

20 Basic Contract Provisions and Disclosures in a Residential Real Estate Transaction

A residential real estate sale transaction usually begins at the time a broker obtains an agency contract in the form of a listing from the property owner. When a buyer is found, the transaction proceeds through several interrelated processes:

Concluding the sale. Buyer and seller agree to terms. The agreement and joint escrow instructions are fully executed and unqualified acceptance is communicated. This is the result of sales effort, negotiation and communication.

Legal transfer of title. Title insurance or title evidence has been furnished and escrow has the funds necessary to cash out the seller's equity, less expenses. All instruments necessary to transfer title are executed and recorded. Transfer of title and transfer of money are thought of as simultaneous acts.

Completing the financing and providing the final settlement statement. Completing the financing is closely related to the legal transfer of title but with more emphasis upon the settlement function: i.e., the actual disbursement of funds by checks and a written accounting to all parties. In a complicated transaction involving new financing, besides the buyer and seller, there may be prior lenders and a new lender. To show the instructions of the escrow have been fully performed, the escrow holder will prepare an accounting of the transaction by providing a settlement statement for the principals.

A TYPICAL TRANSACTION

The California Association of REALTORS® provides many of the forms used and user guides associated with a typical transaction. C.A.R. assists the user of these forms in the defense of any claim, on appeal, that any pre-printed provision of the current version of a C.A.R. form is unlawful.

While the C.A.R. forms are used in typical real estate transactions, they may be written in a number of other legal formats. Regardless of the written form, the licensee must be familiar with the form used or seek the advice of another professional.

Typical C.A.R. Forms, Name and Number

- Transaction Cover Sheet – TCS
- Disclosure Regarding Real Estate Relationships – AD
- Disclosure and Consent, Representation Of More Than One Buyer Or Seller – DA
- Statewide Buyer and Seller Advisory – SBSA
- Contingency For The Sale Or Purchase of Other Property – COP
- Contingency Removal – CR
- Lead Based Paint Hazards - FLD
- Real Estate Transfer Disclosure Statement – TDS
- Water Heater and Smoke detector Compliance Statement – WHSD
- Extension of Time Addendum – ETA
- Purchase Agreement Addendum – PAA
- Receipt and Delivery of Notices To Perform - RDN
- Addendum – ADM
- Counter Offer – CO
- Cancellation of Contract, Release of Deposit and Joint Escrow Instructions - CC

Additional C.A.R. Listing Forms and Number

- Estimated Sellers Proceeds – ESP
- Residential Listing Agreement, Exclusive – RLA
- Seller's Advisory - SA
- Short Sale Addendum - SSA
- Modification of Terms Authorization - MT
- Notice To Buyer To Perform – NBP

Other Types of C.A.R. Listing Forms

- Seller Instruction to Exclude Listing From the Multiple Listing Service – SEL
- Seller Financing Addendum and Disclosure – SFA
- Seller's Intent To Exchange – SES
- Business Listing Agreement – BLA
- Business Purchase Agreement and Joint Escrow Instructions - BPA
- Lease Listing Agreement – LL
- Residential Lease or Month to Month Rental Agreement - LR
- Manufactured Home Listing Agreement – MHL

Additional C.A.R. Buyer Forms and Number

- Estimated Buyers Costs – EBC
- Residential Purchase Agreement and Joint Escrow Instructions – RPA CA
- Notice of Default Purchase Agreement - NODPA Megan's Law Data Base Disclosure - DBD
- Wood Destroying Pest Inspections and Allocation of Cost Addendum - WPA
- Request for Repair – RR
- Notice To Seller To Perform – NSP Notice to Buyer to Perform - NBP
- Verification of Property Condition – VP

Other Types of C.A.R. Forms Used with Buyers

- Buyer Broker Representation Agreements – BRE, BRNE and BRNN
- Probate Purchase Agreement and Joint Escrow Instructions – PPA
- Residential Income Purchase Agreement and Joint Escrow Instructions – RIPA
- New Construction Purchase Agreement and Joint Escrow Instructions – NCPA
- Vacant Land Purchase Agreement and Joint Escrow Instructions – VLPA
- Business Purchase Agreement and Joint Escrow Instructions – BPA
- Commercial Property Purchase Agreement and Joint Escrow Instructions – CPA
- Buyers Intent To Exchange Supplement – BES

- Manufactured Home Purchase Agreement and Joint Escrow Instructions – MHPA

The latest information on the most typical C.A.R. forms can be obtained at <http://C.A.R..org> and <http://www.winforms.com>

OVERVIEW - A TYPICAL TRANSACTION

An owner (the seller) of a single-family residence (the property) in California wishes to sell the property.

The seller enters into a Residential Listing Agreement, Exclusive - RLA (the listing) with a California real estate broker (the listing broker).

Prior to entering into the listing, the broker is required to give the seller a Disclosure Regarding Real Estate Relationships – AD form. This requirement is discussed more completely in Chapter 10. In addition, the seller would typically be given an Estimated Sellers Proceeds – ESP or similar form. The listing typically provides that it will be placed into a multiple listing service and the listing broker can cooperate/share the commission if another broker (the selling broker) finds a buyer for the property. If the seller does not want the property listed in the multiple listing service, the C.A.R. form Seller Instruction to Exclude Listing From the Multiple Listing Service – SEL is used.

Licensee's should note the typical Residential Listing Agreement, Exclusive – RLA allows 5 days for management approval, and if the Broker or the Brokers Manager does not approve of its terms, the Broker or the Brokers Manager has the right to cancel the agreement.

The selling broker finds a buyer purportedly ready, willing and able to purchase the property. An offer (preceded by a Disclosure Regarding Real Estate Relationships – AD) is made, negotiated, and accepted so that a meeting of the minds is reflected in the Residential Purchase Agreement and Joint Escrow Instructions – RPACA (the contract). If a dual agency exists, as soon as practicable the selling agent shall disclose to the buyer and the seller the agents agency relationship. As soon as practicable the listing agent shall disclose to the seller whether the agent is acting as a dual agent. These relationships shall be acknowledged by the Confirmation of Agency relationships contained in the contract RPA-CA or by a separate form - Confirmation of Agency Relationships - AC. In the event a broker's presentation of offers on behalf of two different buyers occurs, the broker should obtain the clear, informed and unequivocal consent of both parties. C.A.R form DA addresses this issue. This requirement is discussed more completely in Chapter 10.

The transaction, grounded in the conclusion of the sale negotiated by the listing and selling brokers, proceeds to the legal transfer of title, completing the financing and providing the final settlement statement.

The typical licensee should note that extensive re-writing of any of the standard forms language is not advised and could be construed as the unauthorized practice of law. Specific contract provisions relating to the buyer and sellers unique situation should be outlined using the appropriate spaces provided in the standard forms or by using additional forms such as counter offers or addendums.

The following sections of this chapter examine the provisions of a listing agreement and a typical residential agreement involved in such a transaction and the required disclosures. The real estate practitioner should check with the employing broker for any additional procedures required by the employing broker.

A TYPICAL LISTING

The Residential Listing Agreement, Exclusive - RLA is a listing for sale of one or more specifically described parcels of real property. (This is one of several different types of listing agreements.) The phrase “right to sell” means, “right to find a buyer.” It does *not* authorize the broker to sign transaction documents for the seller.

A typical listing authorizes the broker to:

- Place a “for sale” sign on the property;
- Place the property in a multiple listing service;
- Cooperate with buyer’s agents; and
- Accept on the seller’s behalf a prospective buyer’s good faith deposit.

Any modifications to the typical listing agreement are made using the Modification of Terms Authorization and Right to Sell, Acquire or Rent- C.A.R. form MT.

1. Term

A listing must have a definite term. The term of the listing ends at 11:59 PM on a specified day.

2. Description of the Property

The description of the property should be specific and detailed. Accuracy of description avoids any doubt and assists if needed in the enforcement of the listing on that ground.

3. Exclusion and Inclusions

Other than fixtures and fittings that are attached to the property, which are included, and personal property, which are excluded, the licensee should be sure to specifically write in items the seller is including or excluding from the sale. If there is any doubt or potential confusion it is best to specifically point out items that are included or those items that are excluded.

4. Listing Price and Terms of Sale

The minimum requirement for setting forth the terms of sale, where cash is acceptable to the seller, is to express the price in cash.

Complications may arise when the seller demands assumption of the existing loan or loans, or indicates a willingness to pay part of the assumption fees or new set-up charges if the buyer assumes the existing loan or refinances with the existing lender. Such terms of sale should be spelled out in detail.

If the sale may be financed by a VA or FHA loan, the listing will include details of the seller's conditions with respect to the payment of points.

Where a first loan can be assumed and the seller is willing to carry secondary financing, the specific terms of the proposed secondary financing will be set forth.

If the sale is to be a 'short sale' - where the sales price is less than the encumbrances on the property - it should be noted that lender approval of any offer will be required and a Short Sale Addendum (C.A.R. form SSA) should be used.

5. Broker's Compensation and Negotiability of Commission

In the sale of residential property of not more than four units, including a mobilehome, Business and Professions Code Section 10147.5 requires that the listing (or whatever document initially establishes the broker's right to a commission, or increases the amount or rate of the commission) contain, in not less than 10-point boldface type, the following provision before the compensation clause:

Notice: 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.

A broker can set a typical commission rate for the firm, but cannot use a listing form in which the amount or rate of compensation is preprinted or otherwise inserted prior to negotiation with the seller.

The compensation clause in a typical listing agreement will be specific and unequivocal. It will state simply that the broker is entitled to the compensation, expressed either as a percentage of the purchase price or a dollar amount, if the property is sold by the broker, by another broker, or by the seller during the term of the listing or any extension of it. It also obligates the seller to pay the compensation if, without the consent of the broker, the owner withdraws the property from sale or in some other way makes it unmarketable during the term of the listing or any extension thereof.

A listing's "protection clause" will designate a period of time after expiration of the listing during which the broker's compensation is protected if the owner personally sells to someone who physically entered and was shown the property or who wrote an offer on the property. For this clause to be effective, the broker must, either before or within the time specified in the agreement, notify the owner in writing of the names of the prospective buyers with whom the broker has negotiated during the listing term.

6. Ownership, Title, and Authority

In a typical transaction the seller warrants they are the owner with the right to sell the property and no other persons or entities have title. Any exceptions to ownership, title and authority should be noted.

7. Multiple Listing Service (MLS)) and the Internet

A paragraph typically provides that the listing will be submitted to a designated MLS where information about the property will be disseminated to members, who may also solicit potential buyers for the property. The MLS and broker often have additional services to provide Internet access to registered clients via the brokers virtual office website or to advertise the property on the Internet on sites like Realtor.com or through the brokers own website using Internet Data Exchange (IDX) protocol.

8. Seller Representations

The seller typically represent that, unless specified in writing, they are not aware of any of the following:

- Notice of Default
- Loan Delinquencies
- Bankruptcy or insolvency affecting the property
- Threatened or pending litigation
- Current, pending or proposed special assessments

To notify the broker if the seller becomes aware of any changes in the items listed.

9. The Broker's and Seller's Duty

In return for the exclusive rights granted by the owner, the broker agrees to use due diligence in attempting to find a suitable buyer and negotiate a sale. Thus, the listing is a bilateral contract.

The listing states that the right of the broker is "irrevocable." Basically, this means that it cannot be revoked by either party without the other's consent. However, if there is a breach of contract (e.g., failure of the broker to use due diligence), the contract may be subject to legal rescission.

The seller is responsible for determining at what price to list and sell the property and agrees to indemnify and hold Broker harmless in actions resulting from any material fact the Seller knows but fails to disclose.

10. Deposit

This clause authorizes the agent to accept a certain deposit to be applied toward the purchase price. The proper handling of earnest money deposits should be outlined by your employing broker and is discussed in more detail in Chapter 23.

11. Agency Relationships

The broker is required to give the seller a Disclosure Regarding Real Estate Relationships – C.A.R. form AD. In the event the selling broker also represents more than one buyer, the consent of both the buyers and the seller is required by using the C.A.R. form, Disclosure and Consent For Representation Of More Than One Buyer Or Seller – DA or equivalent. These requirements are discussed more completely in Chapter 10.

12. Security and Insurance

This clause advises the seller to take reasonable precautions in safeguarding valuables and discloses that 3rd parties such as inspectors, virtual tour providers, prospective buyers, appraisers and others will access the property and they may take pictures and videos. The clause also discloses to the seller that the broker does not maintain insurance to protect the seller and is not responsible for loss of or damage to personal or real property.

13. Keysafe/lockbox

Authorizes the agent to place a key repository on the listed property.

14. Sign

Authorizes placement of broker's "for sale/sold" sign on the property.

15. Equal housing opportunity clause

This clause is *prima facie* evidence of nondiscriminatory intent. The proof of compliance is, of course, that the parties act in the spirit of the declaration.

16. Attorney's fees

In the event of any legal action to resolve a dispute, this clause provides that the prevailing party will be paid reasonable attorney's fees.

17. Additional terms

Additional provisions could include: date for possession; rent if possession is delivered on a date other than closing day; repairs to be made by owner; and termite work. Also, if the seller has a prospect, which the seller personally located, the seller may wish to exclude a sale to that person from seller's obligation to pay a commission.

18. Management Approval

After its' execution, the broker or the broker's designee has the right to approve the terms of the agreement within 5 days or cancel the agreement in writing.

19. Successors and assigns

The agreement is typically binding on the seller's successors and assigns.

20. Dispute Resolution

The seller and broker agree to first mediate any dispute regardless of the arbitration election. After mediation the parties will arbitrate, if initiated by all parties to the contract. There are certain exclusions from mediation and arbitration, most notably foreclosure, probate, bankruptcy and small claims actions.

21. Entire Agreement

It should be noted in the standard listing agreements published by C.A.R., all prior discussions and negotiations are superseded by the written agreement. Thus it is important to commit to writing all terms and conditions.

22. Owner's signature

All owners must sign the listing. If the property is owned by a partnership or a corporation, the proper officials must sign and provide the appropriate authorization or resolution

23. Agent's signature

When the listing is signed by an authorized licensee member of the broker's staff or by the broker himself, it becomes a (bilateral) contract, with a 5-day management approval contingency. Broker (or broker's agent) must give the seller a copy of the agreement at the time of signing.

RESIDENTIAL PURCHASE AGREEMENT AND JOINT ESCROW INSTRUCTIONS

This section highlights provisions, which comprise a residential purchase agreement using the standard C.A.R. form, Residential Purchase Agreement and Joint Escrow Instructions – RPA CA. When completed with the terms and other information relative to the buyer's attempt to purchase the property, it is an offer. When the seller [or seller or buyer after counter offer(s)] executes the documents and communicates unqualified acceptance, it is a contract. The contract provides joint escrow instructions. Many escrow companies will generate supplemental or other general provisions, which buyer and seller agree to execute. In this discussion, we refer to the document as the offer, contract or agreement.

The contract will state that time is of the essence and that the time for performance can be extended or any other provision of the offer can be modified only by a writing signed by both buyer and seller. In general the buyer has 3 days to get the deposit to escrow, 7 days to complete loan applications and provide verification of funds and 17 days to inspect and investigate. The seller typically has 7 days to provide the buyer all required disclosures. Any removal of contingencies must be in writing, typically using the C.A.R. standard form Contingency Removal – CR. If one party does not perform, the other party has the option to provide a "Notice To Perform" and typically allow 24 hours for performance to occur. However, before initiating a cancellation of the agreement and escrow the "Notice To Perform" is typically required. Unilateral cancellation of the agreement and escrow is possible; however, the disposition of funds on deposit must be bilateral.

The California Association of Realtors offers a comprehensive user guide to the Residential Purchase Agreement and Joint Escrow Instructions – RPA CA that is highly recommended for all licensees using these forms.

Date and Place of Buyer's Offer

This is the date and place the deposit receipt is signed by the (prospective) buyer. This is *not* the date used to measure temporal compliance with any of the performance provisions of the contract. Those time constraints flow from the date a contract is formed by legal acceptance and formation of the contract.

The Full and Correct Name of the Buyer

This will include all the buyer's complete names. If the buyer is a corporation, include the state where the corporation is chartered and a copy of the corporate resolution authorizing the activity. If the buyer is a general partnership, include the names of the partners. If buyer is a limited partnership, include the name of the general partner. If the buyer is a real estate licensee, disclose that fact. It is not necessary to include the manner in which the buyer will take title, since this will be handled in escrow.

Description of the Property

The property description must be adequate for a court to identify it: street address, map book, page and parcel, or other legal description such as an assessors parcel number (APN).

Purchase Price

The offer must state unmistakably the total purchase price offered and the terms to which the buyer is willing to commit (e.g., all cash, new loan, or loan assumption) as described in the Finance Terms Section. The total purchase price will *not* include the buyer's closing costs and any costs associated with obtaining financing.

Close of Escrow

The offer must state when the close of escrow will occur, in general, to avoid confusion among all parties, it is best to write a specific date.

Agency Disclosure

Acknowledges the buyer and seller's prior receipt of the agency disclosure form (C.A.R. Form AD).

Potentially Competing Buyers and Sellers

Buyer understands that the broker representing the buyer may also represent other potential buyers who may make offers on the same property. Seller understands that broker representing seller may also represent other sellers with competing properties. If not previously disclosed the agent should complete C.A.R. form DA.

Confirmation

This section discloses the agency relationship chosen for this transaction. It is important to remember that if different agents each represent the buyer and the seller but are employed by the same broker, the agency relationship must represent both the buyer and the seller (dual agency).

Finance Terms

Licensees should note that the standard C.A.R. agreement states the buyer represents the funds will be good when deposited into escrow.

The offer will typically outline within the Finance Terms section the initial deposit amount, increased deposit, the first loan amount and terms, any secondary financing, if FHA/VA financing is to be obtained the buyer has 17 days to provide the seller with written notice of any lender required repairs, any additional financing terms, the balance of the purchase price, the control total to ensure the terms add up to the total price offered.

It is important to note that the agent has several options regarding the handling of the initial deposit. The agent may designate that the buyer will deliver the deposit directly to Escrow Holder within 3 business days after acceptance or the buyer has given the deposit to the agent and the deposit shall be held uncashed until acceptance and then deposited into the broker's trust account or taken to escrow within 3 business days after acceptance. The agent should ensure that if this option is selected that the agent has the deposit in hand at the time of submitting the offer.

The typical contract will contain a financing contingency unless both parties agree otherwise. That is, the loan(s) necessary for closing will be described and the buyer will agree to act diligently to obtain the financing. There may be a time limitation so the buyer must act promptly. If a loan contingency exists and in spite of buyer's diligent attempt, the stated financing is not obtained within the allotted time the seller can deliver to the buyer a Notice To Buyer to Perform (C.A.R. form NBP). The buyer then must remove the financing contingency and proceed with the transaction or the seller may chose to cancel the contract.

Typically the buyer will have 7 days after acceptance to deliver to the seller written verification that buyer has sufficient funds to cover the down payment and closing costs and when the loan application must be completed. The buyer typically has 17 days to remove the loan and any appraisal contingencies.

Allocation of Costs

The offer will outline the allocation of costs between buyer and seller, including but not limited to:

- **Inspections and Reports**

The contract will specify whether or not a pest control inspection is to be performed, who will complete the inspection and it may specify who must pay for any work required so that a registered structural pest control company can issue a written certification that the property is free of evidence of active infestation in the accessible areas. The C.A.R. standard form Wood Destroying Pest Inspections and Allocation of Cost Addendum – WPA can be used to add additional clarity or assign specific responsibility for repairs.

Lenders may require issuance of a certification prior to funding. If the contract provides that some of the required work will be completed at seller's expense after close of escrow, that provision may also require that the seller deposit funds into escrow, to be disbursed when the buyer has received a written certification.

- **Other Inspections**

The contract will specify if the buyer or the seller will pay for various inspections or reports such as septic systems, wells and natural hazard zone disclosures.

- **Government Requirements and Retrofit**

- ***Retrofit***

The contract may assign responsibility for any retrofitting required, upon sale, by the local government. This could include among other items the installation of low flow showerheads and gallon restricted flush toilets.

- ***Smoke Detector(s)***

The contract may reiterate state laws that require that dwelling units be equipped with smoke detectors approved by the State Fire Marshall. In an existing dwelling, there must be a battery-operated smoke detector outside each sleeping area. As of August 14, 1992, new construction (or an addition, alteration or repair that exceeds \$1,000 and requires a permit or includes addition of a sleeping room) must include smoke detectors in each bedroom and at a point centrally located *outside* the bedroom(s). In new construction, the smoke detector(s) must be hard-wired, with battery backup. The seller must give the buyer written certification of smoke detector compliance, as required by Health and Safety Code Section 13113.8. This may be done in the contract or in a separate writing. Certain transactions are exempt from this requirement, as set forth in Health and Safety Code Section 13113.8(d). These exemptions are nearly identical to those set forth below relative to the provision of a Transfer Disclosure Statement.

- ***Water Heater Bracing***

The contract may set forth the seller's duty to see that each water heater is braced, anchored or strapped, in accordance with the California Plumbing Code, to resist falling or horizontal displacement during an earthquake. As indicated in Health and Safety Code Section 19211, the seller must give the buyer written certification of compliance in the contract, the Homeowner's Guide to Earthquake Safety (discussed later in this chapter), in the Transfer Disclosure Statement, or in some other transaction document.

- **Escrow and Title**

This section specifies how title and escrow fees are to be paid and establishes the escrow holder.

- **Other Costs**

Establishes who is to pay for additional costs such as County Transfer Tax, any Homeowner's Association transfer fees, Homeowner Warranty plans, etc.

Closing and Possession

Typically for the benefit of the lender, the offer will address if the buyer *does* or *does not* intend to occupy the property and the date and time occupancy will be delivered. When using the standard forms and the transfer of title and occupancy do not occur at the same time, buyer and seller are advised to enter into a written agreement and consult with their insurance and legal advisors. The typical standard form used for occupancy under 30 days is the Purchase Agreement Addendum – PAA, which references paragraph 3. In addition the standard form will address among other items, tenant occupancy, warranty rights and the disposition of keys, locks, security systems and HOA facilities.

If the property is tenant occupied it is the seller's responsibility to have the property vacated at least 5 days prior to the close of escrow unless otherwise agreed to in writing.

If the property is being purchased as an income/investment property, the Residential Income Purchase Agreement and Joint Escrow Instructions – RIPA standard form should be considered. Regardless of the form used, if applicable, the standard contracts have language dealing with tenants. The standard contract can help ensure that the rental situation undergoes a smooth transition by requiring that:

- the seller, within a stated period of time, give the buyer copies of the rental agreement/lease, the current income and expense statement, and any notices sent to the tenants;
- the seller cannot make any changes to the rental agreement/lease without the buyer's consent;
- the seller must give the buyer written statements from the tenants confirming the salient aspects of the tenancy and that no defaults exist; and
- the seller must transfer to the buyer, through escrow, any unused tenant deposits.

Statutory Disclosures

The offer will outline the required statutory disclosures. See the **Disclosures** section of this chapter for more details.

Condominium and Planned Unit Development Disclosures

The seller typically has 7 days if not previously disclosed to disclose whether the property is a condominium or is located in a planned unit development. Typically within 3 days, if applicable, the seller must order all required documents from all controlling Home Owners Associations.

Items Included or Excluded From Purchase Price

The buyer and seller should be very clear on items that are included or excluded from the sale and the typical contract will state the seller represents they own the items being transferred and they will be transferred free and clear of any liens and without warranty.

- ***Fixtures***
Subject to specific exclusions made part of the contract, the buyer is entitled to all fixtures. Fixtures are items attached permanently (e.g., by cement, plaster, bolts, screws, or nails) to what is permanent (walls, etc.). Examples are electrical, lighting, plumbing and heating fixtures, fireplace inserts, solar systems, built-in appliances, window coverings, TV antennas, air conditioners, and in-ground landscaping.
- ***Personal Property***
The buyer is entitled to only that personal property listed in the contract and subject to lender approval. This could include any large outside potted plants, as these are ordinarily not fixtures.

Condition of Property

Unless otherwise agreed to in writing the property is sold in its present physical ("as is") condition subject to the right of the buyers to inspect and investigate, including the investigating the insurability of the property. The seller shall disclose all material facts and defects including known insurance claims.

Buyers Investigation of Property

Acceptance of the property's condition is a contract provision, subject to inspections and investigations to be conducted at buyer's expense. The buyer must communicate approval of the property's condition or request the seller make repairs or take other actions.

The seller shall make the property available for all of the buyer's investigations and buyer shall give the seller complete copies of all investigation reports obtained by the buyer.

The seller shall have all utilities on for buyer's investigations

The buyer agrees to keep the property free and clear of any liens and to repair any damage arising from the buyer's inspections or investigations.

Seller Disclosures

The contract has provisions for disclosures, addenda and advisories such as Buyer's Inspection Advisory (C.A.R. form BIA), Purchase Agreement Addendum (C.A.R. form PAA), Probate Advisory (C.A.R. form PAK). If any of the disclosures, addenda are checked they become a part of the contract and should be signed and included at the time of presenting the offer.

Title and Vesting

The contract will state that title will vest as directed by the buyer in instructions to the escrow holder. As there can be significant legal and tax implications, a real estate licensee should urge a buyer to seek competent advice regarding the manner of taking title.

The contract will typically require transfer by grant deed, with mineral, oil and water rights if currently owned by the seller.

The contract will state that title must be free of financing liens except as provided in the contract and will be subject to all other encumbrances, easements, covenants, conditions, and restrictions, etc. shown in the preliminary title report. Title will also be subject to any other exceptions disclosed to, or discovered by, the buyer prior to closing unless the buyer disapproves in writing of a particular exception.

The contract will designate which party must pay for a preliminary title report and a policy of title insurance.

Sale of Buyer's Property

The offer will indicate if the offer is contingent upon the sale of any property owned by the buyer, if so the licensee will use the C.A.R. standard form Contingency For The Sale Or Purchase of Other Property – COP. The Seller, who counter offers with a contingency subject to finding a replacement property will also use this standard form.

Time Periods, Removal Of Contingencies, Cancellation Rights

The contract will state that time is of the essence and that the time for performance can be extended or any other provision of the offer can be modified only by a writing signed by both buyer and seller. In general the buyer has 3 days to get the deposit to escrow, 7 days to complete loan applications and provide verification of funds and 17 days to inspect and investigate, including the properties insurability. The seller typically has 7 days to provide the buyer all required disclosures. Any removal of contingencies must be in writing using the C.A.R. standard form Contingency Removal – CR. If one party does not perform, the other party has the right to deliver a "Notice To Perform." What happens thereafter depends upon the action of the noticed party and the response of the party giving the notice. Unilateral cancellation of the agreement and escrow may be possible after the Notice To Perform period has expired; however, the disposition of funds on deposit must be bilateral.

Repairs

The buyer must communicate approval of the property's condition by releasing the inspection and investigation contingency or request the seller make repairs or take other actions. The buyer and seller then have a period of time to negotiate buyer's requests. If the seller is willing to correct the items, the transaction proceeds. If the seller is unable or unwilling to correct the items, the buyer must either proceed with the transaction or cancel the escrow and contract.

Final Verification of Condition

The agreement will specify that the buyer has the right to make a final inspection of the property within 5 days prior to closing, not as a contingency of the sale but solely to confirm the property is in the same condition, any repairs have been completed as agreed between the parties and the seller has complied with all other contractual obligations.

Pro-rations of Property Taxes and Other Items

Typically, the contract will require that certain expenses of ownership be paid current as of the date of close of escrow, to become the buyer's responsibility thereafter. These include:

- real property taxes (including supplemental taxes) and assessments;
- if applicable, homeowners' association assessments;
- premiums on insurance assumed by buyer; and
- payments on bonds assumed by buyer.

If the property is a rental, the rent will be prorated so that any prepaid rent for time on and after the date of close of escrow will be credited to the buyer.

Withholding Taxes

The offer will state the buyer and seller agree to execute any instrument reasonably necessary to comply with Federal and California withholding laws. Typically the C.A.R. standard forms AS is used.

Selection of Service Providers

The offer will state if brokers refer buyer and seller to persons, vendors or service providers, that brokers do not guarantee the performance of any providers. Buyer and Sellers may select providers of their own choosing.

Multiple Listing Service

The offer may give the brokers authorization to report the terms of the transaction to any MLS, to be published and distributed to other parties on terms approved by the MLS.

Equal Housing Opportunity

The offer informs the parties that the property is sold in compliance with federal, state and local anti-discrimination laws. It is illegal to discriminate on the basis of race, color, religion, sex, handicap, familial status, or national origin.

Attorney Fees

The offer states, with a few exceptions, in any action arising out of the agreement, the prevailing party shall be entitled to reasonable attorney fees and costs from the non-prevailing party.

Definitions

For clarity, the standard C.A.R. offer defines the various terms used in the offer. The user should be familiar with these definitions or seek professional advice.

Broker Compensation

If applicable, the offer will specify that the seller or buyer, or both, agrees to pay compensation to the broker as specified in a separate written agreement between the broker and seller or buyer.

Compensation is due upon close of escrow, or if escrow does not close, the seller and/or buyer agrees to pay Broker as specified in a separate written agreement between the seller and/or buyer.

Joint Escrow Instructions

The standard C.A.R. form serves as joint escrow instructions and if accepted by the escrow holder, the escrow holder will provide the parties an escrow holder acknowledgment. This acknowledgment will disclose information about the escrow holder, the escrow number assigned, the license status of the escrow holder and will reinforce the acceptance is subject to any supplemental instructions and general provisions issued by the escrow holder. A copy of the agreement shall be delivered to the escrow holder within 3 business days after acceptance.

Liquidated Damages

If separately signed or initialed by both seller and buyer, the liquidated damages paragraph is activated and provides that if the seller proves that the buyer breached the contract:

1. The seller is released from the obligation to sell the property to the buyer.
2. The amount of the liquidated damages is limited to the buyer's deposit, to a maximum of 3% of the purchase price.

The liquidated damages provision must be printed in at least 10-point bold type or in contrasting red print in at least 8-point bold type.

If the deposit was increased after the initial offer/acceptance, the buyer and seller must, if the amount of the increase is to be subject to liquidated damages, sign a separate liquidated damages agreement covering the increased deposit.

Dispute Resolution

The parties agree to mediate, absent some exclusions, all disputes and claims before resorting to arbitration or court action. A mediator is impartial and may facilitate resolution of a dispute but cannot impose a settlement. However, mediation can result in a binding settlement document signed by seller and buyer. For mediation, which is not successful, the contract may afford the option of proceeding to arbitration. An arbitration, conducted in accordance with the rules of either the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services, Inc. (JAMS), results in a binding decision.

Terms and Conditions of Offer

The user should note that among other things, the offer will state that if at least one but not all parties initial a particular section, a counter offer is required until agreement is reached.

In addition this section will state the seller has the right to continue to offer the property for sale and to accept any other offer at any time prior to notification of acceptance.

The offer and any supplements, addendums or modifications, including any copy, may be signed in two or more counter parts, all of which shall constitute one writing.

Time of Essence, Entire Contract and Changes

The contract will state that time is of the essence and that the time for performance can be extended or any other provision of the offer modified only by a writing signed by both buyer and seller.

It should be noted in the standard agreement published by C.A.R., all prior discussions and negotiations are superseded by the written agreement. Thus it is important to commit to writing all terms and conditions.

Expiration

Unless otherwise stated the offer will expire at 5:00 PM on the third calendar day after the offer is signed by the buyer.

Acceptance of Offer

In order to form a binding contract, the seller must accept the buyer's offer in writing, without modification, and communicate that acceptance to the buyer before a specified expiration date.

If the seller finds unacceptable some element(s) of the offer, the seller may make a counteroffer, giving the buyer a certain time to accept. These negotiations will culminate in either a stalemate or a contract. If a contract is reached, the result will be either breach, appropriate cancellation of the contract and escrow or transfer of the property.

The seller warrants that the seller is the owner of the property or has the authority to execute the agreement and acknowledges receipt of a copy of the agreement.

Confirmation of Acceptance

It is a good practice to document the date and time that the buyer or the buyer's representative personally received a copy of the signed. A binding agreement is created when a copy of the signed acceptance is personally received by the buyer or the buyer's authorized representative. Completion of this confirmation is

not legally required in order to create a binding agreement; it is solely intended to evidence the date that confirmation of acceptance has occurred.

Other information

Four additional information boxes are included after the buyers and sellers signatures. These sections provide clarity and ease of use in contacting the parties assisting the buyer and seller during the transaction. They are:

1. Information about the real estate brokers involved in the transaction.

Real estate brokers are not parties to the agreement between buyer and seller; this section documents the contact information for the real estate brokers assisting the buyer and seller as well as cooperating broker compensation information.

2. Escrow Holders Acknowledgment

If accepted by the escrow holder, the escrow holder will provide the parties an escrow holder acknowledgment. This acknowledgment will disclose information about the escrow holder, the escrow number assigned, the license status of the escrow holder and will reinforce the acceptance is subject to any supplemental instructions and general provisions issued by the escrow holder.

3. Presentation of offer

Specifies the date the offer was presented to the seller.

4. Rejection of offer

In the event the offer is rejected and no counter offer will be made, it is a good practice for the licensee to provide the buyer's agent with an acknowledgement that the offer was reviewed by and rejected by the seller.

DISCLOSURES

This section lists important disclosure requirements, which attach primarily to the sale of residential real property of one-to-four units. In a typical transaction, the seller has 7 days to provide the buyer all required disclosures or before the execution of the contract in the case of a lease option, sales contract, or ground lease coupled with improvements. If the seller delivers certain disclosures or amended statutory disclosures after execution of the offer, the buyer may have three days after delivery in person or five days after delivery by deposit in the United States mail to terminate the offer or agreement to purchase by delivering a written notice of termination to the seller or to the seller's agent.

The obligation to prepare and deliver disclosures is imposed upon the seller and the seller's agent and any agent acting in cooperation with such agent. If more than one real estate agent is involved in the transaction, (unless otherwise instructed by the seller) the agent obtaining the offer is required to deliver the disclosures to the prospective buyer. If the disclosure is based on a report or opinion of an expert, such as a contractor or structural pest control operator, the seller and the agent may be protected from liability for any error as to the item covered by the report or opinion.

The required disclosures are set forth in Civil Code Section 1102 et. Seq. and 1103 et. Seq. Disclosure requirements can change and it is important to stay informed using sites like the Department Of Real Estate: <http://www.dre.ca.gov>.

Please note: If you are a REALTOR® in addition to the disclosures outlined in this section the California Association of REALTORS® currently provides a Statewide Buyer and Seller Advisory. In addition your local board of REALTORS® may publish additional local area disclosures for use in your area. Your broker may also publish and require the use of specific local area disclosures.

Agency Relationship Disclosure (See also Chapter 10.)

To clarify relationships between buyers and sellers and real estate brokers, the law requires persons acting as agents in certain residential real estate transactions to make statutorily prescribed written disclosures concerning the agency roles intended. This requirement applies to transactions involving the sale or exchange of certain estates (including leases of more than one year) in residential real property of from one-to-four

dwelling units, as well as the sale or exchange of mobile homes occurring through a real estate agent. The seller should receive the agency disclosure before signing the listing agreement.

Principals and agents may modify and change the agency relationship(s) between the parties by written consent of all of the parties to the transaction. The required agency disclosure form is set forth in Civil Code Section 2079.16.

Smoke Detector and Water Heater Bracing Statement of Compliance

The seller typically shall pay for the installation of smoke detectors and water heater bracing where required by law. Unless exempt, the seller, prior to close of escrow will provide buyer a written statement of compliance. Typically these statements are made using standard C.A.R. form Water Heater and Smoke Detector Statement of Compliance Statement – WHSD.

Disclosure Regarding Lead-Based Paint Hazards

Many housing units in California still contain lead-based paint, which was banned for residential use in 1978. Lead-based paint can peel, chip, and deteriorate into contaminated dust, thus becoming a lead-based paint hazard. A child's ingestion of the lead-laced chips or dust may result in learning disabilities, delayed development or behavior disorders.

The federal Real Estate Disclosure and Notification Rule (the Rule) requires that owners of "residential dwellings" built before 1978 disclose to their agents and to prospective buyers or lessees/renters the presence of lead-based paint and/or lead-based paint hazards and any known information and reports about lead-based paint and lead-based paint hazards (location and condition of the painted surfaces, etc.). The Rule defines a residential dwelling as a single-family dwelling or a single-family dwelling unit in a structure that contains more than one separate residential dwelling unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the residence of one or more persons.

Properties affected by the Rule are termed target housing. Target housing does *not* include pre-1978 housing, which is:

- Sold at a foreclosure sale (but a subsequent sale of such a property *is* covered);
- A "0-bedroom dwelling" (e.g., a loft, efficiency unit or studio);
- A dwelling unit leased for 100 or fewer days (e.g., a vacation home or short-term rental), provided the lease cannot be renewed or extended;
- Housing designated for the elderly or handicapped, unless children reside there or are expected to reside there;
- Leased housing for which the requirements of the Rule have been satisfied, no pertinent new information is available, and the lease is renewed or renegotiated;
- Rental housing that has been inspected by a certified inspector and found to be free of lead-based paint. (The Rule allows use of state certified inspectors only until a federal certification program or a federally accredited state certification program is in place.)

Sellers (and lessors) of units in pre-1978 multifamily structures will have to provide a buyer (or lessee) with any available records or reports pertaining to lead-based paint and/or lead-based paint hazards in areas used by all the residents (stairwells, lobbies, recreation rooms, laundry rooms, etc.). If there has been an evaluation or reduction of lead-based paint and/or lead-based paint hazards in the entire structure, the disclosure requirement extends to any available records or reports regarding the other dwelling units.

The federal Environmental Protection Agency (EPA) publishes a pamphlet titled "*Protect Your Family From Lead In Your Home.*" This pamphlet describes ways to recognize and reduce lead hazards. The Rule requires that a seller (or lessor) of target housing deliver this pamphlet to a prospective buyer (or tenant) before a contract is formed. If this is done after that time the buyer has the right to cancel the contract.

The Rule requires that a seller of target housing offer a prospective buyer ten days to inspect for lead-based paint and lead-based paint hazards. This 10-day inspection period can be increased, decreased, or waived by written agreement between buyer and seller. The Rule does not require a seller to pay for an inspection or to

remove any lead-based paint/hazards, but merely gives a buyer the opportunity to have the property inspected. A list of State-certified lead inspectors and contractors is available by calling the California Department of Health Services at (800) 597-LEAD.

The Rule further requires that the seller's (or lessor's) lead-based paint/lead-based paint hazards disclosures, a Lead Warning Statement, and the buyer's (or lessee's) acknowledgment of receipt of the information, offer of inspection period (or waiver of same) and the EPA pamphlet be included in an attachment to the contract. Seller (or lessor), buyer (or tenant) and agent must sign and date the attachment. The retention period, for sellers (or lessors) and agents, of this document is three years from completion of the sale (or from commencement of the lease/rental).

A real estate agent must ensure that:

- His or her principal (seller or lessor) is aware of the disclosure requirements;
- The transaction documentation includes the required notifications and disclosures;
- The buyer or lessee/renter receives the EPA pamphlet; and,
- In the case of a sale, the buyer is offered an opportunity to have the property inspected for lead-based paint and lead-based paint hazards. In the case of a sale, "agent" does not include one who represents only the buyer and receives compensation only from the buyer.

Violation of the Rule may result in civil and/or criminal penalties.

To obtain more information, a person may call the EPA at 1-800-424-LEAD. The typical form used in disclosure is the C.A.R. standard form, Lead Based Paint Hazards – FLD.

Real Estate Transfer Disclosure Statement

Many facts about a residential property affect its value and desirability. These include:

- age, condition, and any defects or malfunctions of the structural components and/or plumbing, electrical, heating, or other mechanical systems;
- easements, common driveways, or fences;
- room additions, structural alterations, repairs, replacements, or other changes, especially those made without required building permits;
- flood, drainage, settling or soil problems on or near the property;
- zoning violations, such as nonconforming uses or insufficient setbacks;
- homeowners' association obligations and deed restrictions or "common area" problems;
- citations against the property or lawsuits against the owner or affecting the property;
- neighborhood noise or nuisance problems; and
- location of the property within a known earthquake zone.

California Civil Code Section 1102.3 requires that a seller of real property consisting of one-to-four residential dwelling units deliver to prospective buyers a specified written disclosure statement concerning the condition of the property. The disclosure covers matters within the personal knowledge of the seller and the agent, and matters based on a reasonably diligent inspection of the property. This requirement extends to any transfer by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements. The following transfers are exempt:

- transfers required to be preceded by delivery to the prospective transferee of a subdivision public report or where a public report is not required because the offering of subdivided land satisfies all the criteria in Business and Professions Code Section 11010.4;
- transfer pursuant to a court order;

- transfer to a mortgagee by a mortgagor who is in default; transfer by a foreclosure sale, or pursuant to a power of sale, after such default;
- transfer by a fiduciary in the administration of a decedent's estate, guardianship, conservatorship or certain transfers from a trust;
- transfer from one co-owner to another;
- transfer to a spouse or to a person or persons in the lineal line of consanguinity;
- transfer between spouses resulting from a judgment of dissolution of marriage or of legal separation or from a property settlement agreement incidental to such a judgment;
- transfer by the State Controller of unclaimed property;
- transfer resulting from failure to pay taxes; and
- transfer to or from any governmental entity.

Agents Visual Inspection- Real Estate Transfer Disclosure Statement

The real estate agent representing a seller of residential property consisting of one to four dwelling units (or a manufactured home) and any cooperating agent each have the duty to conduct a reasonably competent and diligent visual inspection of the property and to disclose to a prospective buyer all material facts affecting value, desirability, and implicitly intended use.

Areas not reasonable accessible are not included in the required inspection. If the real property is a dwelling unit in a condominium, planned development, or a stock cooperative, the visual inspection need only include the unit involved and not the common area. It also does not include investigation of areas off the site of the property or public records and permits in the absence of special circumstances.

Nothing in the law relieves a buyer of the duty to exercise reasonable care to protect himself/herself, including the facts that are known to or within the reasonably diligent attention and observation of the buyer.

An agent's certification of performing the required visual inspection is contained in the Real Estate Transfer Disclosure Statement. This requirement does not apply if the sale is made pursuant to a subdivision public report or the sale is exempt from the public report requirement pursuant to Business and Professions Code Section 11010.4, *provided* that the property has not been previously occupied.

(See also Chapter 10.)

Natural Hazards Disclosure

Typically, these disclosure are made on the Natural Hazard Disclosure Statement (C.A.R. form NHD) and/or included as part of a package of disclosures provided by third party vendors:

1. Special Flood Hazard Area Disclosure and Responsibilities of FEMA and Dam or Reservoir Inundation Area

Flood Hazard Boundary Maps identify the general flood hazards within a community. They are also used in flood plain management and for flood insurance purposes. Flood Hazard Boundary Maps developed by the Federal Emergency Management Agency (FEMA) in conjunction with communities participating in the National Flood Insurance Program (NFIP) delineate areas within the 100-year flood boundary termed "special flood zone areas." Also identified are areas between 100 and 500-year levels termed "areas of moderate flood hazards" and the remaining areas above the 500-year level termed "areas of minimal risk."

A seller of property located in a special flood hazard area, or the seller's agent and any cooperating agent, must disclose that fact to the buyer and that federal law requires flood insurance as a condition of obtaining financing on most structures located in a special flood hazard area. Since the cost and extent of flood insurance coverage may vary, the buyer should contact an insurance carrier or the intended lender for further information.

2. Disclosures Regarding State Responsibility Areas

The Department of Forestry and Fire Protection (the Department) has produced maps identifying rural lands classified as state responsibility areas. In a state responsibility area, the state (as opposed to a local or federal

agency) has the primary financial responsibility for the prevention and extinguishing of fires. Maps of these state responsibility areas and any changes (including new maps to be produced every five years) are to be provided to assessors in the affected counties.

If a seller knows that the property is located in a state responsibility area or the property is included on a map given by the Department to the county assessor, the seller must disclose the possibility of substantial fire risk and that the land is subject to certain preventative requirements. (Public Resources Code Section 4291 lists the requirements.) Notices of the location of the maps will be posted at the offices of the county recorder, county assessor, and the county planning commission.

With the agreement of the Director of Forestry and Fire Protection, a county may, by ordinance, assume responsibility for *all* fires, including those occurring in state responsibility areas. Absent such an ordinance, the seller of property located in a state responsibility area must disclose to the buyer that the state is *not* obligated to provide fire protection services for any building or structure unless such protection is required by a cooperative agreement with a county, city, or district.

3. Disclosure of Geological Hazards and Earthquake Fault Zones

Pursuant to the Alquist-Priolo Earthquake Fault Zoning Act, the State Geologist is in the process of identifying areas of the state susceptible to “fault creep” and delineating these areas on maps prepared by the State Division of Mines and Geology.

A seller of real property situated in an earthquake fault zone, or the agent of the seller and any agent acting in cooperation with such agent, must disclose to the buyer that the property is or may be situated in an earthquake fault zone. This disclosure must be made on the Natural Hazard Zone Disclosure Statement,

In addition, the Seismic Safety Commission has developed a Homeowner’s Guide to Earthquake Safety for distribution to real estate licensees and the general public. The guide includes information on geologic and seismic hazards for all areas, explanations of related structural and nonstructural hazards, recommendations for mitigating the hazards of an earthquake, and a statement that safety or damage prevention cannot be guaranteed with respect to a major earthquake and that only precautions such as retrofitting can be undertaken to reduce the risk. The Seismic Safety Commission has also developed a Commercial Property Owner’s Guide to Earthquake Safety.

If a buyer receives a copy of the Homeowner’s Guide (or, if applicable, the Commercial Property Owner’s Guide), neither the seller nor the broker is required to provide additional information regarding geologic and seismic hazards. Sellers and real estate licensees must, however, disclose that the property is in an earthquake fault zone and the existence of known hazards affecting the real property being transferred.

Delivery of a booklet is required in the following transactions:

1. Transfer of any real property improved with a residential dwelling built prior to January 1, 1960 and consisting of one-to-four units any of which are of conventional light-frame construction (Homeowner’s Guide); and,
2. Transfer of any masonry building with wood-frame floors or roofs built before January 1, 1975 (if residential, both guides; if commercial property, only the Commercial Guide).

In a transfer subject to item 1 above, the following aspects of the structure and any corrective measures taken, which are within the seller’s actual knowledge, must be disclosed to a prospective buyer:

- absence of foundation anchor bolts;
- unbraced or inappropriately braced perimeter cripple walls;
- unbraced or inappropriately braced first-story wall or walls;
- unreinforced masonry perimeter foundation;
- unreinforced masonry dwelling walls;
- habitable room or rooms above a garage; and

- water heater not anchored, strapped, or braced.

Certain exemptions apply to the obligation to deliver the booklet when transferring either a dwelling of one-to-four units or a *reinforced* masonry building. These exemptions are essentially the same as those that apply to delivery of the Real Estate Transfer Disclosure Statement.

4. Other Disclosures typically included with the Natural Hazards Disclosure and Residential Disclosure Report provided by third party vendors:

4a. Disclosure of Ordnance Location

Federal and state agencies have identified certain areas once used for military training, which may contain live ammunition. A seller of residential property located within one mile of such a hazard must, pursuant to Civil Code Section 1102.15, give the buyer written notice as soon as practicable before transfer of title. This obligation depends upon the seller having actual knowledge of the hazard. The exemptions, which pertain to delivery of the Real Property Transfer Disclosure Statement, apply also to this requirement.

4b. Commercial/Industrial Disclosure

4c. Airport Proximity and Airport Influence Disclosure

4d. Database Disclosure (Megan's Law)

The report will provide additional details about Megan's Law

4e. Mold Disclosure

The report will provide additional details on Mold and Mold inspections.

4f. Mello-Roos Disclosure

The Mello-Roos Community Facilities Act of 1982 authorizes the formation of community facilities districts; the issuance of bonds, and the levying of special taxes thereunder to finance designated public facilities and services. Civil Code Section 1102.6b requires that a seller of a property consisting of one-to-four dwelling units subject to the lien of a Mello-Roos community facilities district make a good faith effort to obtain from the district a disclosure notice concerning the special tax and give the notice to a prospective buyer. The same exemptions apply as for delivery of a Real Property Transfer Disclosure Statement.

5. Other disclosures:

Environmental Hazard Disclosure Booklet

The booklet, titled *Environmental Hazards: A Guide for Homeowners, Buyers, Landlords, and Tenants* identifies common environmental hazards, describes the risks involved with each, discusses mitigation techniques, and provides lists of publications and sources from which consumers can obtain more detailed information. Hazards discussed in the booklet are asbestos, radon, lead, and formaldehyde. The booklet also provides general information on hazardous wastes and the use and disposal of hazardous household products.

If the booklet is provided to a prospective buyer of real property, neither the seller nor a real estate agent involved in the sale has a duty to provide further information concerning such hazards, other than lead, unless the seller or licensee has actual knowledge of the existence of environmental hazards on or affecting the subject property.

If the booklet is provided to a prospective buyer of real property, neither the seller nor a real estate agent involved in the sale has a duty to provide further information concerning such hazards, other than lead, unless the seller or licensee has actual knowledge of the existence of environmental hazards on or affecting the subject property.

As discussed above, in California a seller (with a few exceptions) of residential real property comprising one-to-four dwelling units must give the buyer a Real Estate Transfer Disclosure Statement. The statement must include environmental hazards of which the seller is aware. The listing and selling agents must inspect the property and disclose to the buyer material facts, including environmental hazards (e.g., lead-based paint), which may affect the value or desirability of the property. Further, the seller or the seller's agent can give the buyer (of any real property) a pamphlet titled "*Environmental Hazards: A Guide for Homeowners, Buyers,*

Landlords, and Tenants.” If the buyer receives the pamphlet, neither the seller nor agent is required to say more about environmental hazards (again, assuming no awareness of such a problem).

Energy Conservation Retrofit and Thermal Insulation Disclosure

State law prescribes a minimum energy conservation standard for all new construction without which a building permit may not be issued. Local governments also have ordinances that impose additional energy conservation measures on new and/or existing homes. Some local ordinances impose energy retrofitting as a condition of the sale of an existing home. The requirements of the various ordinances, as well as who is responsible for compliance, may vary among local jurisdictions. The existence and basic requirements of local energy ordinances should be disclosed to a prospective buyer by the seller and/or the seller’s agent and any cooperating agent.

Federal law requires a “new home” seller to disclose in every sales contract the type, thickness, and R-value of the insulation, which has been or will be installed in the house.

If the buyer receives the informational booklet published pursuant to Section 25402.9 of the Public Resources Code (Home Energy Rating Program Booklet) the seller or the broker is not required to provide information additional to that contained in the booklet.

Local Option Disclosure Statement

Civil Code Section 1102.6a permits any city or county to require an additional disclosure statement focusing on some local condition which may materially affect a buyer’s use and enjoyment of residential property. The statute uses the example of adjacent land zoned for timber production and perhaps subject to harvest.

Local Requirements Resulting from City and County Ordinances

Residential properties located in cities and counties throughout California are typically subject to specific local ordinances relating to occupancy, zoning and use, building code compliance, and fire, health and safety code regulations. Whether such matters must be investigated when they are not within the personal knowledge of the seller or the agent may depend on the circumstances. Civil Code Section 2079.3 provides that the listing and selling agents’ duty to inspect does not include areas off the site of the property or public records or permits concerning the title or use of the property in the absence of special circumstances.

Foreign Investment in Real Property Tax Act

Federal law requires that a buyer of real property must withhold and send to the Internal Revenue Service (IRS) 10% of the gross sales price if the seller of the real property is a “foreign person.” The primary grounds for exemption from this requirement are: the seller’s nonforeign affidavit and U.S. taxpayer I.D. number; a qualifying statement obtained through the IRS attesting to other arrangements resulting in collection of, or exemption from, the tax; or the sales price does not exceed \$300,000 and the buyer intends to reside in the property.

Because of the number of exemptions and other requirements relating to this law, it is recommended that the IRS be consulted for more detailed information. Sellers and buyers and the real estate agents involved who desire further advice should also consult an attorney, CPA, or other qualified tax advisor.

Notice and Disclosure to Buyer of State Tax Withholding on Disposition of California Real Property

In certain California real estate sale transactions, the buyer must withhold 3 1/3% of the total sale price as state income tax and deliver the sum withheld to the State Franchise Tax Board. The escrow holder, in applicable transactions, is required by law to notify the buyer of this responsibility.

A buyer’s failure to withhold and deliver the required sum may result in the buyer being subject to penalties. Should the escrow holder fail to notify the buyer, penalties may be levied against the escrow holder.

Transactions to which the law applies are those in which:

- The seller shows an out of state address, or sale proceeds are to be disbursed to a financial intermediary of the seller;
- The sales price exceeds \$100,000; and,
- The seller does not certify that he/she is a resident of California or that the property being conveyed is his/her personal residence, as defined in Section 1034 of the Internal Revenue Code. (Note: If the seller is a

corporation, the certification would be that the corporation has a permanent place of business in California.)

For further information, contact the Franchise Tax Board.

Furnishing Controlling Documents and a Financial Statement

The owner (other than a subdivider) of a separate interest in a common interest development (community apartment project, condominium project, planned development, or stock cooperative) must provide a prospective buyer with the following:

- a copy of the governing documents of the development;
- should there be an age restriction not consistent with Civil Code Section 51.3, a statement that the age restriction is only enforceable to the extent permitted by law and specifying the applicable provisions of law;
- a copy of the most recent documents of the homeowners' association, including financial statements, budgets and insurance information required under Civil Code Section 1365;
- a written statement from the association specifying the amount of the current regular and special assessments as well as any unpaid assessment, late charges, interest, and costs of collection which are or may become a lien against the property; and,
- information regarding any approved change in the assessments or fees which is not yet due and payable as of the disclosure date.

Notice Regarding the Advisability of Title Insurance

In an escrow for a sale (or exchange) of real property where no title insurance is to be issued, the buyer (or both parties to an exchange) will receive from escrow and acknowledge receipt by signing the following notice: :

“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.”

This requirement is also of interest to a real estate broker conducting an escrow pursuant to the exemption set forth in Financial Code Section 17006(a)(4).

Disclosure of Sale Price Information

Within one month after the close of escrow for the transfer of title to real property (or the sale of a business opportunity) through a real estate agent(s), the agent(s) must inform the buyer and seller in writing of the selling price. In the case of an exchange, the information on the selling price is required to include a description of the property and the amount of added money consideration, if any.

If a transaction is closed through an authorized third party escrow holder, a closing statement from said escrow holder will be regarded as compliance with the requirements of this law.

Seller Financing Disclosure Statement

Some sellers of residential properties participate in financing the sale of their homes by extending credit to the buyer in the form of a seller “carry-back.” This is usually in the form of a promissory note secured by a deed of trust. To ensure adequate disclosure and to prevent abuses involving some of these seller-assisted financing plans, the state legislature enacted a disclosure law which applies to real estate transactions involving residential dwellings of not more than four units if the seller extends credit to the buyer through a written agreement which provides for either a finance charge or more than four payments of principal and interest (or interest only), not including the down payment.

Written disclosures required by this law are the responsibility of the *arranger of credit*. An *arranger of credit* is defined as a person who is not a party to the transaction (except as noted below), but is involved in negotiation of the credit terms and completion of the credit documents, and who is compensated for arranging the credit or

for facilitating the transaction. A real estate broker may be deemed an arranger of credit. The duty to provide the disclosures also applies to an attorney or a real estate licensee who is a principal in the transaction.

Disclosures pursuant to this law are *not* required to be given to a buyer or seller who is entitled to receive (in connection with the credit being extended) a disclosure under any of the following :

- Federal Truth-in-Lending Act;
- Real Estate Settlement Procedures Act (RESPA);
- A mortgage loan disclosure statement (Business and Professions Code Section 10240) or a lender/purchaser disclosure statement (Business and Professions Code Section 10232.4); or
- Section 25110 of the Corporations Code or exemption therefrom relating to the sale of qualified securities under permit or exempt securities or transaction.

The disclosure statement required by this law must be delivered as soon as possible before the execution of any note or security document. The statement must be signed by the arranger of credit and the buyer and seller, who are each to receive a copy. Should there be 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.

The disclosure statement will include comprehensive information about the financing, cautions applicable to certain types of financing, and suggestions of procedures which will protect the parties during the term of the financing. The disclosures include:

- Identification of the note, or credit, or security document and the property which is or will become the security;
- A copy of the note, or credit, or security document, or a description of the terms of these documents;
- The terms and conditions of each encumbrance recorded against the property which shall remain as a lien or is an anticipated lien which will be senior to the financing being arranged;
- A warning about the hazards and potential difficulty of refinancing and, should the existing financing or the financing being arranged involve a balloon payment, the amount and due date of any balloon payment and 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 being arranged 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, and if the party receiving and forwarding the payments is not a neutral third party, 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, in the event of foreclosure, to recover proceeds of the sale financed;
- A statement recommending loss payee clauses be added to the property insurance policy to protect the seller's interest and advising of the existence or the 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 and a request for notice of default in case the buyer fails to pay liens senior to the financing being arranged;
- 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 whether the security documents for the financing being arranged have been or will be recorded, and what might occur if the documents are not recorded; and,
- 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.

An arranger of credit must inform the seller that a buyer who intends to occupy the real property involved may have the right to homeownership counseling in the event of a default in the mortgage payments. The collector of the payments, whether the seller or a loan servicing agent, has the duty to inform the defaulting homeowner of the availability of such counseling. Loss of or reduced ability to make payments on a residence may entitle the homeowner to the aforementioned counseling. The duty to inform a defaulting homeowner of the availability of counseling is operative regardless of the nature of the credit transaction or the presence of an arranger of credit.

Disclosure of Roles when Arranging Financing

When an agent undertakes to arrange financing in connection with a sale, lease, or exchange of real property, or when a person or entity arranging financing in connection with the sale, lease, or exchange of real property undertakes to act as an agent with respect to that property, that agent, person, or entity shall, within 24 hours, make a written disclosure of those roles to all parties to the sale, lease, or exchange, and any related loan transaction. For purposes of this section, "agent" has the same meaning as defined in subdivision (a) of Section 2079.13 of the Civil Code. (Business and Professions Code Section 10177.6)