

FRIDAY, JANUARY 13, 2023

## PERSPECTIVE

# Exempt fiduciary sellers and their duty to disclose

By Teresa Gorman

The sale of real property in California is replete with required and recommended advisories and disclosures. Gone are the days of *caveat emptor*. Sellers of residential real property must provide buyers with a required disclosure form entitled Real Estate Transfer Disclosure Statement (TDS) as set forth in Civil Code §1102.6 and formalized by a California Association of Realtors (CAR) form. A narrowly defined group of sales are exempt from providing the disclosures found in the TDS. These sellers are frequently referred to as “Exempt Sellers.”

This article will focus on Exempt Sellers specifically defined in subsections (b) and (d) of Civil Code §1102.2:

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

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



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Not all fiduciaries are Exempt Sellers. An Agent under a Power of Attorney is not an Exempt Seller. Pursuant to §1102.2(d) above, a Trustee is not always an Exempt Seller. A Trustee who is also the Trustor/Grantor of their revocable trust is not an Exempt Seller. Perhaps it is less intuitive that the child/successor trustee who lived on the property to take care of their parent(s) is also not an Exempt Seller.

CAR has developed the Exempt Seller Disclosure form (ESD), which incorporates the disclosures an Exempt Seller must provide. The scope of these questions is much narrower than those found in the TDS, which is generally bundled

with the Seller Property Questionnaire required by non-exempt sellers.

Fiduciaries may believe they do not need to respond to the question on the ESD. The ESD is only asking if Seller is “aware” of any issues. It is best practice to answer these questions. Answering “no” is not asserting there have been no insurance claims within the past five years (Question H below). It is merely a statement that the Seller is not aware of any insurance claims.

The ESD form is comprised of 11 questions asking if the Seller is aware of the following:

A. Within the last 3 years, the death of an occupant of the Property upon the Property?

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B. An Order from a government health official identifying the Property as being contaminated by methamphetamine?

C. The release of an illegal controlled substance on or beneath the Property?

D. Whether the Property is located in or adjacent to an "industrial use" zone?

E. Whether the Property is affected by a nuisance created by an "industrial use" zone?

F. Whether the Property is located within one-mile of a former federal or state ordinance location?

G. Whether the Property is a condominium or located in a planned unit development or other common interest subdivision?

H. Insurance claims affecting the Property within the past 5 years?

I. Matters affecting title of the Property?

J. Plumbing fixtures on the Property that are non-compliant plumbing fixtures as defined by

Civil Code § 1101.3?

K. Any other material facts or defects affecting the Property, or material documents in Seller's possession affecting the Property, not otherwise disclosed to Buyer?

Reviewing a Death Certificate may provide a response to Question A. If an Exempt Seller has a Death Certificate in their possession which indicates there was a death on the property and they respond "no" to Question A, there may be liability to a buyer. Ordering a Natural Hazard Disclosure Report (NHD) facilitates accurate responses to Questions C and F. Question J is often incorrectly answered "no." Most homes built prior to 2009 will have plumbing fixtures that do not meet the low flow requirements found in Civil Code § 1101.3.

Additionally, Exempt Sellers are not exempt from disclosing material facts (Question K). Any fact which a reasonable person would

believe may affect the property's value should be considered a material fact. A death on the property four years prior may not be material, but a murder on the property four years prior is likely a material fact and should be disclosed.

Sellers are required to comply with both statutory disclosure requirements and common law requirements. In *Lingsch v. Savage* (1963) 213 Cal.App 2d 729, the Seller and their agent failed to disclose to the buyers that the building was in poor physical condition, having illegal units that had been condemned. The holding of *Lingsch* (Id.) requires disclosure of 1) any known defects that materially decrease the market value of a property; and 2) defects not apparent or within the reach of the diligent attention of the buyer.

There is a contingent of fiduciaries who ascribe to the philosophy of "see no evil," believing the less disclosed the better. Exempt Sellers

must take care to review documents in their possession which may reveal material facts and conduct thorough visual inspections to ensure no further investigation is merited. It is important that fiduciaries reduce the risk of being sued by a buyer long after the estate funds have been distributed.

It is a further misconception that fiduciaries are Exempt Sellers regardless of the property type. Public Policy is to protect average persons purchasing a home. This principle is not applicable in the purchase and sale of vacant land, commercial, and residential property exceeding 4 units. As such, the TDS form is not required in these sales; and therefore, there is no distinction between exempt and non-exempt sellers.

Disclosures provided by an Exempt Seller should be thoughtfully tailored to address the specific property being sold, without a one size fits all approach.