

The Importance of the Transfer Disclosure Statement

The **Transfer Disclosure Statement** or TDS is one of the most important disclosure documents that a seller gives to a buyer in a residential real estate transaction. It is important not only for the information it provides to the buyer regarding the property, but also because the law places upon this disclosure an enormous importance. It is a disclosure that cannot be waived by the buyer, and if the TDS is given after an offer is made or at any time materially amended, the buyer may be entitled to cancel the contract and to get back his or her deposit. Therefore, it is important for a real estate licensee to have a thorough understanding of the TDS.

When Is a TDS Required?

» The seller is required to give a TDS, whether or not the seller is represented by an agent, to the buyer in a transfer of a residential 1-4 unit property, unless a specific exemption applies. Some of the more common exemptions are sales where a public report is required, probate sales, bankruptcy sales, transfers by a conservator or guardian, transfers from one co-owner to another, transfers made to a spouse, child, grandchild, or grandparent, transfers by a deed in lieu of foreclosure or by an REO, transfers to or from government entities, and some transfers by a trustee in the administration of a trust. The exemption for transfer by a trustee does not apply where the trustee is a natural person, who is the sole trustee of a revocable trust, and he or she is either a former owner of the property or an occupant in possession of the property within the year preceding the transfer.

Also, unless a seller is exempt, the seller must provide the TDS, no exceptions. Receipt of the TDS cannot be waived by the buyer. So even if the buyer signs a document saying, "I waive receipt of the TDS," the seller must still deliver it to the buyer.

Completing the TDS

» The TDS has sections for each party and the agents, to fill out. The first two pages of the document are for the seller to fill out and should be completed only by the seller based on the seller's knowledge. The newly revised version of the C.A.R. Residential Purchase Agreement (RPA-CA) requires the seller to "fully complete" all required statutory disclosures (paragraph 10.A(1)). Under the terms of the contract, the seller has "fully completed" the disclosure if the seller answered all the questions and completed and signed the seller sections, and the listing agent has filled out his or her section (see below). Therefore, in addition to the statutory obligation to fill out the form, a seller also has a contractual obligation to answer all the questions.

The listing agent and buyer's agent sections are on the third page of the TDS. The listing agent and buyer's agent are both given space to fill out what they observe as they each independently perform a "reasonably competent and diligent visual inspection of the property" with the exception of those areas which are reasonably and normally inacces-

sible. It is important that the visual inspection be taken seriously by a licensee. It is not sufficient for the agent to simply say that the buyer is strongly advised to do a home inspection without also doing a proper visual inspection. Failure to conduct a proper visual inspection could result in liability for the agent for a breach of the agent's fiduciary duty to his or her client and also could constitute a possible CalBRE violation.

In order to assist an agent in his or her completion of the applicable section of the TDS, C.A.R. has made available the form "Agent's Visual Inspection Disclosure" (form AVID) in zipform®. This form helps guide licensees in fulfilling their obligation to perform the visual inspection by providing extensive space to write comments and to serve as a prompt to help agents remember to look at various rooms and parts of rooms. Furthermore, the form states the limitations of the agent's inspection duties in plain language such as "agent will not climb on to a roof or into an attic." The AVID is not a required form, but it is highly recommended as it helps agents complete their obligation in a thorough and complete manner.

Cancellation Rights

» The TDS gives the buyer the right to cancel the contract within three days of receipt of the TDS if delivered by the seller in person, or five days if delivered by mail, when the disclosure is delivered to the buyer after the buyer has submitted his or her offer to the seller. The law does not address other means of delivery of documents, but since it is a consumer protection statute, it is likely that the five day cancellation right will apply for any

means of delivery other than in person.

This protection is not that relevant in the standard transaction utilizing the RPA-CA. This is because the buyer usually has a 17 day right to cancel the contract based upon the RPA-CA's inspection contingency if the buyer in good faith does not accept the condition of the property, or for other reasons based on any of the other contingencies.

Where the TDS cancellation right is most relevant is in two scenarios. The first is where the buyer has removed all contingencies and the seller makes a subsequent or amended disclosure because he or she has discovered material facts affecting the property or a material inaccuracy in the disclosures originally provided. Where such discovery is made, the seller is required to make a subsequent written disclosure by the TDS law and by the RPA-CA in paragraph 10.A(7). In such case, the buyer would be able to cancel within the three-to-five day timeframe and would be entitled to the return of his or her deposit.

Even where the buyer hasn't removed their contingencies, a subsequent or amended disclosure could extend the buyer's contingency timeframe as the buyer has three-to-five days to cancel af-

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ter receipt of the disclosure by law and five days to review a disclosure which is delivered late by the RPA-CA.

Another area where the TDS cancellation right is important is for noncontingent offers. Where an offer has no contingencies, if the buyer receives the TDS after the offer is written, the buyer may

still cancel within the three-to-five day timeframe after delivery and would be entitled to the return of the deposit. In order to make sure a noncontingent offer is not given a right to cancel based on the TDS, the TDS needs to be given to and receipt acknowledged by the potential buyer prior to making their offer. In areas of the state where noncontingent offers are common (such as Silicon Valley or the San Francisco Bay), the seller generally makes the TDS available to potential buyers and requires that the buyer take delivery and acknowledge receipt of the TDS prior to making an offer. Of course, if the disclosure is amended, as discussed earlier, that could once again trigger a cancellation right.

The TDS is clearly a powerful disclosure. It is important that both the REALTOR® and the seller treat it seriously and make sure it is completed properly and delivered to the buyer. ♦

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