BE INSERTED

(c) This section does not preclude the use of addenda to the form specified in subdivision (b) to facilitate the required disclosures. This section does not preclude a city or county from using the disclosure form specified in subdivision (b) for a purpose other than that specified in this section.

(d) (1) On and after January 1, 2005, if a city or county adopts a different or additional disclosure form pursuant to this section regarding the proximity or effects of an airport, the statement in that form shall contain, at a minimum, the information in the statement "Notice of Airport in Vicinity" found in Section 11010 of the Business and Professions Code, or Section 1103.4 or 4255.

(2) On and after January 1, 2006, if a city or county does not adopt a different or additional disclosure form pursuant to this section, then the provision of an "airport influence area" disclosure pursuant to Section 11010 of the Business and Professions Code, or Section 1103.4 or 4255, or if there is not a current airport influence map, a written disclosure of an airport within two statute miles, shall be deemed to satisfy any city or county requirements for the disclosure of airports in connection with transfers of real property.

(Amended by Stats. 2012, Ch. 181, Sec. 33. Effective January 1, 2013. Operative January 1, 2014, by Sec. 86 of Ch. 181. Note: See published chaptered bill for complete section text; the Local Option Real Estate Transfer Disclosure Statement appears on pages 26 and 27 of Ch. 181.)

1102.6b. (a) This section applies to all transfers of real property for which all of the following apply:

(1) The transfer is subject to this article.

(2) The property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act (Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 of the Government Code), to a fixed lien assessment collected in installments to secure bonds issued pursuant to the Improvement Bond Act of 1915 (Division 10 (commencing with Section 8500)

Appendix 1: California Civil Code Section 1102-1102.14

of the Streets and Highways Code), or to a contractual assessment program authorized pursuant to Chapter 29 (commencing with Section 5898.10) of Part 3 of Division 7 of the Streets and Highway Code.

(3) A notice is not required pursuant to Section 53341.5 of the Government Code.

(b) In addition to any other disclosure required pursuant to this article, the seller of any real property subject to this section shall make a good faith effort to obtain a disclosure notice concerning the special tax as provided for in Section 53340.2 of the Government Code, or a disclosure notice concerning an assessment installment as provided in Section 53754 of the Government Code, from each local agency that levies a special tax pursuant to the Mello-Roos Community Facilities Act, or that collects assessment installments to secure bonds issued pursuant to the Improvement Bond Act of 1915 (Division 10 (commencing with Section 8500) of the Streets and Highways Code), or a disclosure notice concerning the contractual assessment as provided in Section 5898.24 of the Streets and Highways Code, on the property being transferred, and shall deliver that notice or those notices to the prospective purchaser, as long as the notices are made available by the local agency.

(c) (1) The seller of real property subject to this section may satisfy the disclosure notice requirements in regard to the bonds issued pursuant to the Improvement Bond Act of 1915 (Division 10 (commencing with Section 8500) of the Streets and Highways Code) by delivering a disclosure notice that is substantially equivalent and obtained from another source, until December 31, 2004.

(2) The seller of real property subject to this section may satisfy the disclosure notice requirements in regard to the assessments collected under the contractual assessment program authorized pursuant to Chapter 29 (commencing with Section 5898.10) of Part 3 of Division 7 of the Streets and Highway Code by delivering a disclosure notice that is substantially equivalent and obtained from another source.

(3) For the purposes of this section, a substantially equivalent disclosure notice includes, but is not limited to, a copy of the most recent year's property tax bill or an itemization of current assessment amounts applicable to the property.

(d) (1) Notwithstanding subdivision (c), at any time after the effective date of this section, the seller of real property subject to this section may satisfy the disclosure notice requirements of this section by delivering a disclosure notice obtained from a nongovernmental source that satisfies the requirements of paragraph (2).

(2) A notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe a special tax pursuant to the Mello-Roos Community Facilities Act levied against the property or to clearly and accurately consolidate information about two or more districts that levy or are authorized to levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property, and shall include the name of the Mello-Roos entity levying taxes against the property, the annual tax due for the Mello-Roos entity for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum tax for the Mello-Roos entity may increase per year, and the date until the tax may be levied against the property for the Mello-Roos entity and a contact telephone number, if available, for further information about the Mello-Roos entity. A notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or to clearly and accurately consolidate information about two or more districts that levy or are authorized to levy special assessments and bonds pursuant to the Improvement Bond Act of 1915 against the property, and shall include the name of the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, the current annual tax on the property for the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915 and a contact telephone number, if available, for further information about the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915.

Appendix 1: California Civil Code Section 1102-1102.14

(3) This section does not change the ability to make disclosures pursuant to Section 1102.4 of the Civil Code.

(e) If a disclosure received pursuant to subdivision (b), (c), or (d) has been delivered to the transferee, a seller or his or her agent is not required to provide additional information concerning, and information in the disclosure shall be deemed to satisfy the responsibility of the seller or his or her agent to inform the transferee regarding the special tax or assessment installments and the district. Notwithstanding subdivision (b), (c), or (d), nothing in this section imposes a duty to discover a special tax or assessment installments or the existence of any levying district not actually known to the agents.

(Amended by Stats. 2009, Ch. 444, Sec. 1. Effective January 1, 2010.)

1102.6c. (a) In addition to any other disclosure required pursuant to this article, it shall be the sole responsibility of the seller of any real property subject to this article, or his or her agent, to deliver to the prospective purchaser a disclosure notice that includes both of the following:

(1) A notice, in at least 12-point type or a contrasting color, as follows:

"California property tax law requires the Assessor to revalue real property at the time the ownership of the property changes. Because of this law, you may receive one or two supplemental tax bills, depending on when your loan closes.

The supplemental tax bills are not mailed to your lender. If you have arranged for your property tax payments to be paid through an impound account, the supplemental tax bills will not be paid by your lender. It is your responsibility to pay these supplemental bills directly to the Tax Collector.

If you have any question concerning this matter, please call your local Tax Collector's Office."

(2) A title, in at least 14-point type or a contrasting color, that reads as follows: "Notice of Your 'Supplemental' Property Tax Bill."

(b) The disclosure notice requirements of this section may be satisfied by delivering a disclosure notice pursuant to Section 1102.6b that satisfies the requirements of subdivision (a).

(Added by Stats. 2005, Ch. 392, Sec. 2. Effective January 1, 2006.)

1102.6d. Except for manufactured homes and mobilehomes located in a common interest development governed by Part 5 (commencing with Section 4000) of Division 4, the disclosures applicable to the resale of a manufactured home or mobilehome pursuant to subdivision (b) of Section 1102 are set forth in, and shall be made on a copy of, the following disclosure form:

NOTICE OF INCOMPLETE TEXT: The Manufactured Home and Mobilehome

Transfer Disclosure Statement appears in the hard-copy publication

of the chaptered bill. See Sec. 34 of Chapter 181, Statutes of 2012.

PRINTER PLEASE NOTE: TIP-IN MATERIAL TO BE INSERTED

Appendix 1: California Civil Code Section 1102-1102.14

(Amended by Stats. 2012, Ch. 181, Sec. 34. Effective January 1, 2013. Operative January 1, 2014, by Sec. 86 of Ch. 181. Note: See published chaptered bill for complete section text; the Manufactured Home and Mobilehome Transfer Disclosure Statement appears on pages 29 to 33 of Ch. 181.)

1102.6e. If a property being transferred on or after January 1, 2008, is subject to a transfer fee, as defined in Section 1098, the transferor shall provide, at the same time as the transfer disclosure statement required pursuant to Section 1102.6 is provided, an additional disclosure statement containing all of the following:

- (a) Notice that payment of a transfer fee is required upon transfer of the property.
- (b) The amount of the fee required for the asking price of the real property and a description of how the fee is calculated.
- (c) Notice that the final amount of the fee may be different if the fee is based upon a percentage of the final sale price.
- (d) The entity to which funds from the fee will be paid.
- (e) The purposes for which funds from the fee will be used.
- (f) The date or circumstances under which the obligation to pay the transfer fee expires, if any.

(Added by Stats. 2007, Ch. 689, Sec. 3. Effective January 1, 2008.)

1102.7. Each disclosure required by this article and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of this article, "good faith" means honesty in fact in the conduct of the transaction.

(Added by Stats. 1985, Ch. 1574, Sec. 2. Operative January 1, 1987, by Sec. 3 of Ch. 1574.)

1102.8. The specification of items for disclosure in this article does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

(Added by Stats. 1985, Ch. 1574, Sec. 2. Operative January 1, 1987, by Sec. 3 of Ch. 1574.)

1102.9. Any disclosure made pursuant to this article may be amended in writing by the transferor or his or her agent, but the amendment shall be subject to Section 1102.3 or 1102.3a.

(Amended by Stats. 1999, Ch. 517, Sec. 7. Effective January 1, 2000.)

1102.10. Delivery of disclosures required by this article shall be by personal delivery to the transferee or by mail to the prospective transferee. For the purposes of this article, delivery to the spouse of a transferee shall be deemed delivery to the transferee, unless provided otherwise by contract.

(Added by Stats. 1985, Ch. 1574, Sec. 2. Operative January 1, 1987, by Sec. 3 of Ch. 1574.)

1102.11. Any person or entity, other than a real estate licensee licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code, acting in the capacity of an escrow agent for the transfer of real property subject to this article shall not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements of this article, unless the person or entity is empowered to so act by an express written agreement to that effect. The extent of such an agency shall be governed by the written agreement.

(Added by Stats. 1985, Ch. 1574, Sec. 2. Operative January 1, 1987, by Sec. 3 of Ch. 1574.)

Appendix 1: California Civil Code Section 1102-1102.14

1102.12. (a) If more than one licensed real estate broker is acting as an agent in a transaction subject to this article, the broker who has obtained the offer made by the transferee shall, except as otherwise provided in this article, deliver the disclosure required by this article to the transferee, unless the transferor has given other written instructions for delivery.

(b) If a licensed real estate broker responsible for delivering the disclosures under this section cannot obtain the disclosure document required and does not have written assurance from the transferee that the disclosure has been received, the broker shall advise the transferee in writing of his or her rights to the disclosure. A licensed real estate broker responsible for delivering disclosures under this section shall maintain a record of the action taken to effect compliance in accordance with Section 10148 of the Business and Professions Code.

(Amended by Stats. 1986, Ch. 460, Sec. 6.)

1102.13. No transfer subject to this article shall be invalidated solely because of the failure of any person to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee.

(Added by Stats. 1985, Ch. 1574, Sec. 2. Operative January 1, 1987, by Sec. 3 of Ch. 1574.)

1102.14. (a) As used in this article, "listing agent" means listing agent as defined in subdivision (f) of Section 1086.

(b) As used in this article, "selling agent" means selling agent as defined in subdivision (g) of Section 1086, exclusive of the requirement that the agent be a participant in a multiple listing service as defined in Section 1087.

(Added by Stats. 1986, Ch. 460, Sec. 7.)

Appendix 2: California Civil Code Section 2079 - 2079.24

2079.(a) It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property comprising one to four dwelling units, or a manufactured home as defined in Section 18007 of the Health and Safety Code, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer.

(b) It is the duty of a real estate broker or salesperson licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code to comply with this section and any regulations imposing standards of professional conduct adopted pursuant to Section 10080 of the Business and Professions Code with reference to Sections 10176 and 10177 of the Business and Professions Code.

(Amended by Stats. 1996, Ch. 812, Sec. 2. Effective January 1, 1997.)

2079.1. The provisions of this article relating sale transactions of residential real property comprising one to four dwelling units apply with equal force to leases of that property that include an option to purchase, ground leases of land on which one to four dwelling units have been constructed, or real property sales contracts, as defined in Section 2985, for that property.

(Added by Stats. 1985, Ch. 223, Sec. 2.)

2079.2. The standard of care owed by a broker under this article is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license under Division 4 (commencing with Section 10000) of the Business and Professions Code.

(Added by Stats. 1985, Ch. 223, Sec. 2.)

2079.3. The inspection to be performed pursuant to this article does not include or involve an inspection of areas that are reasonably and normally inaccessible to this type of an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property, and, if the property comprises a unit in a planned development as defined in Section 11003 of the Business and Professions Code, a condominium as defined in Section 783, or a stock cooperative as defined in Section 11003.2 of the Business and Professions Code, does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the provisions of Sections 4525 to 4580, inclusive.

Appendix 2: California Civil Code Section 2079 - 2079.24

(Amended by Stats. 2012, Ch. 181, Sec. 38. Effective January 1, 2013. Operative January 1, 2014, by Sec. 86 of Ch. 181.)

2079.4. In no event shall the time for commencement of legal action for breach of duty imposed by this article exceed two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first.

(Added by Stats. 1985, Ch. 223, Sec. 2.)

2079.5. Nothing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer.

(Added by Stats. 1985, Ch. 223, Sec. 2.)

2079.6. This article does not apply to transfers which are required to be preceded by the furnishing, to a prospective transferee, of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code and transfers which can be made without a public report pursuant to Section 11010.4 of the Business and Professions Code, unless the property has been previously occupied.

(Added by Stats. 1988, Ch. 274, Sec. 1.)

2079.7. (a) If a consumer information booklet described in Section 10084.1 of the Business and Professions Code is delivered to a transferee in connection with the transfer of real property, including property specified in Section 1102 of the Civil Code, or manufactured housing, as defined in Section 18007 of the Health and Safety Code, a seller or broker is not required to provide additional information concerning, and the information shall be deemed to be adequate to inform the transferee regarding, common environmental hazards, as described in the booklet, that can affect real property.

(b) Notwithstanding subdivision (a), nothing in this section either increases or decreases the duties, if any, of sellers or brokers, including but not limited to, the duties of a seller or broker under this article, Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2, or Section 25359.7 of the Health and Safety Code, or alters the duty of a seller or broker to disclose the existence of known environmental hazards on or affecting the real property.

(Added by Stats. 1989, Ch. 969, Sec. 2.)

2079.8. (a) If a Homeowner's Guide to Earthquake Safety described in Section 10149 of the Business and Professions Code is delivered to a transferee in connection with the transfer of real property, including property specified in Section 1102 or under Chapter 7.5 (commencing with Section 2621) of Division 2 of the Public Resources Code, a seller or broker is not required to provide additional information concerning, and the information shall be deemed to be adequate to inform the transferee regarding, geologic and seismic hazards, in general, as described in the guide, that may affect real property and mitigating measures that the transferee or seller might consider.

(b) Notwithstanding subdivision (a), nothing in this section increases or decreases the duties, if any, of sellers or brokers, including, but not limited to, the duties of a seller or broker under this article, Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2, or under Chapter 7.5 (commencing with Section 2621) of Division 2 of the Public Resources Code, or alters the duty of a seller or broker to disclose the existence of known hazards on or affecting the real property.

(Amended by Stats. 1991, Ch. 550, Sec. 2.)

Appendix 2: California Civil Code Section 2079 - 2079.24

2079.9. (a) If a Commercial Property Owner's Guide to Earthquake Safety described in Section 10147 of the Business and Professions Code is delivered to a transferee in connection with the transfer of real property, including property specified in Section 1102 or under Chapter 7.5 (commencing with Section 2621) of Division 2 of the Public Resources Code, a seller or broker is not required to provide additional information concerning, and the information shall be deemed to be adequate to inform the transferee regarding, geologic and seismic hazards, in general, as described in the guide, that may affect real property and mitigating measures that the transferee or seller might consider.

(b) Notwithstanding subdivision (a), nothing in this section increases or decreases the duties, if any, of sellers, their brokers or agents under this article or under Chapter 7.5 (commencing with Section 2621) or Chapter 7.8 (commencing with Section 2690) of Division 2 of the Public Resources Code, or alters the duty of a seller, agent, or broker to disclose the existence of known hazards on or affecting the real property.

(Added by Stats. 1991, Ch. 859, Sec. 2.)

2079.10. (a) If the informational booklet published pursuant to Section 25402.9 of the Public Resources Code, concerning the statewide home energy rating program adopted pursuant to Section 25942 of the Public Resources Code, is delivered to a transferee in connection with the transfer of real property, including, but not limited to, property specified in Section 1102, manufactured homes as defined in Section 18007 of the Health and Safety Code, and property subject to Chapter 7.5 (commencing with Section 2621) of Division 2 of the Public Resources Code, the seller or broker is not required to provide information additional to that contained in the booklet concerning home energy ratings, and the information in the booklet shall be deemed to be adequate to inform the transferee about the existence of a statewide home energy rating program.

(b) Notwithstanding subdivision (a), nothing in this section alters any existing duty of the seller or broker under any other law including, but not limited to, the duties of a seller or broker under this article, Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2 of the Civil Code, or Chapter 7.5 (commencing with Section 2621) of Division 2 of the Public Resources Code, to disclose information concerning the existence of a home energy rating program affecting the real property.

(c) If the informational booklet or materials described in Section 375.5 of the Water Code concerning water conservation and water conservation programs are delivered to a transferee in connection with the transfer of real property, including property described in subdivision (a), the seller or broker is not required to provide information concerning water conservation and water conservation programs that is additional to that contained in the booklet or materials, and the information in the booklet or materials shall be deemed to be adequate to inform the transferee about water conservation and water conservation programs.

(Amended by Stats. 2004, Ch. 111, Sec. 1. Effective January 1, 2005.)

2079.10.5. (a) Every contract for the sale of residential real property entered into on or after July 1, 2013, shall contain, in not less than 8-point type, a notice as specified below:

NOTICE REGARDING GAS AND HAZARDOUS LIQUID TRANSMISSION PIPELINES

This notice is being provided simply to inform you that information about the general location of gas and hazardous liquid transmission pipelines is available to the public via the National Pipeline Mapping System (NPMS) Internet Web site maintained by the United States Department of Transportation at <http://www.npms.phmsa.dot.gov/>. To seek further information about possible transmission pipelines near the property, you may contact your local gas utility or other pipeline operators in the area. Contact information for pipeline operators is searchable by ZIP Code and county on the NPMS Internet Web site.

Appendix 2: California Civil Code Section 2079 - 2079.24

(b) Upon delivery of the notice to the transferee of the real property, the seller or broker is not required to provide information in addition to that contained in the notice regarding gas and hazardous liquid transmission pipelines in subdivision (a). The information in the notice shall be deemed to be adequate to inform the transferee about the existence of a statewide database of the locations of gas and hazardous liquid transmission pipelines and information from the database regarding those locations.

(c) Nothing in this section shall alter any existing duty under any other statute or decisional law imposed upon the seller or broker, including, but not limited to, the duties of a seller or broker under this article, or the duties of a seller or broker under Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2.

(Added by Stats. 2012, Ch. 91, Sec. 1. Effective January 1, 2013.)

2079.10a. (a) Every lease or rental agreement for residential real property entered into on or after July 1, 1999, and every contract for the sale of residential real property comprised of one to four dwelling units entered into on or after that date, shall contain, in not less than 8-point type, a notice as specified in paragraph (1), (2), or (3).

(1) A contract entered into by the parties on or after July 1, 1999, and before September 1, 2005, shall contain the following notice:

Notice: The California Department of Justice, sheriff's departments, police departments serving jurisdictions of 200,000 or more, and many other local law enforcement authorities maintain for public access a database of the locations of persons required to register pursuant to paragraph (1) of subdivision (a) of Section 290.4 of the Penal Code. The database is updated on a quarterly basis and is a source of information about the presence of these individuals in any neighborhood. The Department of Justice also maintains a Sex Offender Identification Line through which inquiries about individuals may be made. This is a "900" telephone service. Callers must have specific information about individuals they are checking. Information regarding neighborhoods is not available through the "900" telephone service.

(2) A contract entered into by the parties on or after September 1, 2005, and before April 1, 2006, shall contain either the notice specified in paragraph (1) or the notice specified in paragraph (3).

(3) A contract entered into by the parties on or after April 1, 2006, shall contain the following notice:

Notice: Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

(b) Subject to subdivision (c), upon delivery of the notice to the lessee or transferee of the real property, the lessor, seller, or broker is not required to provide information in addition to that contained in the notice regarding the proximity of registered sex offenders. The information in the notice shall be deemed to be adequate to inform the lessee or transferee about the existence of a statewide database of the locations of registered sex offenders and information from the database regarding those locations. The information in the notice shall not give rise to any cause of action against the disclosing party by a registered sex offender.

(c) Notwithstanding subdivisions (a) and (b), nothing in this section shall alter any existing duty of the lessor, seller, or broker under any other statute or decisional law including, but not limited to, the duties of a lessor, seller, or broker under this article, or the duties of a seller or broker under Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2.

Appendix 2: California Civil Code Section 2079 - 2079.24

(Amended by Stats. 2005, Ch. 722, Sec. 1. Effective October 7, 2005.)

2079.11. (a) Except as provided in subdivision (b), to the extent permitted by law, the consumer information publications referred to in this article, including, but not limited to, the information booklets described in Section 10084.1 of the Business and Professions Code and Section 25402.9 of the Public Resources Code, shall be in the public domain and freely available.

(b) Notwithstanding subdivision (a), the Seismic Safety Commission's Homeowner's Guide to Earthquake Safety, published pursuant to Section 10149 of the Business and Professions Code, shall be made available to the public at cost and for reproduction at no cost to any vendor who wishes to publish the guide, provided the vendor agrees to submit the guide to the commission prior to publication for content approval.

(Amended (as added by Stats. 1994, Ch. 66) by Stats. 1998, Ch. 65, Sec. 4. Effective June 9, 1998. Applicable from June 1, 1998, by Sec. 18 of Ch. 65. Note: Ch. 65 (pursuant to Sec. 20) supersedes and precludes operation of Stats. 1997, 1st Ex. Sess., Ch. 7.)

2079.12. (a) The Legislature hereby finds and declares all of the following:

(1) That the imprecision of terms in the opinion rendered in *Easton v. Strassburger*, 152 Cal. App. 3d 90, and the absence of a comprehensive declaration of duties, standards, and exceptions, has caused insurers to modify professional liability coverage of real estate licensees and has caused confusion among real estate licensees as to the manner of performing the duty ascribed to them by the court.

(2) That it is necessary to resolve and make precise these issues in an expeditious manner.

(3) That it is desirable to facilitate the issuance of professional liability insurance as a resource for aggrieved members of the public.

(4) That Sections 2079 to 2079.6, inclusive, of this article should be construed as a definition of the duty of care found to exist by the holding of *Easton v. Strassburger*, 152 Cal. App. 3d 90, and the manner of its discharge, and is declarative of the common law regarding this duty. However, nothing in this section is intended to affect the court's ability to interpret Sections 2079 to 2079.6, inclusive.

(b) It is the intent of the Legislature to codify and make precise the holding of *Easton v. Strassburger*, 152 Cal. App. 3d 90. It is not the intent of the Legislature to modify or restrict existing duties owed by real estate licensees.

(Amended by Stats. 1996, Ch. 476, Sec. 1. Effective January 1, 1997.)

2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

(a) "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under whose license a listing is executed or an offer to purchase is obtained.

(b) "Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.

The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller

Appendix 2: California Civil Code Section 2079 - 2079.24

who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(d) "Commercial real property" means all real property in the state, except single-family residential real property, dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5, mobilehomes, as defined in Section 798.3, or recreational vehicles, as defined in Section 799.29.

(e) "Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.

(f) "Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer.

(g) "Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation.

(h) "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.

(i) "Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.

(j) "Offer to purchase" means a written contract executed by a buyer acting through a selling agent that becomes the contract for the sale of the real property upon acceptance by the seller.

(k) "Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property that constitutes or is improved with one to four dwelling units, any commercial real property, any leasehold in these types of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code.

(l) "Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.

(m) "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.

(n) "Seller" means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor.

(o) "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.

(p) "Subagent" means a person to whom an agent delegates agency powers as provided in Article 5 (commencing with Section 2349) of Chapter 1 of Title 9. However, "subagent" does not include an associate licensee who is acting under the supervision of an agent in a real property transaction.

(Amended by Stats. 2014, Ch. 200, Sec. 2. Effective January 1, 2015.)

Appendix 2: California Civil Code Section 2079 - 2079.24

2079.14. Listing agents and selling agents shall provide the seller and buyer in a real property transaction with a copy of the disclosure form specified in Section 2079.16, and, except as provided in subdivision (c), shall obtain a signed acknowledgment of receipt from that seller or buyer, except as provided in this section or Section 2079.15, as follows:

(a) The listing agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement.

(b) The selling agent shall provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form pursuant to subdivision (a).

(c) Where the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the selling agent may be furnished to the seller (and acknowledgment of receipt obtained for the selling agent from the seller) by the listing agent, or the selling agent may deliver the disclosure form by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment of receipt is required.

(d) The selling agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer.

(Added by Stats. 1995, Ch. 428, Sec. 3. Effective January 1, 1996.)

2079.15. In any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt pursuant to Section 2079.14, the agent, or an associate licensee acting for an agent, shall set forth, sign, and date a written declaration of the facts of the refusal.

(Added by Stats. 1995, Ch. 428, Sec. 4. Effective January 1, 1996.)

2079.16. The disclosure form required by Section 2079.14 shall have Sections 2079.13 to 2079.24, inclusive, excluding this section, printed on the back, and on the front of the disclosure form the following shall appear:

DISCLOSURE REGARDING

REAL ESTATE AGENCY RELATIONSHIP

(As required by the Civil Code)

When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction.

SELLER'S AGENT

A Seller's agent under a listing agreement with the Seller acts as the agent for the Seller only. A Seller's agent or a subagent of that agent has the following affirmative obligations:

To the Seller:

A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller.

To the Buyer and the Seller:

Appendix 2: California Civil Code Section 2079 - 2079.24

- (a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
- (b) A duty of honest and fair dealing and good faith.
- (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

BUYER'S AGENT

A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for a Buyer has the following affirmative obligations:

To the Buyer:

A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.

To the Buyer and the Seller:

- (a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
- (b) A duty of honest and fair dealing and good faith.
- (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties. An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

AGENT REPRESENTING BOTH SELLER AND BUYER

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

- (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.
- (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect his or her own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A real estate

Appendix 2: California Civil Code Section 2079 - 2079.24

agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

This disclosure form includes the provisions of Sections 2079.13 to 2079.24, inclusive, of the Civil Code set forth on the reverse hereof. Read it carefully.

Agent(date)

Buyer/Seller(date)

(Signature)

Associate Licensee(date)

Buyer/Seller(date)

(Signature)

(Amended by Stats. 1996, Ch. 240, Sec. 4. Effective January 1, 1997.)

2079.17. (a) As soon as practicable, the selling agent shall disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract by the buyer and the seller, respectively.

(b) As soon as practicable, the listing agent shall disclose to the seller whether the listing agent is acting in the real property transaction exclusively as the seller's agent, or as a dual agent representing both the buyer and seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller and the listing agent prior to or coincident with the execution of that contract by the seller.

(c) The confirmation required by subdivisions (a) and (b) shall be in the following form:

(Name of Listing Agent) _____ is the agent of (check one):

Appendix 2: California Civil Code Section 2079 - 2079.24

the seller exclusively; or

both the buyer and seller.

_____ (Name of Selling Agent if not the same as the Listing Agent) _____

is the agent of (check one):

the buyer exclusively; or

the seller exclusively; or

both the buyer and seller.

(d) The disclosures and confirmation required by this section shall be in addition to the disclosure required by Section 2079.14.

(Added by Stats. 1995, Ch. 428, Sec. 6. Effective January 1, 1996.)

2079.18. No selling agent in a real property transaction may act as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction.

(Added by Stats. 1995, Ch. 428, Sec. 7. Effective January 1, 1996.)

2079.19. The payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer. A listing agent and a selling agent may agree to share any compensation or commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such agreement shall not necessarily be determinative of a particular relationship.

(Added by Stats. 1995, Ch. 428, Sec. 8. Effective January 1, 1996.)

2079.20. Nothing in this article prevents an agent from selecting, as a condition of the agent's employment, a specific form of agency relationship not specifically prohibited by this article if the requirements of Section 2079.14 and Section 2079.17 are complied with.

(Added by Stats. 1995, Ch. 428, Sec. 9. Effective January 1, 1996.)

2079.21. A dual agent shall not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller. A dual agent shall not disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer.

This section does not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information other than price.

(Added by Stats. 1995, Ch. 428, Sec. 10. Effective January 1, 1996.)

2079.22. Nothing in this article precludes a listing agent from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent.

(Added by Stats. 1995, Ch. 428, Sec. 11. Effective January 1, 1996.)

Appendix 2: California Civil Code Section 2079 - 2079.24

2079.23. (a) A contract between the principal and agent may be modified or altered to change the agency relationship at any time before the performance of the act which is the object of the agency with the written consent of the parties to the agency relationship.

(b) A lender or an auction company retained by a lender to control aspects of a transaction of real property subject to this part, including validating the sales price, shall not require, as a condition of receiving the lender's approval of the transaction, the homeowner or listing agent to defend or indemnify the lender or auction company from any liability alleged to result from the actions of the lender or auction company. Any clause, provision, covenant, or agreement purporting to impose an obligation to defend or indemnify a lender or an auction company in violation of this subdivision is against public policy, void, and unenforceable.

(Amended by Stats. 2014, Ch. 893, Sec. 2. Effective January 1, 2015.)

2079.24. Nothing in this article shall be construed to either diminish the duty of disclosure owed buyers and sellers by agents and their associate licensees, subagents, and employees or to relieve agents and their associate licensees, subagents, and employees from liability for their conduct in connection with acts governed by this article or for any breach of a fiduciary duty or a duty of disclosure.

(Added by Stats. 1995, Ch. 428, Sec. 13. Effective January 1, 1996.)

